Corrected Pages IS and 19
12/31/02

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MARK ZIMMERMAN, Derivatively on behalf of Nominal Defendant PRICELINE.COM INCORPORATED,

Plaintiff,

v.

RICHARD S. BRADDOCK, JAY S. WALKER, DANIEL H. SCHULMAN, PAUL A. ALLAIRE, RALPH M. BAHNA, PAUL J. BLACKNEY, WILLIAM E. FORD, MARSHALL LOEB, N. J. NICHOLAS, JR. and NANCY B. PERETSMAN,

Defendants,

and

PRICELINE.COM INCORPORATED, a Delaware corporation,

Nominal Defendant.

C.A. No. 18473-NC

MEMORANDUM OPINION

Date Submitted: April 23, 2002
Date Decided: December 20, 2002
Corrected: December 3 1, 2002

R. Bruce McNew, Esquire of Taylor & McNew, Greenville, Delaware; Robert B. Weiser, Esquire and Eric L. Zager, Esquire of Schiffrin & Barroway, LLP, Bala Cynwyd, Pennsylvania, Attorneys for Plaintiff.

Bruce L. Silverstein, Esquire, Christian Douglas Wright, Esquire, and Danielle Gibbs, Esquire of Young Conaway Stargatt & Taylor, LLP, Wilmington, Delaware; Evan R. Chesler, Esquire and Daniel Slifkin, Esquire of Cravath, Swaine & Moore, New York, New York, Attorneys for Defendants priceline.com incorporated, Richard S. Braddock and Daniel H. Schulman.

Anne C. Foster, Esquire and Catherine G. Dearlove, Esquire of Richards, Layton & Finger, Wilmington, Delaware, Attorneys for Defendants Jay S. Walker, Paul A. Allaire, Ralph M. Bahna, Paul J. Blackney, William E. Ford, Marshall Loeb, N. J. Nicholas, Jr. and Nancy B. Peretsman; Martin Glenn, Esquire of O'Melveny & Myers LLP, New York, New York, Attorney for Defendant Jay S. Walker; Steven B. Rosenfeld, Esquire of Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York, Attorney for Defendant William E. Ford; Sheldon H. Elsen, Esquire of Orans, Elsen & Lupert LLP, New York, New York, Attorney for Defendant Marshall Loeb.

NOBLE, Vice Chancellor

In August and September of 2000, the Selling Defendants collectively sold in excess of 10 million shares of the Company's stock, reaping collective proceeds of more than $247 million.[42] These sales were executed based on material, non-public information concerning the truth about the Company's profitability and customer base, the increased competition facing the Company, and the troubles besetting WebHouse. In particular, it is alleged that Walker needed to inflate the market value of his priceline holdings in order to use the proceeds from the sales executed at artificially high levels to support WebHouse.[43]

Soon after the completion of the alleged insider trading by the Selling Defendants, the market learned the truth regarding the Company's condition. On September 27, 2000, the Company warned that its revenues and earnings would fall short of Wall Street's projections.[44] On October 5, 2000,

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[42] The Plaintiff alleges that on August 1, 2000, Walker sold 8 million shares of priceline's common stock, netting $190 million. That same day, Nicholas exercised 200,000 priceline options (at $0.80 per share), and then sold 100,000 shares of priceline's common stock for $2,5 19,000. The following day, acting as trustee of a family trust, Nicholas sold another 100,000 shares of priceline's common stock, earning $2,532,000. On August 15, 2000, Braddock exercised his priceline options (at $0.80 per share) and then sold 72,000 shares of priceline's common stock, for proceeds of $1,764,720. The next day, Braddock again exercised priceline options (at $0.80 per share) and sold 28,000 shares of priceline's common stock for proceeds of $692,160. Walker sold another 2 million shares of priceline's common stock, this time for a total of $50 million, on September 11, 2000. *Id.* ¶¶ 61, 62, 69, 70.

[43] *Id.* ¶ 55.

