COURT OF CHANCERY
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Re: Ambase Corporation v. Citv Investing Comnanv. et al.
C.A. No. 18207

Dear Counsel:

Plaintiff Ambase Corporation has moved for reargument of my December 14, 2000 bench decision dismissing its claim against City Investing Liquidating Trust (the "Trust") and certain Trust affiliates on statute of limitations and laches grounds. That bench opinion was implemented by a final order on January 3,200 1.

To prevail on its reargument motion, Ambase must demonstrate that the court's prior decision "rested on a misunderstanding of a material fact or

a misapplication of law."[1] "[T]he court's focus on a motion under Rule 59(f) is solely on the facts in the record at the time of the decision."[2]

In its motion, Ambase contends that the court misapprehended the law and the facts in dismissing its claims as time-barred. But its argument is premised on a misreading of the court's decision. The court's earlier decision relied upon undisputed facts and a view of the law the court continues to believe is correct. Moreover, Ambase relies upon a great deal of evidence that it failed to present during the earlier briefing. Ambase also raises new arguments. Neither the new evidence nor the new arguments are properly raised at this time. As a result, the court will deny Ambase's motion.

Factual Background

A brief recitation of the basic dispute will suffice. The underlying facts are drawn from Ambase's complaint. In 1975, City Investing Company ("City") formed a wholly-owned subsidiary called The Home

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[1] *Arnold v. Societyfor Savings Bancorp,* Del. Ch., C.A. No. 12883, 1995 Del. Ch. LEXIS 106, at * 1, Chandler, V.C. (Nov. 5, 1990).

[2] *Price v. The Continental Insurance Co.,* Del. Ch., C.A. No. 17219-NC, letter op. at 2, Lamb, V.C. (Mar. 3, 2000) (citing *Miles, Inc. v. Cookson America, Inc.,* Del. Ch., 677 A.2d 505, 506 (1995)).

Group, Inc., which is now the plaintiff Ambase. For simplicity's sake, I refer to The Home Group as Ambase.

In 1985, City engaged in a transaction whereby it distributed out its assets and liabilities. For purposes of this opinion, what is important is that City distributed its shares of Ambase out to City stockholders. City stockholders also received units in the Trust, which was also formed at that time and was responsible for all liabilities of City that were not otherwise provided for.

Put simply, the owners of City divided the assets and liabilities they solely possessed between two different entities. Pursuant to an August, 1985 Assignment Agreement, Ambase assumed certain liabilities of City. These included all "obligations of City for Federal income taxes (including all interest and penalties thereon) as common parent of the City Affiliated Group . . . "

When the Trust was created and Ambase was spun off, certain directors and officers of City (the "Trustee Defendants") occupied positions with both entities:

- Defendant George Scharffenberger has been a Trustee of the Trust since its creation, and served as Chairman of the Ambase board until January 24, 1993. Scharffenberger had been City's Chief

Executive Officer at the time of the Assignment Agreement. *Scharffenberger left Ambase seven and a half years before Ambase filed its complaint in this action.*

- Defendant Eben Pyne has been a Trustee of the Trust since its creation, and was a member of the Ambase board until January 24, *1993. Pyne left Ambase seven and a half years before the complaint in this action was filed by Ambase.*

- Defendant Lester J. Mantel1 has served as a Trustee of the Trust since its creation. Mantel1 had been a senior City officer before the Ambase spin-off, and served in high ranking positions at Ambase until his departure in December 1996. At Ambase, Mantel1 had significant responsibility for Ambase's handling of tax matters. *Mantel1 left Ambase over three and a half years before its complaint in this action was filed.*

In March 1986, the Internal Revenue Service (the "IRS") issued a Revenue Agent's Report contending that City had failed to properly withhold taxes for years 1979 and 1980 relating to the affairs of its Netherlands Antilles subsidiary. The IRS later extended that claim to years 198 1 to 1985. The amount of the withholding at issue is nearly $2 1 million. As of March 1986, the accrued interest on that sum was around $10 million.

The Revenue Report was addressed to Ambase as City's agent under the Assignment Agreement. Ambase responded as if any liability owed by City was its responsibility under the Assignment Agreement. At that time, it

is alleged that Mantel1 was Ambase's senior tax advisor and guided Ambase policy on the matter.

