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Re: *WatchMark Corp. v. ARGO Global Capital, LLC, et al.*
Civil Action No. 711-N

Dear Counsel:

Defendants and third-party plaintiffs (collectively "ARGO") have moved for (1) clarification of this Court's November 4, 2004 Opinion or, if necessary, (2) entry of a final partial judgment under Chancery Rule 54(b). In this letter, I will clarify the scope of the November 4 Opinion, which did

not purport to resolve all of the claims in this case. In addition, for the reasons set forth below, I decline to enter an Order for a final partial judgment because no good reason exists for exercising my discretion under Rule 54(b).

I. BACKGROUND

To begin, it is important to identify the issues and arguments the parties placed before the Court. On September 21, 2004, plaintiff WatchMark Corporation ("WatchMark") filed its complaint for declaratory judgment. WatchMark sought a declaration under Delaware law that it could proceed with the proposed merger between WatchMark and WatchMark Acquisition Corporation ("WAC") without obtaining a separate series vote of ARGO's Series B Preferred Stock and that the existing WatchMark charter does not entitle the Series B Preferred Stock to a series vote.[1] On September 30, ARGO filed an answer. A few days later, on October 5, ARGO amended its answer, asserting five counterclaims and third-party claims. The first count of ARGO's counterclaim (Count I) sought the opposite relief as WatchMark's complaint—specifically, a declaration that WatchMark could not, consistent with its charter, proceed

[1] *See* Compl. at ¶ 8.

with the WAC merger.[2] Count II alleged that the merger with WAC would breach the fiduciary duties of "Loyalty, Care and Good Faith."[3] Count III sought to preclude the Series F financing because it was inapposite to the protective procedures set forth in Section 3(c) of WatchMark's charter.[4] Count IV alleged fiduciary duty claims similar to those raised in Count II, but predicated those claims on the Series F financing.[5] Count V alleged that WatchMark's board breached its duty of disclosure when it recommended material changes to WatchMark's charter—changes which were approved over a year ago and which altered the voting requirements necessary to approve any merger.[6]

On October 24, 2004, WatchMark filed a motion for summary judgment and set forth the grounds for such motion in a contemporaneously filed brief. On the same day, ARGO filed its motion for preliminary injunction and supporting brief. On October 27, 2004, ARGO filed a motion for summary judgment on Count I of the counterclaim. Both parties completed briefing on the pending motions that day and the Court heard oral argument on October 28, 2004.

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[2] *See* Am. Answer at 14.
[3] *Id*. at 15.
[4] *Id*. at 16.
[5] *Id*. at 17.
[6] *See id*. at 13.

II. ANALYSIS

A. Clarification of the November 4, 2004 Opinion

This Court's November 4, 2004 Opinion (the "Opinion") addressed specifically the issues argued and briefed by the parties. The Court first considered the motion for a preliminary injunction. After considering the applicable standard, the Court determined that ARGO could not establish a reasonable probability of success on the merits.[7] The rationale for this decision is set forth in Section II, Part A and Part B, of the Opinion.[8] In short, the Court found that the clear and unambiguous language of WatchMark's charter did not entitle the Series B preferred stockholders to a separate series vote on the WAC merger. Moreover, neither party disputed the fact that once the merger was consummated, the Series F financing could be approved by a vote of 70 percent of the outstanding preferred, voting together as a single class. Again, it was clear that the purported charter language, language that both parties agreed would exist after the merger, unambiguously denied the Series B preferred stockholders a separate series vote. Finally, based on the briefs as well as the arguments presented to the Court, I concluded that ARGO was unlikely to prove at a final hearing that

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[7] *See WatchMark Corp., v. Argo Capital, LLC, et al.,* Del. Ch., C.A. No. 711-N, Chandler, C. (Nov. 4, 2004) at 8.
[8] *Id*. at 7-14.

this was an interested transaction and, thus, ARGO necessarily failed to rebut the business judgment rule.[9] For the foregoing reasons, I concluded that ARGO was not entitled to a preliminary injunction.

