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Re: *O'Malley, et al. v. Boris, et al.*  
Civil Action No. 15735

Dear Counsel:

The parties to this derivative action entered into a settlement agreement on December 22, 2003. After appropriate notice and a hearing on February 24, 2004, the Court, pursuant to Court of Chancery Rule 23, approved the settlement agreement. Because of a dispute regarding application of the agreement, plaintiff has now moved to enforce the settlement.<sup>1</sup> For the reasons below, the motion is denied.

The basic consideration provided in the settlement is found in sections 1.14 and 3.4 of the settlement agreement. Those sections provide that each class member is entitled to receive four "commission waiver certificates" worth \$50 each that class members may apply against commissions on stock trades executed through Wachovia Securities LLC.<sup>2</sup> The issue presented here is whether, under the terms of the settlement agreement, class members may use the commission waiver certificates when the commission charged

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<sup>1</sup> In the Order approving the settlement, the Court retained jurisdiction to enforce the agreement.

<sup>2</sup> These commission waiver certificates are really nothing more than coupons.

to a class member is already discounted. In other words, can class members combine their coupons with already discounted commissions?

This Court, when resolving a dispute of this nature, will give clear and unambiguous language in a settlement agreement its ordinary and usual meaning.<sup>3</sup> “[A] contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.”<sup>4</sup> And the “true test” for determining whether a contractual provision is clear rather than ambiguous is “what a reasonable person would have thought it meant.”<sup>5</sup>

Section 3.4 of the settlement agreement sets forth the circumstances in which the commission waiver may be used: “The commissions to be waived shall be the normal and usual charges then applicable to customers of [Wachovia Securities] that would otherwise have been charged by [Wachovia Securities] in the ordinary course of business to its customers.” Looking to this section, the inquiry sensibly becomes whether a reasonable person would believe that already discounted commissions are “normal and usual charges . . . in the ordinary course of business . . . .”

According to plaintiffs’ counsel, some class members have individually negotiated lower commission rates with their brokers than those typically applied and now find themselves unable to use their commission waivers *in addition to* their individually negotiated discount.<sup>6</sup> Plaintiffs’ argument is that this violates section 3.4 of the settlement agreement because the class members that have negotiated lower commission rates are not “normal[ly] and usual[ly] charge[d]” a full commission and negotiated their lower rates “in the ordinary course” of their business dealings with Wachovia Securities. Simply put, plaintiffs’ argument is that “normal,” “usual,” and “ordinary” are defined in relation to each class member and the

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<sup>3</sup> *Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

<sup>4</sup> *Id.* at 1196 (citing *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. Super. 1982)).

<sup>5</sup> *Id.* (citing *Steigler v. Ins. Co. of N. Am.*, 384 A.2d 398, 400 (Del. 1978)).

<sup>6</sup> I emphasize “in addition to” because there does not appear to be any suggestion that class members cannot use their commission waivers *in lieu of* their separately negotiated discounts.

side-deals that they may have negotiated with individual brokers at Wachovia Securities. This argument fails.

A reasonable person would interpret section 3.4 to allow use of a commission waiver certificate against what a normal customer is normally charged—not what a specific customer, or even a subset of customers, is normally charged. A “normal and usual” commission rate is that rate charged to the average Joe. The fact that customers have to individually negotiate with brokers at Wachovia Securities to receive a discount only seems to prove that such discounts are out of the norm. Moreover, a contrary interpretation renders section 3.4 meaningless. If the commission that each class member has individually negotiated with his or her broker is “normal and usual,” then every commission rate is “normal and usual.” Contracts should be construed to give each provision meaning.

Plaintiffs make much of the fact that the settlement agreement does not explicitly state that the commission waiver certificates are inapplicable when a class member is already the beneficiary of a discounted commission rate. This is of no consequence for two reasons. First, why does the settlement agreement not explicitly state that the commission waiver certificates *are applicable* when a class member has negotiated a discounted commission rate with his or her broker? In other words, this argument proves nothing for either party. Second, I believe the settlement agreement is clear that the commission waiver applies to “normal,” *i.e.*, undiscounted, commissions.

Plaintiffs also point to language in the website instructions to the class members with respect to the commission waivers, the language on the commission waiver certificates themselves, and the instructions enclosed with the certificates as evidencing the parties intent to have the commission waivers applicable to already discounted transactions. This evidence is not persuasive for a couple of reasons. First, none of this language is in the contract itself. And given that the settlement agreement is not ambiguous, there is no justification for me to consider these documents. Second, none of the referenced language states that the commission waiver certificates are applicable when a class member already receives a discounted commission rate. Simply put, the extrinsic evidence (even though it need not be considered) does not support plaintiffs’ argument.

The conclusion I have reached is very pedestrian and, ultimately, driven by the unambiguous language of the settlement agreement: class members may use their commission waivers against normal commission rates, but class members cannot “piggyback” their commission waivers against already discounted commission rates. The motion to enforce the settlement agreement is denied.

IT IS SO ORDERED.

Very truly yours,

*/s/ William B. Chandler III*

William B. Chandler III

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