In 1986, Ambase did not pay the taxes alleged to be owed. If it had done so, the running of further interest would have been cut off. Moreover, if Ambase ultimately proved that the taxes were not owed, Ambase would have received interest to compensate it for the loss of the time-value of its money. Ambase also did not demand that the Trust pay the taxes allegedly owing, nor did it demand that the Trust assume the defense against the IRS.

Nine years then passed during which Ambase acted as if the potential tax liability was its responsibility.

On May 11, 1995, the IRS issued a Notice of Deficiency to Ambase claiming entitlement to the funds that it alleged should have been withheld. As of that time, defendants Scharffenberger and Pyne had left their positions at Arnbase; defendant Mantel1 was still an officer there. Thus, as of the time Ambase received the Notice of Deficiency, the Ambase board had no members who were Trustees.

On June 29, 1995, Ambase filed a petition with the U.S. Tax Court on behalf of City contesting the alleged tax liability. As of 1995, the accrued interest on the withholding obligation of $2 1 million had risen to $6 1

million, for a total liability of over $80 million. Arnbase did not seek to bring the Trust into the case or to sue the Trust.

As noted, defendant Mantel1 left Ambase's employment in December 1996.

1997 passed without Ambase claiming that the Trust, and not Ambase, was primarily responsible for the withholding tax.

1998 also passed without Ambase claiming that the Trust and not Ambase was primarily responsible for the withholding tax.

1999 passed without Ambase claiming that the Trust and not Arnbase was primarily responsible for the withholding tax obligation.

The first seven and a half months of 2000 passed without Ambase claiming that the Trust and not Ambase was primarily responsible for the withholding tax obligation.

On August 14, 2000, Ambase filed its complaint for declaratory and injunctive relief in this court. At that time, Ambase for the first time contended that the potential withholding tax obligation that it had been apprised of *for fourteen years* was not its primary responsibility under the Assignment Agreement. Ambase sought a preliminary injunction preventing the Trust from making distributions that would endanger the Trust's ability

to pay the withholding tax liability, which had by then grown to $141 million. The complaint also sought a recovery of Ambase's expenses in dealing with the IRS since 1986, an amount equal to over $3 million.

The basis for the complaint was that the withholding tax liability of City for its Netherlands Antilles subsidiary was not assigned to Ambase under the Assignment Agreement as a primary liability of Ambase. Rather, that liability was primarily the Trust's, which had a duty to step up to the plate by defending against the IRS's claim and paying the liability if it ultimately was proved to be owed.

By the time the complaint was filed, the Trust had remaining assets of around $73 million, or slightly more than half of the potential withholding tax liability. The Trust had been funded with assets of between $150 million and $225 million. Between 1985 and 1990, the Trust had distributed over $280 million to former City stockholders who held Trust units. By 2000, the Trust was poised to make its final distributions and close down, if it could address certain environmental liabilities.

<u>The Court's Prior Opinion</u>

The Court's prior opinion was buttressed by the facts just articulated, all of which emerge from Ambase's own complaint. In that oral opinion, I

concluded that Ambase's complaint was barred by the statute of limitations because the suit should have been brought *at the latest* no later than three years after Mantell's departure from his employment at Ambase.

At that time, I reasoned that Ambase could have brought this action against the Trust as early as 1986, when the Revenue Report was issued, and certainly by 1995, when the Notice of Deficiency was issued.

These IRS documents quantified a specific liability that was allegedly owed as a result of City's withholding failures. Not only that, the liability was fixed in a manner that could be addressed in a financially and legally important manner. If the liability was paid subject to a contest, the liability was not subject to further interest payments and the payor was protected because interest would accrue to it if it prevailed against the IRS in the end.

Under Ambase's own theory, the Trust was the entity that had to address this liability. Because Ambase could be injured by the Trust's failure to satisfy the liability and cut off the running of interest or, alternatively, to set aside funds sufficient to pay the entire liability, it could have sued the Trust for failing to accept its contractual responsibilities. This failure obviously could compromise Ambase, which might be forced to bear

the whole liability if the Trust distributed its assets and did not provide for an obligation primarily assigned to it, and not Ambase.

Furthermore, as Ambase's claims for reimbursement for its expenses back to 1986 demonstrates, Ambase had a litigable dispute with the Trust over which entity should have to deal with the IRS. If the Assignment Agreement did not assign the potential liability primarily to Ambase, it was the Trust's duty to defend the claim and Ambase would only be exposed if the Trust lost and was unable to make the government whole.