Moving next to the summary judgment arguments, ARGO contends that the only issues before the Court (and therefore the subject of cross-motions for summary judgment) were those raised in either WatchMark's complaint or Count I of ARGO's counterclaim. ARGO further contends that Counts II through V of their counterclaims were "never subject to any motion for summary judgment."[10] WatchMark's motion for summary judgment, however, plainly asks for summary judgment based on "the grounds . . . set forth in the briefs filed herein."[11] WatchMark's brief, filed in support of WatchMark's motion for summary judgment, and referenced by its motion, was filed after ARGO's counterclaim—a counterclaim that sought to block the WAC merger and Series F financing by alleging that those transactions were in violation of WatchMark's charter and approved in breach of the directors' fiduciary duties.[12] Thus, when WatchMark asserted that "[t]he sole question raised by WatchMark's Complaint . . . is whether

[9] This conclusion logically implies that ARGO was unsuccessful in persuading the Court that WatchMark's directors had breached their fiduciary duties in recommending either the WAC merger or the Series F financing.
[10] Defs.' Mot. for Clarification of Order or Entry of a Partial Final J. Pursuant to Rule 54(b) at 5.
[11] Pls.' Mot. for Summ. J. at 1.
[12] Am. Answer at 14–17.

the Existing Certificate allows Argo to block the WAC merger, and therefore the necessary Series F financing and Metrica acquisition"[13] this Court concluded that the questions before it were all claims implicated by Counts I through IV of ARGO's counterclaim.[14]

In response to WatchMark's opening brief, ARGO filed their answering brief in opposition to WatchMark's motion and in support of their own motions for preliminary injunction and summary judgment on Count I of their counterclaims. ARGO proceeded by arguing that the WAC merger, proposed for the purposes of amending and restating the Company's Charter (*i.e.*, the Series F financing), was prohibited by the "plain language of the charter"[15] and was additionally prohibited, because it was approved in violation of the "Defendant Directors"[16] fiduciary duties. ARGO then summarized their position by stating that "[i]n the event the Court concludes that the language of the Charter is ambiguous or believes that some questions remain as to whether the Defendant Directors met their fiduciary duties, then such facts would necessitate a trial [and] [t]he preliminary injunction should remain in place pending the trial."[17] Clearly, ARGO

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[13] Pls.' Opening Br. in Supp. of its Mot. for Summ. J. at 3.
[14] Neither party advised the Court, after its November 4 decision, that its conclusion in this respect was erroneous.
[15] Defs.' Answering Br. in Opp'n to Pls.' Mot. for Summ. J. at 1.
[16] *Id*.
[17] *Id*. at 1-2.

understood that WatchMark's motion for summary judgment, fairly read, encompassed ARGO's counterclaims. In fact, ARGO sought to protect its interests by joining issue with WatchMark, in their reply brief and during oral argument, on the fiduciary duty, entire fairness and charter issues.[18]

By October 28, 2004, the date of oral argument on these motions, ARGO had briefed the Court on the law it believed proscribed the WAC merger (and necessarily the subsequent financing). Also fully briefed by ARGO were facts it thought were necessary to trigger entire fairness review of WatchMark's board approval of the WAC merger. At oral argument there were numerous instances where both parties addressed the legal issues and facts implicated in Counts II through Count IV of ARGO's counterclaims. In light of the briefing and argument, and viewing all evidence in a light most favorable to ARGO, the Court concluded that: (1) ARGO failed to show the existence of any dispute concerning a material fact; (2) the transaction was not prohibited by the current WatchMark charter (a matter of contract interpretation); and (3) no evidence suggested either that the merger and financing transaction were predicated upon any breach

[18] Even if I give ARGO the benefit of the doubt and find that WatchMark's motion could not be read this broadly, judicial economy would best be served by dealing with these issues jointly as ARGO was clearly on notice that these issues were before the Court and addressed those issues in its briefing and oral argument. *See Beal Bank v. Lucks*, 1999 Del. Ch. LEXIS 124, at *16 (Del. Ch.) (granting summary judgment *sua sponte* when no factual disputes surfaced at the hearing and the remaining issues were ones of contract interpretation).

of the fiduciary duties owed by WatchMark's directors, or were irrational business decisions. The Court concluded, therefore, that the director's decision to approve the WAC merger and its attendant consequences should be afforded the presumption of the business judgment rule.[19]

Now, to be clear, the issues that were before the Court and were fairly addressed by both sides were the issues and facts concerning the WAC merger and the subsequent Series F financing. Although WatchMark did initially discuss the disclosure issues raised in Count V of ARGO's counterclaim,[20] there was insufficient argument in the briefs or during oral argument for the Court to address Count V of ARGO's counterclaim. Thus, issues raised under Count V are still pending in this Court.

