COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Re: *Grenko, et al. v. Wussler, et al.*
Civil Action No. 413-N

Dear Counsel:

This letter contains a partial ruling on defendants' motion to dismiss or stay, or in the alternative to extend time to respond to the complaint. Believing that oral argument would be helpful to the court on the issue of

whether personal jurisdiction exists over the "Officer Defendants"[1] and "Shareholder Defendants",[2] the Court also proposes dates for such a hearing.

First, with respect to the motion to dismiss the First through Third Causes of Action because they allegedly are derivative, and because a necessary party was not joined, that motion has been mooted by plaintiffs' amendment of the complaint. Furthermore, because demand futility is pled in the complaint,[3] allegations that I must accept as true at this point in time, if I were to decide that those claims were derivative, and I express no opinion on the subject, they would simply survive the motion to dismiss as derivative claims. Therefore, I will not rule on the issues with respect to whether the First through Third Causes of Action state individual or derivative claims at this time.

Second, with respect to the argument that the Third Cause of Action for waste fails to state a claim, first I note that, construed in the manner most favorable to plaintiffs, it purports to state claims for both breach of fiduciary duty and for waste. I do not opine on whether the Third Cause of Action states a claim for breach of fiduciary duty, as that issue was not briefed, but I

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[1] Terry Hanson and Charles R Jeter, Jr.
[2] G. David Gordon, Joel C. Holt, Richard T. Clark, William C. "Billy" Morris, and Godley Morris Group, LLC
[3] Am. Compl. for Individual and Derivative Claims ¶¶ 185-192.

do conclude that it fails to state a claim for waste as a matter of law because Wussler did perform services for the Company (defined as TSE and its subsidiary TRAC).

The Amended Complaint alleges that Wussler did reach an agreement with ESPN on behalf of the Company, and while that agreement may not be as favorable as the one envisioned by the July 26, 2002 letter of intent, the award of options to Wussler in April 2003 cannot be considered to be wholly without consideration, or "for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade,"[4] and therefore, defendants' motion to dismiss the cause of action for waste on the grounds that it fails to state a claim upon which relief can be granted is granted.[5]

Third, with respect to the motion to dismiss or stay this action in favor of the first-filed actions pending in Georgia,[6] defendants do not assert that

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[4] *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997).

[5] Plaintiffs place great emphasis upon the number of options that Wussler received (2,250,000), and how (apparently determined some time before mid-2002) this number of options would be tied to the revenue to be received. Plaintiffs also allege how the financial health of the Company was deteriorating, which deterioration might require the Company to issue a larger number of options to Wussler in April 2003 in order to achieve comparable economic value to what he was promised in 2002.

[6] App. Exs. B and C to Defs.' Opening Br. in Support of their Mtn. to Dismiss or Stay or, in the Alternative, to Extend Time to Respond to the Compl.

McWane[7] controls, because there is not a substantial identity of parties and issues between the Georgia actions and this action.[8] Therefore, in order to be entitled to a stay in favor of the Georgia actions, the Court will consider the traditional principles of *forum non conveniens*, bearing in mind the heavy burden placed upon the defendants to show that a stay is warranted.[9] Furthermore, this is not a comparative test (I am not to determine whether Georgia or Delaware is more appropriate), but rather the defendants must demonstrate that litigation in Delaware would result in an "overwhelming hardship."[10]

Defendants have not argued that litigating here would constitute an overwhelming hardship. Instead they have argued that Delaware is a more appropriate forum than Georgia. As discussed above, that is not the appropriate inquiry. Having failed to meet their burden, I am compelled to deny defendants' motion to stay this action in favor of the Georgia actions.

Fourth, with respect to the motion to dismiss as to the Shareholder Defendants and Officer Defendants on the grounds that this Court lacks

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[7] *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281 (Del. 1970).
[8] Defs.' Reply Br. in Support of their Mtn. to Dismiss or Stay or, in the Alternative, to Extend Time to Respond to the Compl. at 24.
[9] *Apple Computer, Inc. v. Exponential Technology, Inc.*, 1999 WL 39547 at *13 (Del. Ch.); *Joyce v. Cuccia*, 1996 WL 422339 at *6 (Del. Ch.).
[10] *Mar-Land Indus. Contractors Inc. v. Caribbean Petroleum Refining, L.P.*, 777 A.2d 774, 779 (Del. 2001).

personal jurisdiction over them, the Court proposes the following dates and times for oral argument: January 20th, 24th, 25th, or 26th in Georgetown at either 10:30 a.m. or 2:30 p.m. on any one of those days. Please notify my secretary, Mary Ellen Greenly, which date and time is most convenient for counsel.

In an attempt to narrow the issues for oral argument, I note that the Gordon and Pritchett affidavits are contradictory with respect to what documents were filed in Delaware by whom and on whose behalf. Clarification of these facts would be helpful in determining whether any of the Officer Defendants or Shareholder Defendants, individually or through agents, transacted any business in Delaware as contemplated by 10 *Del. C.* § 3104(c)(1). Furthermore, to the extent that plaintiffs rely on a conspiracy theory to establish personal jurisdiction, I note that Delaware law is clear that a conspiracy theory is not an independent basis for jurisdiction, but instead is merely a framework in which to analyze the application of 10 *Del. C.* § 3104(c).[11]

The Court would also benefit from argument and additional information regarding plaintiffs' allegations of defendants' use of Delaware

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[11] *See Hercules Inc. v. Leu Trust and Banking (Bahamas) Ltd.*, 611 A.2d 476, 482 n.6 (Del. 1992); *Chandler v. Ciccoricco*, 2003 WL 21040185 at *10-11 (Del. Ch.).

corporations in numerous "pump and dump" schemes, and whether these activities, if proven, constitute "engag[ing] in any other persistent course of conduct in [Delaware] or deriv[ing] substantial revenue from services or things used or consumed in [Delaware]" under 10 *Del C.* § 3104(c)(4).

Therefore, the Court requests that the parties agree on a date for oral argument based on the dates presented in this letter, and notify the Court at their earliest convenience. In addition, defendants' motion to dismiss the claims for waste is granted, and their motion to stay this action in favor of the Georgia actions is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ William B. Chandler III

William B. Chandler III

WBCIII:amf