



Michael J. Scharf, a former Edgcomb Corporation Chairman, director and CEO, seeks indemnification from Edgcomb for legal expenses incurred in relation to a Securities and Exchange Commission securities fraud investigation. Scharf contends that the SEC investigation focused primarily on Scharf's actions in his capacity as an Edgcomb officer and director. In contrast, Edgcomb states that the SEC investigation primarily focused on Scharf's personal trading involving Edgcomb securities as well as securities of unrelated entities. Accordingly, Edgcomb maintains that the expenses Scharf incurred were not incident to his duties at Edgcomb. The SEC ultimately decided to take no action against Scharf, but not until after Scharf allegedly spent \$1.7 million in legal fees.

Scharf has moved for summary judgment that he is entitled to indemnification. He does not request a specific amount, and states that the exact amount of his entitlement can be determined at some future date. Edgcomb maintains that summary judgment is not appropriate at this time because a material fact -- the actual scope of the SEC investigation -- remains disputed. Edgcomb asserts that additional discovery is needed in order to resolve the scope of the SEC's investigation.

I agree with Edgcomb for the reasons stated below. Furthermore, my earlier decision denying Edgcomb's Motion to Dismiss should not be read to foreclose Edgcomb from arguing the statute of limitations as a defense.

## I. Facts

In May 1989, Edgcomb, a Delaware Corporation, entered into a merger agreement with Metal Acquisition Corporation, a Delaware corporation. Under the Merger Agreement, MAC merged into Edgcomb. In February and March 1990, the SEC sent Edgcomb and Scharf, Edgcomb's former Chairman, director, and CEO, subpoenas requesting documents relating to transactions transpiring around the time of the merger.

The focus of that SEC investigation as it related to Scharf is in dispute. Scharf contends that a "significant part" of the SEC investigation focused on allegations that Scharf conveyed non-public information concerning Edgcomb to outsiders.<sup>1</sup> Conversely, Edgcomb claims that the investigation focused on Scharf's trading of three issues (Edgcomb and two unrelated entities) for his own *personal* account.

When he learned that he was a target of the SEC investigation, Scharf hired the law firm Fried Frank Harries Schriver & Jacobson to represent and advise him. Over the following two years, Fried Frank worked many hours on the matter.

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<sup>1</sup> Pl.'s Opening Brief in Support of his Summary Judgment Mot., at 4.

On June 4, 1992, the SEC investigation resulted in the filing of a civil complaint against seven individuals and one company. Two other individuals eventually entered guilty pleas in parallel criminal proceedings. Scharf was neither a party to, nor accused of wrongdoing in, any of those criminal or civil proceedings.

The Merger Agreement provides for indemnification for each person serving as an Edgcomb director or officer against “any losses, claims, damages, expenses, judgments, and amounts paid in settlement in connection with any claim arising from *actions taken or omissions to act as directors or officers.*”<sup>2</sup> Edgcomb’s obligation to provide indemnification extended six years from the effective date of the merger. Likewise, Edgcomb’s By-Laws in effect at the time of the merger provided that Edgcomb “shall indemnify” any person who is or is threatened to be made a party to any action, suit or proceeding, including investigative, by reason of the fact that the person was a director of Edgcomb if “he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the Corporation.”<sup>3</sup> Section 3 of the By-Laws provides that if the director is “successful

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<sup>2</sup> Merger Agreement, § 6.09 (emphasis added).

<sup>3</sup> Edgcomb’s By-Laws, Article VIII, § 1.

on the merits or otherwise in defense of any action, suit or proceeding described above, or in defense of any claim, issue or matter therein, he shall be indemnified.”

On January 9, 1995, Scharf submitted a claim to Edgcomb asking to be indemnified for legal expenses incurred as a result of the SEC investigation. On June 11, 1996, Edgcomb denied that request on the theory that it was time barred. Scharf then brought this action seeking \$1.7 million for legal fees he allegedly incurred. On December 2, 1997, this Court denied Edgcomb’s Motion to Dismiss in which Edgcomb had argued that Scharf’s claim was barred by the statute of limitations.<sup>4</sup> Now, Scharf asks this Court to enter partial summary judgment that he is entitled to be indemnified for fees in an amount to be determined later.

## II. Legal Standard for Partial Summary Judgment

A party’s motion for summary judgment may be granted when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law.<sup>5</sup> Therefore, Scharf must demonstrate that there are no disputed facts that if resolved against him would bar his indemnification claim.

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<sup>4</sup> *Scharf v. Edgcomb Corp.*, Del. Ch., C.A. No. 15224, Steele, V.C. (Dec. 2, 1997) (“[a]ccepting, for the purpose of this motion only, all properly supported allegations in the light most favorable to plaintiff, I conclude that the three-year statute of limitations is applicable and did not begin to run until plaintiff was confident that any claim made against him during a contractually defined six-year period has been resolved with certainty”).