In sum, Ambase's claims that the Trust is primarily responsible for the potential withholding tax liability, that it should be required to set aside assets sufficient to satisfy that liability, and that it and not Ambase should bear the cost of contesting the liability were surely ripe as of 1995, if not in 1986.[3] These claims could also have been explicitly framed as breaches of the Trust's obligations under the Assignment Agreement;[4] they are in fact pled implicitly as such now.

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[3] *Keller v. President, Directors & Co. Of Farmers Bank,* Del. Super., 24 A.2d 539,541 (1942) ("Statutes of Limitation begin to run when proper parties are in existence capable of suing and being sued, and a cause of action exists capable of being sued on forthwith.").

[4] *Nardo v. Guido DeAscanis &* Sons, Inc., Del. Super., 254 A.2d 254,256 (1969) (cause of action accrues at time contract is breached).

Another foundational element of my prior decision was that there was no reason not to hold Ambase to the relevant statute of limitations, even though this case is brought in equity.[5] Because Ambase's injunctive and declaratory relief claims are based on a breach of contract theory and the complaint was not filed until August 2000, I held that the operation of the three year statute of limitations[6] barred its claim unless some basis for equitable tolling of the statute existed.

"[E]quitable tolling occurs when the plaintiff can show that it was ignorant of the wrong due to the defendant's fraud or fraudulent concealment or some other circumstance justifying why plaintiff did not have reason to know of the facts constituting the alleged wrong."[7] Ambase argued that the statute had been equitably tolled because the Trustee Defendants held offices at both Ambase and the Trust after the Assignment Agreement. Rather oddly, Ambase pled the case as one involving dark

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[5] *See Kahn v. Seaboard Corp.,* Del. Ch., 625 A.2d 269,277 (1993).

[6] *See* 10 Del. C. § 8106.

[7] *Cincinnati Bell Cellular Systems Co. v. Ameritech Mobile Phone Service of Cincinnati, Inc.,* Del. Ch., C.A. *No. 13389,* mem. op. at *33,* Chandler, V.C. (Sept. *3,* 1996) *(citing Kahn, 625* A.2d at 276).

motivations, even though the Assignment Agreement itself arises out of the least suspicious of circumstances.[8]

It must be remembered that City was dividing itself in 1985. While the division was obviously structured to be as advantageous as possible to City stockholders, it is paradoxical to think that the City board could structure the division in a way that would be unfair to the City stockholders. After all, those stockholders were the ultimate owners of all of City's assets and liabilities, both before and after the division. City was simply splitting up its own pie.

The fact that the Trustee Defendants thereafter served both as Trustees and as Ambase directors and/or officers thus emerges as benign and to be expected. To buttress its equitable tolling argument, however, Ambase insinuated, without factual support, that the Trustee Defendants had a motive to favor the Trust over Ambase. Therefore, the Trustee Defendants supposedly influenced Ambase to accept liability for the withholding tax

[8] In its reargument motion, Ambase continues its odd approach. For example, it argues that it was somehow unseemly for the Trustee Defendants to want the Trust to pay out distributions to the unitholders. Why? Wasn't the Trust created to benefit the City stockholders, all of whom also became Ambase stockholders when the Trust was created? The fact that time has undoubtedly changed the Ambase stockholder base does not erase the fact that the Trust was not conceived in suspicious circumstances.

liability. But Ambase did not plead or assert facts that suggested that the Trustee Defendants owned a sufficient number of units in the Trust to make it materially beneficial to them to favor the Trust over Ambase, which was the source of Scharffenberger's and Mantell's livelihood until 1993 and 1996 respectively.

In my oral opinion, I noted how thin Ambase's equitable tolling argument seemed to be. While I did not dilate on the point then, it remains apparent that the argument that the Trustee Defendants fraudulently concealed[9] the basis for Ambase's claims or that the claims were inherently undiscoverable before all of them departed Ambase lacks strength.

As my oral decision noted, Ambase does not plead that the Ambase board was ever comprised of a majority with Trust affiliations. To the contrary, Ambase's counsel admitted at argument that since 1985, Ambase's board has always been comprised of a majority without affiliations with the Trust.

[9] The complaint does not plead such fraud with particularity nor do Arnbase's submissions articulate the supposed fraudulent acts with particularity. It must also be remembered that the basis for Ambase's claims is the Assignment Agreement; those claims are not based on any breach of fiduciary duty allegedly committed by the Trustee Defendants in connection with the execution of the Assignment Agreement.