B. ARGO's Motion Pursuant to Court of Chancery Rule 54(b)

ARGO has moved for entry of a partial final judgment pursuant to Chancery Rule 54(b), which provides in part that when more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the Court may direct the entry of a final judgment upon one or more but fewer than all of the claims or parties only

[19] Many of the facts briefed and argued may certainly have overlapped between ARGO's preliminary injunction motion and the dueling summary judgment motions. Nevertheless, this Court concluded that under both applicable standards of review, ARGO was not entitled to the relief it sought and that WatchMark was entitled to summary judgment on Counts I-IV of ARGO's counterclaims.

[20] Pls.' Opening Br. in Supp. of its Mot. for Summ. J. at 26-28.

upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. When deciding to exercise its discretion in this manner, the Court must consider "the long established policy against piecemeal appeals [that] requires . . . this Court exercise that discretion sparingly."[21] Indeed, Rule 54(b) exists to create "a discretionary power to afford a remedy in the *infrequent* harsh case . . . ."[22]

The Court is not persuaded that the standard—no just reason for delay—has been met in this case. In exercising its discretion, the Court may consider many factors.[23] Here, the issues concerning Count V seem inextricably tied to ARGO's other claims. Specifically, ARGO asserts that had they known of the full effect of the 2003 amendment to WatchMark's charter they would never have voted to approve it.[24] ARGO goes on to argue that the amendment was a first and necessary step to the WAC merger and the subsequent Series F financing.[25] If this is true, then resolution of all issues relating to Count V of ARGO's counterclaim should be undertaken in a manner such that an appeal, if made, will deal with all these interrelated issues at once.

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[21] *In re Tri-Star Pictures, Inc., Litigation*, 1989 Del. Ch. LEXIS 126, at *3 (Del. Ch.).
[22] *Id*. (citing *Panichella v. Penn. R. R. Co*., 252 F.2d 452, 455 (3d Cir. 1958)) (emphasis added).
[23] *Id*. at *3 ("the court may consider any factor relevant to judicial administrative interests or the equities of the case.").
[24] Am. Answer at ¶ 96-100.
[25] *Id*.

ARGO also contends that they will suffer hardship if not permitted to take an immediate appeal. ARGO overstates their position. Contrary to what ARGO contends, they have not lost their right to vote on the WAC merger.[26] Moreover, their conversion to common stock is not a foregone conclusion. First, ARGO, as owner of 8 percent of the total outstanding preferred, could petition 23 percent of the remaining preferred to block the issuance of the Series F financing—not necessarily an insurmountable battle.[27] Second, ARGO still has the opportunity to participate in the financing and protect their economic interests.[28] So, while it may be true that ARGO's stake in the company may be converted to common stock, that conversion is not a foregone conclusion and certainly does not present the type of harm contemplated when issuing an order pursuant to Rule 54(b).[29]

[26] *See* Defs.' Mot. for Clarification or Entry of Partial Final J. Pursuant to Rule 54(b) at 7.
[27] *See* Tr. at 41:21.
[28] The fact that ARGO tried to use its leverage over the transaction to extract more favorable liquidation terms for itself and over the other preferred stockholders strongly suggests that it has the financial ability to participate in the Series F financing.
[29] The Court also rejects ARGO's contention that denial of their motion will make complete relief nearly impossible. The Court of Chancery has broad remedial powers and can use these powers where appropriate to fashion a just remedy. Nothing in this case suggests otherwise. If ARGO prevails on its disclosure claim, therefore, this Court has broad equitable authority to fashion a remedy. To that extent, WatchMark proceeds with the merger transaction at its own peril.

III. CONCLUSION

Based on the statements above, the Court has clarified its November 4, 2004 Opinion. That Opinion denied ARGO's motion for a preliminary injunction and, for the reasons stated, granted in part (regarding Counts I through IV of ARGO's counterclaim) and denied in part (regarding Count V of ARGO's counterclaim) summary judgment in favor of WatchMark. Finally, for the reasons stated herein, ARGO's motion for Entry of a Final Partial Order Pursuant to Court of Chancery Rule 54(b) is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ William B. Chandler III

William B. Chandler III

WBCIII:jpd