

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

WILLIAM B. CHANDLER III
CHANCELLOR

February 8, 2000

THE FAMILY COURT BUILDING
P.O. BOX 581
GEORGETOWN, DELAWARE 19947

Robert D. Goldberg
Biggs and Battaglia
P.O. Box 1489
Wilmington, DE 19899

Stephen E. Jenkins
Richard D. Heins
Ashby & Geddes
P.O. Box 1150
Wilmington, DE 19899

Jesse A. Finkelstein
Raymond J. DiCamillo
Richards, Layton & Finger
P.O. Box 551
Wilmington, DE 19899

Re: *Parnes v. Bally Entertainment Corp., et al.*
Civil Action No. 15192

Dear Counsel:

Plaintiff Linda Parnes, a former shareholder of Bally Entertainment Corporation (“Bally”), has moved to file an amended and supplemental complaint under Court of Chancery Rule 15. One defendant, Hilton Hotels Corporation (“Hilton”), opposes the motion. Hilton, however, only takes exception to a small portion of the amended complaint, namely, the four paragraphs (¶¶ 142-145) in which plaintiff alleges Hilton manipulated its stock price to avoid paying a cash supplement to Bally shareholders. Hilton argues that plaintiffs delay in filing her motion warrants denial of her request and, alternatively, that the disputed paragraphs are irrelevant because Hilton owed no fiduciary duties to Bally’s

shareholders, the purported plaintiff class. This is my decision on plaintiffs motion.

I.

In 1996, Hilton merged with Bally, culminating in the conversion of Bally shares into Hilton shares. Plaintiffs original complaint challenged the fairness of the merger process and the resulting exchange ratio. Plaintiff alleges that Bally's Chairman and CEO, Arthur M. Goldberg ("Goldberg"), used his control of the merger negotiations to demand lavish personal payoffs in return for his consent to the merger. Hilton allegedly agreed to pay off Goldberg, despite fully knowing it was wrong to do so. Hilton supposedly complied with Goldberg's demands in order to acquire Bally at an unfair price.

Plaintiff has since had the benefit of extensive discovery and has reportedly uncovered evidence supporting the additional allegations she makes in the amended complaint. Plaintiff wishes now to argue, *inter alia*, that Goldberg and Stephen Bollenbach, Hilton's CEO, orchestrated a cover-up designed to conceal the role played by the Goldberg payoff in the merger negotiations and in the inadequate disclosure made to the Bally and Hilton Boards.

Specifically regarding Hilton's role, plaintiff purportedly recently has learned that in September 1996, Hilton's Board approved a repurchase program of twenty million shares of stock and announced an increase in its dividend. Plaintiff

contends the repurchase program was designed to stabilize the market price of Hilton's stock. Plaintiff maintains Hilton had a strong motive to bolster its stock price because under the price protection provisions of the merger, Hilton was bound to pay cash to Bally stockholders to bring the merger consideration up to \$27 per share in the event Hilton's stock fell below that price. In the summer of 1996, Hilton's stock traded as low as \$23 per share and Hilton's potential cash liability at that price was \$170 million. According to the plaintiff, the average price of Hilton's stock during the ten trading days ending three days prior to the effective date of the merger was the benchmark determining whether the price protection would mature into a liability. Since the effective date of the merger was December 18, the ten-day period began on December 2. Plaintiff argues that as a direct result of the repurchase program, Hilton's stock did, in fact, stabilize at \$27 during the critical ten-day period. Therefore, Hilton was not required to pay a cash supplement. Hilton's stock declined almost immediately after the expiration of the ten-day period and by year-end reached a low of \$254 per share. Plaintiff argues these facts demonstrate that Hilton wrongfully manipulated its stock price to the detriment of the class.

II.

Court of Chancery Rule 15(d) provides in part that “[u]pon motion of a party the Court may, upon reasonable notice and upon such terms as are just, permit the

party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.” Plaintiff maintains the challenged paragraphs do indeed allege facts that occurred after the filing of the original complaint. “As a general rule, leave to amend is freely given . . . and there is no apparent reason why the same liberality should not apply to a motion to supplement.” Leave to amend can be denied if plaintiff inexcusably delayed in making its request *and* defendant is prejudiced as a result.³ This exception to the general rule permitting liberal amendment is narrowly construed. Such narrow construction is true to the purpose of Rule 15(d)—“to promote as complete an adjudication of the dispute between the parties by allowing the addition of claims which arise after the initial pleadings are filed.”⁴

¹ Because the amended complaint alleges matters occurring since the filing of the original complaint, Court of Chancery Rule 15(d) controls instead of Rule 15(a). Accordingly, the supplemental pleading may only be allowed in the discretion of the Court.

² *Citron v. Lindner*, Del. Ch., C.A. No. 6150, slip op. at 4, Berger, V.C. (Nov. 13, 1985) (citations omitted); see Court of Chancery Rule 15(a) (stating “leave [to amend] shall be freely given when justice so requires”).

³ See *Norm Gershman’s Things to Wear, Inc. v. Dayon*, Del. Ch., C.A. No. 11733, 1992 WL 368587, at *1-2, Chandler, V.C. (Dec. 11, 1992).

⁴ *Coca-Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola Co.*, 668 F. Supp. 906, 922 (D. Del. 1987) (construing virtually identical Federal Rule 15(d)).

III.

Hilton first argues that plaintiffs delay in seeking to amend her complaint warrants denial of her motion. Hilton fails to allege specific prejudice resulting from plaintiffs delay but implies that a long delay is tantamount to an actual showing of prejudice.⁵ Delaware courts have historically required a more tangible showing of prejudice resulting from the delay.⁶

Hilton notes that the stock repurchase plan was publicly announced in a Form 8-K filed with the SEC, which was readily discoverable since September 1996. Plaintiff does not deny that the information was in the public domain, but the fact remains that Hilton has not demonstrated it was prejudiced by plaintiffs inaction. Hilton has been a named defendant since the beginning of this litigation and has since been involved in extensive discovery. The new allegations, while perhaps unexpected, cannot be said to place an unfair hardship on Hilton.

Hilton next argues that allowing plaintiff to supplement her complaint with the disputed four paragraphs would be futile because: Delaware law holds no

⁵ In support of its position, Hilton cites *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798-99 (9th Cir. 1991) (holding party to be “unreasonably prejudiced” by the additional allegations so close to trial).

⁶ See *Citron, supra*; *Bowl-Mor v. Brunswick Corp.*, Del. Ch., 297 A.2d 61, 63 (1972).

fiduciary duty is owed to *prospective* shareholders of a corporation.⁷ Plaintiff responds by stating that the disputed paragraphs go directly to claims that plaintiff already lodged against Hilton in the initial complaint. According to plaintiffs initial complaint, Hilton knowingly conspired in a corrupt process resulting in an unfair merger price. Plaintiff argues that the new allegations link directly to that theory. In the end, plaintiff may or may not be able to persuasively establish such a link, but keeping in mind the liberal test for supplementing a complaint, she should be given the opportunity to try.

I grant plaintiffs motion to supplement her original complaint.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in black ink that reads "William B. Chandler III". The signature is written in a cursive, slightly slanted style.

William B. Chandler III

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xc: Vice Chancellors
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⁷ In support of that purported rule, Hilton cites a litany of Delaware caselaw. Plaintiff does not appear to question Hilton's claim that such a rule exists, and disputes only its application to the present case.