COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 S. STATE STREET
DOVER, DELAWARE 19901
TELEPHONE (302) 739-4397
FACSIMILE (302) 7396179

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John L. Reed, Esquire
Duane Morris, LLP
1100 North Market Street
Wilmington, DE 19801

William M. Lafferty, Esquire
Morris, Nichols, Arsht & Tunnel1
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899-1347

Re: Goldman v. Pogo.com Inc., et al.
C.A. No. 18532-NC
Date Submitted: June 27,2002

Dear Counsel:

Pogo.com Inc. (the "Company") and its directors (the "Director Defendants") (together with the Company, the "Defendants") have moved pursuant to Court of Chancery Rule 59(f) for reargument of a portion of this Court's June 14, 2002 letter opinion and order.[1] At issue is my conclusion that the allegations in Plaintiffs Second Amended Complaint (the

[1] *Goldman v. Pogo.com Inc.*, Del. Ch., C.A. No. 18532, let. op. at 29, Noble, V.C. (June 14, 2002). A motion for reargument under Court of Chancery Rule 59(f) is governed by the familiar standard requiring the moving party to demonstrate that the Court's decision was predicated upon a misunderstanding of a material fact or misapplication of law. See *In re ML/EQ Real Estate P 'ship Litig.*, Del. Ch., C.A. No. *15741,* mem. op. at 31, Strine, V.C. (Mar. *22, 2000); Miles, Inc. v. Cookson America, Inc.*, 677 A.2d 505, 506 (Del. Ch. 1995); Defendants' motion does not argue that this Court misapplied the law.

"Complaint") state a disclosure claim that survives a motion to dismiss under Court of Chancery Rule 12(b)(6). For the reasons set forth below, Defendants' motion for reargument is denied.

Count V of the Complaint alleges that "[a]t the time the Company solicited Daniel Goldman ("Plaintiff') to participate in the [F]irst Bridge Loan financing, the Director Defendants were aware [yet failed to disclose] that the ultimate conversion of the Bridge Loans would take place only following a major restructuring of the Company, the effect of which would be to effectively eliminate Plaintiffs shareholdings."[2] As noted in the June 14, 2002 letter opinion, "[i]n substance, Plaintiff claims that he was not fairly apprised of the extent to which his equity position in the Company

[2] Compl. ¶ 95. This case is not about the suffkiency of the disclosures as to the First Bridge Loan as if the First Bridge Loan were the only transaction. Instead, this case is about the sufficiency of the disclosures in light of a series of related transactions implementing Defendants' calculated scheme to "effectively eliminate" (not merely dilute) Plaintiff's interest.

would likely be diluted"[3] and that he "was not informed of the magnitude of the potential dilution."

Defendants argue in this motion, as they did in support of their motion to dismiss, that the magnitude of the dilution was disclosed to Plaintiff through the representations of Company executives to Plaintiff stating that his ownership in the Company would be reduced to 1% following the contemplated financing and restructuring.' Defendants, in addition, argue that the Court failed to address their argument that Plaintiff was as fully and fairly informed as he could have been, given the uncertain and speculative nature of the subsequent bridge loan and restructuring transactions.

I begin with Defendants' argument regarding the sufficiency of the disclosures relating to the consequences accompanying Plaintiffs failure to

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[3] *Goldman v. Pogo.com Inc.,* let. op. at 29.
[4] *Id.* at 30.
[5] As support for this assertion, Defendants cite Paragraph 37 of the Complaint in which Plaintiff acknowledges a June 4, 1997 letter sent to him from one of the Company's executives urging him to "agree to vote his shares in favor of the restructuring, following which Plaintiffs ownership would be reduced to 1% of the Company.*' Defendants also cite the June 17, 1997 letter to Plaintiffs attorney from a Company representative stating that "Goldman's Common Stock position after the exchange and after the contemplated financing would be reduced to 1% of the Company." Compl., at Ex. G.

invest in the First Bridge Loan. I concluded that the Complaint adequately alleged that, while informed of the general, indeed significant potential, consequences of the First Bridge Loan, Plaintiff was not fully advised of the extent to which his equity interest in the Company would be diluted through the series of transactions planned by his adversaries and that such failure was material![6]

