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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Re: Credit Suisse Securities (USA) LLC v.
West Coast Opportunity Fund, LLC
C.A. No. 4380-VCN
Date Submitted: July 12, 2010

Dear Counsel:

Defendant West Coast Opportunity Fund, LLC ("West Coast") has moved to vacate the Court's memorandum opinion and order granting partial judgment on the pleadings (the "Memorandum Opinion") against it and in favor of Plaintiff Credit Suisse Securities (USA) LLC ("Credit Suisse").[1] This application follows a

[1] *Credit Suisse Sec. (USA) LLC v. West Coast Opportunity Fund, LLC*, 2009 WL 2356881 (Del. Ch. July 30, 2009).

settlement agreement reached between West Coast and Credit Suisse. Credit Suisse does not oppose the motion.

* * *

West Coast asserts that vacatur is appropriate because of the extraordinary nature of the case; that West Coast and Credit Suisse are not adverse parties in the traditional sense because each "has likely been defrauded or damaged through its own separate contractual relationship with a third party, Gary Evans."[2] Evans is the Chairman, Chief Executive Officer, and President of GreenHunter Energy, Inc. ("Green Hunter") and the manager of Investment Hunter LLC ("Investment Hunter"), a broker dealer which indirectly held all of Evans's Green Hunter shares.

In March 2007, Evans signed a lockup agreement (the "Lockup Agreement") with West Coast, an investor in Green Hunter, under which he pledged not to dispose of any Green Hunter stock without the prior written consent of West Coast. Thereafter, in July 2008, Investment Hunter, through Evans, pledged shares of Green Hunter (the "Pledged Shares") to Credit Suisse as collateral against which

[2] Mot. for Vacatur ¶ 1.

Investment Hunter established a margin account and borrowed substantial sums from Credit Suisse. In the agreement establishing this margin account (the "Margin Agreement"), Investment Hunter represented that the Pledged Shares were not subject to any security interest, claim, or charge.

After the market value of the Pledged Shares dropped significantly, Credit Suisse issued a margin call and was informed that West Coast objected to any sale of the Pledged Shares to meet the margin deficiency. West Coast based its objection on the Lockup Agreement and the fact that Green Hunter was instructing its transfer agent to place a stop order on any Green Hunter shares owned by Investment Hunter. Credit Suisse filed a Statement of Claim against Investment Hunter with the Financial Industry Regulatory Authority ("FINRA") alleging a knowing violation of the Margin Agreement and seeking compensatory and punitive damages, which the FINRA arbitration panel ultimately awarded. Concurrently with its arbitration proceeding, Credit Suisse also brought this action against West Coast seeking a declaration that the Lockup Agreement did not prohibit a transfer of the Pledged Shares to Credit Suisse to satisfy the Margin

Agreement margin deficiency and damages for West Coast's alleged interference with Credit Suisse's contract with Investment Hunter.

In the Memorandum Opinion granting partial judgment on the pleadings, the Court held that Evans had signed the Lockup Agreement in his personal capacity and that the Lockup Agreement did not bind Investment Hunter and, therefore, that it did not prohibit a transfer of the Pledged Shares to Credit Suisse. West Coast pursued an interlocutory appeal to the Supreme Court, arguing that the Court's determination that it need not consider the question of whether the Lockup Agreement prohibited Evans from pledging Green Hunter shares no matter who owned them by virtue of the phrase "directly or indirectly" in the Lockup Agreement constituted reversible error. The Supreme Court remanded, by a May 17, 2010, order, for this Court to consider two issues which had first been identified on appeal and which could arguably affect the outcome of the case: (1) whether Credit Suisse was a bona fide pledgee for value; and (2) whether Investment Hunter was Evans's alter ego such that Investment Hunter's pledge of

the shares could be attributed to Evans, thereby resulting in a breach of the Lockup Agreement.[3]

On May 27, 2010, this Court upheld Credit Suisse's arbitration award in full against Investment Hunter.[4] Shortly thereafter, and before the questions raised by the Supreme Court could be considered on remand, the parties agreed to a settlement. This motion followed.