<sup>5</sup> See *United Vanguard Fund, Inc. v. Take Care, Inc.*, Del. Supr., 693 A.2d 1076, 1079 (1997).

### III. Analysis

#### A. Edgcomb is entitled to additional discovery before a ruling on this motion is appropriate

Invoking Court of Chancery Rule .56(f), Edgcomb argues that it requires additional discovery to present “facts essential to justify opposition to the summary judgment.”<sup>6</sup> Chancellor Allen wrote that “a typical occasion for invocation of Rule 56(f) is when . . . the party opposing summary judgment cannot by affidavit state facts to overcome the summary judgment motion because the facts, if they exist, are known only by the party moving for summary judgment.”<sup>7</sup>

Edgcomb notes that section 145(c) of the Delaware General Corporation Law requires that the person seeking indemnification to have incurred legal fees by reason of his being a director, officer, employee or agent of the corporation. Edgcomb asserts that SEC documents attached to the submitted affidavit of Mark S. Hurd strongly suggest that the SEC investigation centered on Scharf’s *personal* trading. If that was indeed the case, Edgcomb argues, then section 145(c) does not require indemnification. Edgcomb alleges it needs additional discovery to resolve this important factual issue.

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<sup>6</sup> *vonOpel v. Youbet.com*, Del. Ch., C.A. No. 17200-NC, 2000 Del. Ch. LEXIS 9, \*3, Steele, V.C. (Jan. 26, 2000) (citation omitted).

<sup>7</sup> *Avacus Partners, L.P. v. Brian*, Del. Ch., C.A. No. 11001, 1989 Del. Ch. LEXIS 125, \*2, Allen, C. (Oct. 5, 1989).

Scharf contends, or at least implies, that *all* the SEC investigated was Scharf's handling of inside information regarding Edgcomb that he obtained within the scope of his Edgcomb duties. Further, Scharf argues that Edgcomb needs no additional discovery in order to adequately respond to this motion. Scharf has already allegedly released 4,700 documents to Edgcomb, and questions Edgcomb's claim that material information related to the pending motion remains undiscovered.

Nonetheless, Edgcomb seeks to continue discovery. Specifically, Edgcomb has served additional discovery on Scharf, which has not yet been answered. Edgcomb has noticed Scharf's deposition, but has not yet taken it. The depositions of attorneys at Fried Frank have been noticed and are pending, and a FOIA request has been submitted with the SEC.

Clearly, a dispute regarding the actual scope of the SEC investigation exists. The scope of that investigation is a material fact that must be resolved before this Court can fairly rule on Scharf's motion for summary judgment. Even if I were to rule in favor of Scharf on the pending motion, the discovery that Edgcomb seeks, at least in part, might be necessary in order to determine the dollar amount to which Scharf may be entitled. Therefore it makes no practical sense to rule on the motion now when there is a strong likelihood that discovery could shed needed light on some disputed material facts.

This case has been open for some time. For that reason, a tight discovery schedule is warranted. Edgcomb is permitted sixty days from the date of this decision to complete discovery relating to the scope of the SEC investigation. Ninety days from the date of this decision the parties are to confer with the vice chancellor assigned to this case. After that conference, the parties will be permitted to submit additional briefs that hopefully will better explain the scope of the SEC investigation.

**B. The statute of limitations issue has not been definitively resolved**

I earlier denied Edgcomb's Motion to Dismiss, which was based on an argument that the statute of limitations barred Scharf's request.' In doing so, I assumed, as was appropriate in that context, that Scharf's version of any disputed fact was true. Scharf now alleges that my decision denying Edgcomb's motion prevents Edgcomb from now raising the statute of limitations as a defense. Scharf's position is incorrect.

Unlike when he responded to Edgcomb's Motion to Dismiss, Scharf, now the movant, is not entitled to all disputed facts construed against the moving party. Edgcomb maintains that the SEC discontinued its investigation of Scharf as early as June 4, 1992. It argues that the three-year limitations period would start to run

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<sup>x</sup> *Scharf v. Edgcomb Corp.*, Del. Ch., C A, No. 15224, Steele, V.C. (Dec. 2, 1997).

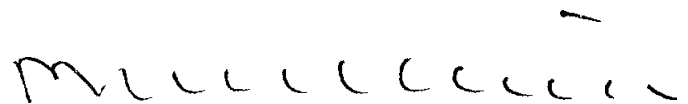


at least as early as that date. If Edgcomb is right, Scharf's claim could conceivably be barred. 'This issue has never been resolved on the merits. My ruling on Edgcomb's motion should be interpreted simply as a finding that Edgcomb was not at that point in the proceedings entitled to have Scharf's case dismissed. As such, my earlier decision should not be construed to foreclose Edgcomb from advancing a statute of limitations argument.

#### **IV. Conclusion**

For the reasons stated above, Scharf's Motion for Summary Judgment is *denied*.

**IT IS SO ORDERED.**

  
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Vice Chancellor (by designation)