It is not plausible that this Ambase board majority lacked knowledge of the Trustee Defendants' positions with the Trust. If the Ambase board majority blindly relied upon the Trustee Defendants' advice as to which entity was primarily responsible for the disputed tax liability, the board majority did so with knowledge of the Trustee Defendants' affiliations with the Trust-and thus at its own peril. Likewise, the Ambase board surely knew or had reason to know that the Trustee Defendants might hold Trust units; after all, all the City stockholders received Ambase shares and Trust units in the division. Therefore, the Ambase board had every reason to seek another opinion on the matter, from sources unconnected to the Trust.

Adding to the weakness of Ambase's equitable tolling argument was the obvious difficulty of concealing claims that Ambase now alleges can be wholly supported by the language of the Assignment Agreement and the IRS Code. While the tax issues are complex and Mantell was obviously an important player on tax matters at Ambase, the withholding tax liability is a large one. Neither the Assignment Agreement nor the IRS Code are secret documents. There is no reason that a diligent Ambase board would not have looked into the issue or sought a view from sources other than the Trustee

Defendants. [10] It was simply not a practical impossibility" for Ambase to discover a breach of a contract it had in its own possession.

In view of these factors, the notion that the statute of limitations was tolled as to Ambase during the time Trustee Defendants served the company seemed to me to be quite weak. But, in the end, I did not rest my dismissal decision on a holding that the statute of limitations began to run before the last of the Trustee Defendants had left Ambase.

Instead, I noted the undisputed fact that all of the Trustee defendants had left Ambase's service by December 1996. Thus, any influence the Trustee Defendants had over Ambase was gone as of that point.

Given that the Assignment Agreement was fully available to Ambase, as was the IRS Code, there was no reason why Ambase could not have asserted its claim within three years after Mantell's December 1996 departure. [12] Ambase had full notice of the fact that the Assignment

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[10] *In re Dean Witter Partnership Litig.,* Del. Ch., Cons. C.A. No. 14816, mem. op. at 14-15, Chandler, C. (July 17, 1998) (fraudulent concealment "requires an affirmative act of concealment by a defendant" and even when proven, the statute is only tolled until the plaintiffs claims "could have been discovered by the exercise of reasonable diligence").

[11] *Dean Witter,* mem. op. at 14 (inherently unknowable exception requires proof that injury's discovery was practically impossible).

[12] *Dean Witter,* mem. op. 14-16 (plaintiff invoking equitable tolling doctrines must show that it could not have brought claims if it acted diligently).

Agreement was the basis for it assuming primary liability for City's withholding tax liability. Ambase thus had the information to decide whether to assert a claim. All its board or management had to do was instruct someone to read the contract and the IRS Code.

Tellingly, Ambase could never identify when the spell cast over its decision-making processes by the Trustee-Defendants would end and the running of the statute of limitations would begin again. Apparently, the claims could have been brought two, five, ten years, or twenty-five years later than they were. How the claims were miraculously discovered in the summer of 2000 given the supposed impossibility of their discovery was not clear.

Given all these circumstances, I held that Ambase's argument that the statute of limitations was equitably tolled beyond December 1996 to be without merit. Equitable tolling doctrines are an exception to the normal rule, and should not be lightly invoked. When a party has reason and the capacity to assert claims in a timely manner it must do so. When the circumstances that give rise to equitable tolling dissipate, the party which had the benefit of more time is expected to act diligently thereafter.

As Chancellor Chandler has noted:

> [The statute] is tolled ***only** until* the plaintiff discovers (or exercising reasonable diligence should have discovered) his injury. Thus, the limitations period begins to run when the plaintiff is *objectively* aware of the facts giving rise to the wrong, i.e., on inquiry notice.[13]

Consistent with these principles, I held that no later than December 1996 Ambase was on full inquiry notice and possessed all the knowledge it needed to bring its claim.

That reasoning was the primary basis for my dismissal order. In the alternative, I held that the doctrine of laches also barred Ambase's claim. I based that alternative holding on the facts pled in the complaint, and concluded that those facts demonstrated that the requisite elements of laches existed.[14] Ambase had reason to know of its claims for quite a long time, but did not assert them until August 2000. During the long delay that had transpired since the withholding tax liability first emerged in 1986, the Trust had taken actions in reliance upon the undisputed fact that Ambase had acted as if it was primarily liable for the disputed tax. In particular, the Trust had distributed out assets that could have been used to satisfy the liability. It

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[13] *Dean Witter,* mem. op. at 16 (emphasis in original).