Plaintiff was provided with notice that his interest in the Company might be significantly diluted. Indeed, the correspondence of June 4, 1997 and June 17, 1997 informed Plaintiff that his interest in the Company might be diluted to 1%. This alone, however, is not dispositive of the issue of whether Plaintiff was apprised of the magnitude of the Defendants alleged plan to dilute his interest. As carried out, Defendants' scheme, or so the Complaint alleges, was successful in diluting Plaintiffs equity interest to 0.1 %,[7] an interest that is one-tenth of the remaining interest communicated

[6] Materiality involves an inquiry into the importance of an omitted fact to a given decision when viewed in light of the "total mix" of information made available to a plaintiff. ***Rosenblatt v. Getty Oil Co., 493*** A.2d 929,944 (Del. 1985).

[7] Compl. ¶ 43.

to Plaintiff by the Company. Moreover, according to the Complaint, the bridge loans and restructuring were part of a well-planned undertaking to deprive Plaintiff of his interest. Accepting, because I must, that the allegations of the Complaint are true, the June 4, 1997 lettef was part of a series of efforts to pressure Plaintiff into forfeiting substantial portions of his interest in the Company. The wording of that letter, as set forth in Paragraph 37 of the Complaint, encouraged Plaintiff to vote in favor of a restructuring which would dilute his stake in the Company to 1% (not 0.1%). Similarly, the June 17, 1997 letter stated that Plaintiffs shares would be diluted to 1% upon the occurrence of the exchange and the contemplated financing regardless of whether he chose to participate in another proposal by the Company to exchange his shares. In short, when the Complaint is viewed in light of the plaintiff-friendly pleading standard of Rule 12(b)(6), I was, and remain, unable to conclude that Plaintiff was fully apprised of the material facts necessary for comprehending the full extent of the alleged

dilutive scheme (not simply the First Bridge Loan, but the series of planned transactions) to wipe out his holdings.

I now turn to Defendants' argument that that Plaintiff was as fully enlightened about the transactions and their dilutive effects as he could have been in light of their uncertain status. My opinion noted Plaintiffs allegation that the bridge loan transactions and restructuring were part of an overall scheme orchestrated to eviscerate his equity holdings in the Company. After taking those allegations as true and reading them in context with the Complaint's other factual assertions, I was unable to conclude that the dilution of Plaintiffs holdings was a mere collateral consequence of the restructuring. While I understand, as I did before issuing my opinion last month, Defendants' argument as to the speculative nature of the subsequent transactions also challenged by Plaintiff as they relate to the disclosure issue, I must assume, for present purposes, the truthfulness of Plaintiffs allegations that the transactions were not prospective and uncertain but,

instead, were reasonably known to Defendants at the time of the disclosures and were calculated to drive Plaintiff out of the Company.'

Because Defendants' arguments in support of their motion for reargument on Plaintiffs disclosure claim revisit ones understood by the Court prior to the issuance of its June 14, 2002 letter opinion and because I remain of the view that I did not misunderstand the "facts" as I must accept them for these purposes from the well-pled allegations of the Complaint, Defendants' Rule 59(f) motion is denied.

IT IS SO ORDERED.

Very truly yours,

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[8] Because of the Complaint's factual allegations in this case, Defendants' reliance on *In re Encore Computer Corp. S'holders Litig.*, Del. Ch., C.A. No. 16044, mem. op., Jacobs, V.C. (June 16, 2000), is misplaced. While this Court has held that the duty of disclosure does not carry a duty to disseminate speculative or uncertain information, Plaintiff here has specifically alleged a conscious scheme on the part of the Defendants to eviscerate his equity interest in the Company. See Compl. ¶¶ 2-4. Taking this as true, as I must for the purposes of a motion to dismiss pursuant to Rule 12(b)(6), I accept that such a scheme did exist and that details of the projected undertakings necessary to effectuate that effort were known by the Defendants at the time of the disclosures.