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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

TELXON CORPORATION. Plaintiff, v. JOHN H. CRIBB, ROBERT A. GOODMAN, RAJ REDDY, FRANK BRICK, NORTON ROSE, ROBERT F. MEYERSON, and TELANTIS VENTURE V INC., Defendants.	)	C.A. No. 17706

MEMORANDUM OPINION

Submitted: November 13, 2001
Decided: December 6, 2001

Joseph A. Rosenthal, Esquire, ROSENTHAL, MONHAIT, GROSS & GODDESS, P.A., Wilmington, Delaware; Sidney B. Silverman, Esquire, New York, New York; and Walter Siegle, Esquire, Symbol Technologies, Inc., *Attorneys for Plaintiff.*

Henry E. Gallagher, Jr., Esquire, CONNOLLY, BOVE, LODGE & HUTZ, LLP, Wilmington, Delaware; and Steven J. Miller, Esquire, Drew A. Carson, Esquire, GOODMAN, WEISS, MILLER, LLP, Cleveland, Ohio, *Attorneys for Defendants Cribb, Goodman, Reddy, Brick and Rose.*

Martin P. Tully, Esquire, MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware, *Attorneys for Defendant Meyerson.*

LAMB, Vice Chancellor.

I.

The defendant Non-Meyerson Directors' have moved to reargue the Court's opinion of October 29, 2001. In that opinion, I decided, among other things, that for purposes of satisfying the statute of limitations the Amended Complaint (filed as a direct action by Telxon Corporation after its acquisition by Symbol Technologies, Inc.) related back to the time of filing of the original stockholders complaint (filed derivatively on behalf of Telxon). I further held that because the original complaint was timely filed, the Amended Complaint was too. In reaching that conclusion, I noted that the defendants had moved to dismiss the original complaint for failure to comply with Rule 23.1 of the Court of Chancery Rules, but that the motion was never fully briefed or brought on for decision. Because the Rule 23.1 motion was not decided before the corporation chose to realign itself as plaintiff and assume control of the litigation, I treated that motion as moot.

The crux of the motion for reargument is that, notwithstanding the fact that the Rule 23.1 motion was not brought on for decision, the Amended Complaint should not be allowed to relate back to the original derivative complaint because

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[1] In the Opinion, I granted the motion to dismiss the complaint against director Bogomolny and, therefore, assume that he is no longer a party to this matter.

it was an "unlawfully-brought derivative action" or, stated differently, that the holdings in the Opinion "should be limited in their applicability to a properly-initiated derivative action." The factual predicate for this argument is the assertion that, at the time the original complaint was filed, "Telxon's newly-elected Board consisted of a clear disinterested majority – Garwood, Hone, Paxton and Bogomolny." Relying on Rule 23.1, the Non-Meyerson Directors argue that because of this "clear disinterested majority" the original derivative complaint did not satisfy the demand excusal requirements of that rule and, thus, was not "properly initiated."

II.

A motion for reargument will be granted only when "the Court has overlooked a decision or principle of law that would have controlling effect or the Court has misapprehended the law or the facts so that the outcome of the decision would be affected."[2] If the motion "merely restates arguments a court has already rejected, the court should deny the motion."[3] I have considered the

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[2] *Stein v. Orloff*, Del. Ch., C.A. No. 7276, mem. op. at 3, Hartnett, V.C. (Sept. 26, 1985); *Miles v. Cookson*, Del. Ch., 677 A.2d 505, 506 (1995).

[3] *Continental Ins. Co. v. Rutledge & Co.*, Del. Ch., C.A. No. 15539, 2000 WL 268297, Chandler, C. (Feb. 15, 2000) at **1.

motion for argument in light of these standards and conclude that it must be denied, for several reasons.

First, the defendants had ample opportunity to litigate the demand futility issue to a conclusion before the Symbol acquisition of Telxon and, in fact, filed a motion directed at the issue. But the resolution of that motion was delayed by a discovery dispute that arose when the defendants' supporting papers introduced matters outside the scope of the pleadings in order to contradict a central allegation of the complaint. In the end, the moving defendants evidently chose to defer their motion in light of the impending Symbol/Telxon transaction. In the circumstances, as the Opinion observed, the issue of demand futility was mooted by Telxon's post-transaction decision to file the Amended Complaint as a direct claim.

Second, defendants' Rule 23.1 argument mistakenly treats only the first prong of the test for demand futility found in *Aronson* v. *Lewis*,[4] focussing on issues of director independence and disinterest in the challenged transaction. The defendants argue that, because a majority of the Telxon directors at the time the original complaint was filed were both independent of Meyerson (the director

[4] Del. Supr., 473 A.2d 805 (1984).

participating in the challenged transaction) and disinterested in that transaction, demand was not excused. This argument ignores the fact that a majority of those directors were also directors at the time of the challenged transaction and, therefore, that the second prong of *Aronson* is relevant to the court's inquiry under Rule 23.1.[5] *Aronson* describes that inquiry as follows:

> The Court of Chancery in the exercise of its sound discretion must be satisfied that a plaintiff has alleged facts with particularity which, taken as true, support a reasonable doubt that the challenged transaction was the product of a valid exercise of business judgment .[6]

The moving defendants do not address this second part of *the Aronson* analysis. This omission is, perhaps, due to the fact that the Opinion sustained the claim of waste asserted in the Amended Complaint against a motion to dismiss. Since the claim of waste alleged in the original complaint was substantially similar to that in the latter complaint, there is reason to conclude that the original complaint would also have survived a motion to dismiss and have satisfied the second prong *of Aronson* .

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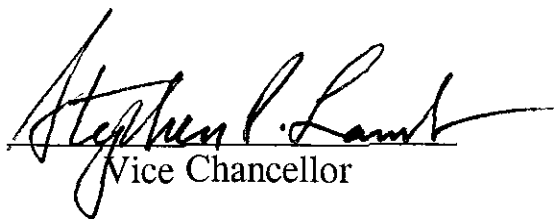
[5] For this reason, defendants' reliance on *Rules v. Blasband*, Del. Supr., 634 A.2d 927 (1993) is misplaced. That case involved the situation faced where demand is to be made on a different board of directors than the one that authorized the challenged transaction.

[6] Id. at 815.

Finally, I note my disagreement with the premises of the motion for reargument. They contend that because (i) the original derivative complaint failed to satisfy the requirements of Rule 23.1, and (ii) the board in place before the Symbol/Telxon merger authorized the filing of the motion to dismiss, it is improper to allow the relation back of the Amended Complaint because that will result in an "unwarranted interference" with the managerial authority of the Telxon board that determined to file the motion to dismiss. Suffice it to say that the mere decision of a board of directors to move to dismiss a derivative claim does not, *ipso facto*, deprive that claim of all vitality. Certainly, it is not enough to deprive a later installed board of directors from determining to take over the litigation and prosecute it directly on behalf of the corporation.

III.

For all these reasons, the motion for reargument is DENIED.



Vice Chancellor