[14] *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.,* Del. Ch., 714 A.2d 96, 104 (1998) (setting forth the test for laches).

now has fewer dollars than are needed to satisfy the withholding claim alone, leaving it with no resources to address the other pending claims mentioned in the complaint.

Ambase's course of conduct also prejudiced the Trust in another way. Because payment of the liability could have cut off the running of interest *at any time,* the Trust could have limited its risk by doing just that. Because Ambase did not raise its claim until the year 2000, the Trust had no earlier chance to do so.

Ambase's Reargument Motion

Ambase's reargument motion is based on a misapprehension of my prior decision. In particular, Ambase claims that I dismissed its claims because Ambase had not convinced me that equitable tolling had stopped the running of the statute of limitations before Mantell's departure in December 1996. It therefore believes that I erred by relying upon contested factual issues regarding the motivations of the Trustee Defendants.

But that was not the linchpin of my statute of limitations decision. I took a far more conservative approach. I held that it was clear that Ambase's claims were ripe as of December 1996, that any influence of the Trustee Defendants was gone as of that time, that Ambase possessed all the

knowledge it needed to file suit within three years of that time, and that it did not do so.

In its reargument motion, Ambase does not quibble with the facts that support my prior decision. Rather, they argue that Ambase was entitled to rely blindly and indefinitely on what the Trustee Defendants had said about which entity bore the withholding tax liability. That is, regardless of the fact that Ambase's claims arise from the face of a contract that it has possessed since 1985 and its reading of the IRS Code, the statute of limitations was forever tolled. I continue to believe that not to be the law, and to disagree with the proposition that claims based on the language of a contract and a code book are inherently undiscoverable by a public company, with a board of directors, officers, employees, and potential derivative plaintiffs to help it sniff out litigable injuries.

Ambase's motion also attaches an array of documentary evidence that Ambase did not file in its papers answering the dismissal motion. This new evidence is not properly raised at this late juncture.

My refusal to consider this evidence does not work any procedural unfairness upon Ambase. Ambase could have submitted this newly asserted evidence in response to the defendants' dismissal motion. Ambase also

could have attempted to justify the need for discovery at that time. It did not do so and its arguments in that regard now come too late. Most important, the court's dismissal motion is buttressed by facts that Ambase even now does not dispute.

Finally, Ambase raises a host of other new arguments in its papers, which it did not raise in briefing on the dismissal motion and which are therefore not properly made on a reargument motion. For example, it spins a new yam about the substantial motivations that Mantel1 had to cover up the Trust's possibility liability for the withholding tax liability. The new theory in large part reduces to the assertion that it made little business sense for City to allocate the withholding tax liability to the Trust rather than to Ambase, and that Mantel1 faced exposure to the Trust for his alleged failure to make sure that the liability was allocated to Ambase in the Assignment Agreement. [15]

[15] The reader should remember that it is the defendants' position that the Assignment Agreement did in fact make Ambase primarily liable for the withholding tax liability. Ambase's assertion that assignment of the disputed liability to the Trust was at least counter-intuitive from a business perspective has the unintended effect of supporting defendants' argument on the merits.

Putting aside the many reasons that this theory seems improbable,[16] the theory does not explain the over three and a half year delay that followed Mantell's departure from Ambase. Again, it bears emphasis that the supposed motivations that Mantell harbored to favor the Trust were known by Ambase's other directors and officers since 1985. Ambase's argument thus reduces to its assertion that Mantell had placed some Svengali-like spell on Ambase's board that did not wear off until more than three years after he left.

All of Ambase's other arguments rest on this same foundation. Because the Ambase board chose to rely on Mantell with full knowledge of his Trust affiliations, Ambase contends that it had until the end of the universe to file this suit. I continue to reject this view that corporations and their directors have no obligation to act in a commercially diligent manner in discovering and asserting claims.

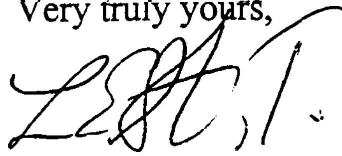
[16] The improbability of the theory is well articulated in the defendants' answer to Ambase's reargument motion.

Conclusion

For the foregoing reasons, Ambase's motion for reargument is denied.

IT IS SO ORDERED.

Very truly yours,



Leo E. Strine, Jr.

oc: Register in Chancery