* * *

Court of Chancery Rule 60(b) establishes grounds for the grant of vacatur: "[o]n motion and upon such terms as are just, the Court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons . . . (5) . . . it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."[5] Courts

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[3] *West Coast Opportunity Fund, LLC v. Credit Suisse Sec. (USA) LLC*, 2010 WL 2169634, at *3-*4 (Del. May 17, 2010).
[4] *Credit Suisse Sec. (USA) LLC v. Inv. Hunter, LLC*, 2010 WL 2160904, at *7 (Del. Ch. May 27, 2010).
[5] Ct. Ch. R. 60(b).

have interpreted this standard narrowly.[6] It is generally employed when a case becomes moot at some point during the appellate process and where the interests of justice so require.[7] "The rationale for the rule of vacatur is 'that those who have been prevented from obtaining the [appellate] review to which they are entitled should not be treated as if there had been [an adverse determination upon] review.'"[8] Vacatur allows "for the protection of a party whose desire for appellate review has been thwarted."[9] Where appellate review has been prevented by some event beyond the parties' control, vacatur may be necessary to prevent the unappealable judgment from obtaining "precedential or preclusive *res judicata* effect . . . ."[10]

[6] *See, e.g.*, *Tyson Foods, Inc. v. Aetos Corp.*, 818 A.2d 145, 147 (Del. 2003) ("In Delaware, the equitable remedy of vacatur is available in only a narrow set of circumstances.").
[7] *See id.* at 147-48 ("[W]hen a case becomes moot at some point during the appellate process, this Court will vacate the judgment below where the interests of justice so require.").
[8] *Stearn v. Koch*, 628 A.2d 44, 46 (Del. 1993) (alteration in original) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)).
[9] *Id.*
[10] *Id.* at 47.

Nevertheless, "[j]ustice does not require vacatur where the parties voluntarily settle a matter unless exceptional circumstances abound."[11] In *Tyson Foods*, our Supreme Court noted that Delaware's vacatur standard is "drawn entirely from federal precedent[,]" and that "[a]s a precursor to considerations of justice, federal courts are instructed to consider whether the case is mooted by happenstance, or alternatively, whether the mooting event was assented to by the party seeking vacatur."[12] As the United States Supreme Court has pointed out, the reference to "happenstance" in the case law on vacatur "must be understood as an allusion to this equitable tradition of vacatur. A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance [or by the unilateral action of the opposing party], ought not in fairness be forced to acquiesce in the judgment."[13] In contrast, where a settlement causes mootness, "the losing party has voluntarily forfeited his legal remedy by the ordinary

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[11] *Tyson Foods*, 818 A.2d at 148; *see also id.* ("[W]here a party has 'voluntarily forfeited his legal remedy' through settlement he 'surrender[s] his claim to the equitable remedy of vacatur[,]' unless 'exceptional circumstances' counsel otherwise.") (alteration in original) (quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25-29 (1994)).
[12] *Id.*
[13] *Bonner Mall*, 513 U.S. at 25.

processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur. The judgment is not unreviewable, but simply unreviewed by his own choice."[14]

West Coast asserts that extraordinary circumstances are present in this case, due to the unique posture of the two parties, certain factual issues recently uncovered in discovery, and the effect of the remand on the disposition of the case.[15]

First, West Coast points out that the parties to this suit did not seek the vindication of harm caused by the other party, but were both harmed by a third party not a part of this suit, and were simply seeking to protect their legitimate business interests where they overlap. Moreover, some documents emerged in the discovery process that cast some doubt on this Court's earlier determinations and

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[14] *Id.*

[15] West Coast also suggests that the "extraordinary circumstances" test has not been consistently applied, citing *Stephenson v. Cooke*, 2008 Del. Ch. LEXIS 168 (Del. Ch. Oct. 29, 2008), where the Court took the "unusual step" of vacatur because vacatur was a condition precedent to the universal settlement of all claims in the case, and because no third-party interests were implicated, determining that the public interest in the publication of the opinion was outweighed by the interest in avoiding the further expenditure of judicial resources. But *Stephenson* appears to have been driven solely by pressing practical issues.

suggest that West Coast's reading of the Lockup Agreement is the more correct one.[16] However, in oral argument on the motions for judgment on the pleadings, the Court queried whether Evans and/or Investment Hunter were indispensable parties to the proceedings, and both sides argued that they were not.[17] Likewise, the parties chose to forgo expansive discovery in order to bring the action to a conclusion on an expedited basis, and vacatur is not appropriate simply because additional information came to light following a judicial determination that may or may not have been affected by that information if known ex ante.