[44] Upon this release, priceline's stock plummeted 42% to establish a 52-week low of *$10.75* per share.

priceline announced that WebHouse would be suspending operations for 90 days.[45] Therefore, the Plaintiff concludes that because of the materially inaccurate and misleading statements made by the Individual Defendants, priceline has suffered damages in the form of the profits reaped by the Selling Defendants who allegedly engaged in insider trading, liability and costs incurred in connection with defending securities suits, and a deterioration of the Company's goodwill.[46]

2. ANALYSIS

Plaintiffs failure to make a demand upon the Board prior to initiating this action necessitates a threshold inquiry into whether the particularized facts alleged in the Complaint demonstrate that demand would have been futile. A fundamental precept of Delaware corporate law is that the board of directors, not the shareholders, manages the corporation;[47] this managerial autonomy for decision-making extends to the determination to initiate litigation to vindicate the rights of the corporation.[48] Rule 23.1, regulating the encroachment on management's sphere of decision-making presented by

[45] The day of this release, priceline's stock plunged another 38% to close at 5 13/16.
[46] Plaintiff contends that another consequence of the misleading stockholders was a $9 million charge absorbed by priceline for re-pricing warrants held by Delta Airlines. Pl.'s Compl. ¶ 92.
[47] 8 ***Del.*** C. $141(a).
[48] ***White v. Panic, 783*** A.2d 543, 546-47 (Del. 2001).

shareholder derivative suits, has been characterized as the "procedural embodiment of this substantive principle."[49]

Rule 23.1, in pertinent part, provides:

> In a derivative action brought by 1 or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint, shall... *allege with particularity* the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiffs failure to obtain the action or for not making the effort.[50]

However, a complaining shareholder need not always make a demand upon a corporation's board of directors. In this case, because the Complaint alleges that the Company's directors breached their fiduciary duties by failing to act, as opposed to a conscious decision to act or abstain from acting, the proper test for determining demand futility is "whether or not the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board

[49] *Rales v. Blasband*, 634 A.2d 927, 932 (Del. 1993). Rule 23.1 is designed, among other things, to provide the corporation with the opportunity to address the alleged wrong without litigation and to bestow control over the litigation if such litigation is indeed brought for the corporation's benefit. *In re Delta & Pine Land Co. S 'holders Litig., 2000* WL 875421, at *5 (Del. Ch. June 21, 2000).

[50] Emphasis added.

of directors could have properly exercised its independent and disinterested business judgment in responding to a demand.'"

Critical to my resolution of this case is the particularity requirement of Rule 23.1. "Pleadings in derivative suits . . . must comply with stringent requirements of factual particularity that differ substantially from the permissive notice pleadings governed solely by Chancery Rule 8(a)."[52] In deciding whether demand is excused, I am limited to those particularized facts alleged in the Complaint, not those set forth only in the briefs.[53] Furthermore, at this stage in the proceedings, I accept as true the particularized facts of the Complaint, and the Plaintiff is entitled to all reasonable logical inferences drawn from those particularized facts.[54] However, "conclusory allegations are not considered as expressly pleaded facts or factual inferences."[55] With these standards in mind, I turn to deciding whether the Complaint has set forth such particularized facts so as to excuse the demand requirement of Rule 23.1.

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[51] *Rales, 634* A.2d at 934.

[52] *Brehm v. Eisner,* 746 A.2d 244,254 (Del. 2000) (citations omitted).'

[53] *Orman v. Cullman, 794* A.2d 5, 28 n.59 (Del. Ch. 2002). For example, Plaintiff asserts in his brief that he "has alleged that Walker is the . . . *majority* equity owner of Walker Digital." Pl.'s Ans. Br. in Opp'n to Defs.' Mot. to Dismiss at 13 (citing Pl.'s Compl. ¶¶ 6-7) (emphasis added). The paragraphs of the Complaint referenced by Plaintiff allege, instead, only that Walker is the "largest equity owner" of Walker Digital.

[54] *Pogostin v. Rice, 480* A.2d 619, 622 (Del. 1984), *overruled on other grounds, Brehm,* 746 A.2d. 244.

[55] *Brehm, 746* A.2d at 255.