Second, West Coast asserts that the extraordinary circumstances test is met as a result of the somewhat atypical circumstances of the Supreme Court's remand. Instead of deciding whether the Court erred in determining that Investment Hunter was not subject to the Lockup Agreement, the Supreme Court instead allowed

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[16] West Coast notes the discovery of an affidavit where Evans asserted that Investment Hunter was, in fact, subject to the Lockup Agreement, as well as communications between Credit Suisse and Green Hunter's board of directors suggesting that Credit Suisse, at least initially, also believed that Investment Hunter was bound by the Lockup Agreement.

[17] Oral Arg. on Cross Mots. for J. on the Pleadings, Tr. 3-5; 25-27. Admittedly, the Court would probably have not been able to exercise personal jurisdiction over Evans; however, West Coast did not seek to dismiss the suit for failure to include an indispensable party, as it perhaps could have.

Credit Suisse the opportunity to raise on remand an argument not initially made in this Court, bona fide purchaser status. West Coast suggests that, had it chosen to pursue the matter further instead of settling, the same result would have been reached and then affirmed by the Supreme Court on these grounds. As a consequence, the Court's initial interpretation of the Lockup Agreement would stand, effectively denying West Coast appellate review of that interpretation. Furthermore, even if the Supreme Court did ultimately reverse the Court's interpretation of the Lockup Agreement, West Coast would still need to litigate that interpretation a second time in an action against Evans or Investment Hunter. West Coast suggests that, instead of wasting the time and resources of the parties and the Court, the most efficient use of judicial resources would be to grant vacatur and allow West Coast to litigate the issue in a single forum where all interested parties are subject to personal jurisdiction.

Finally, West Coast argues that vacatur would not be prejudicial to any party, since Credit Suisse has been made whole and because Evans would still be able to argue that Investment Hunter is not bound by the Lockup Agreement.

Additionally, the attorneys are not aware of any cases where the opinion is being relied upon.

* * *

With this background—both in fact and in law—the Court concludes that this is one of those very few, unusual cases where vacatur is appropriate. First, even though the case settled on remand, the settlement was not a compromise; although voluntary in a sense, West Coast had no viable alternative to folding its tents because with a new theory, bolstered by uncontested facts, Credit Suisse was highly likely to prevail. Thus, even if West Coast had refused to settle, the holding of the Memorandum Opinion would have escaped appellate review because of Credit Suisse's new position.[18] Second, through the Memorandum Opinion, the Court resolved a claim adversely to West Coast that involved its relationship under the Lockup Agreement with Evans, and, at least arguably, Investment Hunter. Of course, neither Investment Hunter nor Evans is a party here. Thus, in a dispute

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[18] To have fought a losing battle over a separate and distinct issue just to enhance its chances on a motion to vacate would have resulted in additional and unnecessary costs and burdens not only for West Coast, but also for Credit Suisse and the Court. There seems to be little reason to incentivize such inefficiency.

with Investment Hunter, West Coast would have legitimate concerns about the potential collateral estoppel effect of the Court's determination. Third, as requested by the parties, the Memorandum Opinion came in response to competing motions for judgment on the pleadings. That decision inevitably was premised upon the skimpiest of factual records, and it now appears that a more fully developed factual context perhaps, although one may have doubts, would have induced the Court to come to a different conclusion.

* * *

Accordingly, for the foregoing reasons, the Memorandum Opinion (Transaction ID No. 26368863) and its implementing order, dated July 30, 2009, are hereby vacated.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K