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Re: *Kinexus Representative LLC v. Advent Software, Inc.*
C.A. No. 1161-VCN
Date Submitted: July 5, 2012

Dear Counsel:

Defendant Advent Software, Inc. ("Advent") renews its effort to obtain dismissal of this action in which the Plaintiffs seek an "earn out" payment related to Advent's acquisition of Kinexus Corporation ("Kinexus") roughly ten years ago. Plaintiffs' dilatory conduct has again motivated Advent to seek an end to this litigation which was filed approximately seven years ago.

In the spring of 2011, Advent pursued a motion to dismiss under Court of Chancery Rules 41(b) and 41(e) for Plaintiffs' failure to prosecute. The Court denied that motion,[1] but expressed its frustration when it noted that "the Plaintiffs' inactivity tests the outer reaches of the Court's willingness to deny a motion to dismiss for failure to prosecute."[2] With this backdrop, the Court anticipated that the reprieve it granted to the Plaintiffs when it denied Advent's motion to dismiss would have induced the Plaintiffs to abandon their slacker ways and to move forward with dispatch. The Court was wrong.

Following the Court's order of June 30, 2011, counsel discussed how to proceed with this case. Eventually, they agreed to meet at the end of September, a meeting that was not successful in finding a way to bring this litigation to a close. Protracted negotiations, first started by Plaintiffs in early September, resulted in an agreement by the parties, through their counsel, to a case scheduling order that was

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[1] *Kinexus Representative LLC v. Advent Software, Inc.*, 2011 WL 3273253, at *2 (Del. Ch. June 30, 2011) (the "June 30 Decision").

[2] *Id.* This was not the Court's first negative reaction to the Plaintiffs' pace. In 2008, it observed that the Plaintiffs' "nearly three-year delay in responding to [Advent's] request for document production is beyond unreasonable." *Kinexus Representative LLC v. Advent Software, Inc.*, 2008 WL 4379607, at *3 (Del. Ch. Sept. 22, 2008).

approved by the Court on November 9, 2011.[3] The milestones in the scheduling order, which were selected by the parties, seemed aggressive to the Court and included the following:

Identify trial witnesses:	no later than March 15, 2012
Fact discovery:	completed by May 1, 2012
Plaintiffs serve expert report(s):	on or before April 16, 2012
Expert depositions:	completed by June 15, 2012
Trial:	November 13, 2012

It should, unfortunately, come as no surprise that the dates prescribed in the order, except for the trial date, have come and gone without compliance.

The Plaintiffs have offered a number of excuses. First, B. Douglas Morriss, the person most responsible for the activities of Kinexus, the primary plaintiff, filed for bankruptcy. Second, Mr. Morriss—for reasons unrelated to this proceeding—was the target of a federal investigation. Third, Plaintiffs' lead trial lawyer decided to leave the firm in which he practiced. The firm was uncertain as to whether it wanted to continue as Plaintiffs' counsel and eventually determined that it was unwilling to perform that role. Moreover, the lead trial counsel decided that he would be unable to represent the Plaintiffs any longer. These events—none

[3] Transaction ID 40808459.

of which can be attributed to Advent—distracted litigation efforts and impeded progress.

Recognizing schedule slippage, in late January 2012, Plaintiffs' counsel asked Advent's counsel for a revision to the case scheduling order. Advent's counsel demurred.

Plaintiffs noticed two depositions in early February, one of Mr. Price, an Advent employee, and one for an Advent Rule 30(b)(6) witness. Advent, after some insignificant initial quibbling, promptly agreed to Mr. Price's deposition at the end of February.[4] Advent, because of the scope of the Rule 30(b)(6) deposition notice and the extensive turnover among its employees in the years since the Kinexus transaction, reasonably needed more time to identify the appropriate witnesses. For reasons that are not clear, the Plaintiffs never bothered to depose Mr. Price.[5]

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[4] Initially, Advent conditioned Mr. Price's availability on addressing certain issues involving Mr. Morriss, but, a day later, those conditions had disappeared and Advent was prepared to go forward with Mr. Price's deposition on either of the dates proposed by Plaintiffs. *See* Aff. of Mark Jacobs, Esq. (May 9, 2012) Ex. F-1 (Email chain); Aff. of Steven M. Schatz, Esq. (May 18, 2012) Ex. 2.

[5] The Plaintiffs, without any detail, have invoked notions of efficiency.

With these developments, Advent's counsel sought a conference with the Court. A teleconference, held on February 27, 2012, seems to have motivated all of Plaintiffs' counsel to conclude that they no longer wanted (or were able) to represent the Plaintiffs, and they moved to withdraw on March 9, 2012. For months, the Court has been led to believe that replacement counsel would surface shortly, but, as late as July 5, 2012, Plaintiffs' counsel could only report that agreement with potential substitute counsel was "close."[6] Although Plaintiffs' counsel moved to withdraw in advance of the milestones set forth in the Court's scheduling order, there can be no doubt that the dates would not have been met, regardless of whether the motions to withdraw had been filed.[7]

In an effort to deflect responsibility for the scheduling problems, Plaintiffs, unavailingly, attempt to transfer the blame to Advent and its counsel. Perhaps Advent's counsel could have been more responsive, but the resulting delay is not their fault. If Advent's counsel had created problems, Plaintiffs' counsel could

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[6] The motions to withdraw have not yet been addressed. Without replacement counsel, the entity Plaintiffs would not be able to move the litigation forward. *See Parfi Hldg. AB v. Mirror Image Internet, Inc.*, 2006 WL 903578, at *2 n.4 (Del. Ch. April 3, 2006) ("In Delaware, artificial entities must be represented by counsel.") (citations omitted).

[7] The motions to withdraw were filed six days before the first milestone.

have sought the Court's assistance in resolving whatever roadblocks were being encountered.

Under Court of Chancery Rule 41(b), the Court may, on motion of the defendant, dismiss the action "[f]or failure of the plaintiff to prosecute or to comply with . . . any order of court."[8] Between the end of June 2011, when the Court denied Advent's motion under Court of Chancery Rule 41(e), until early March, the Plaintiffs' actions to prosecute this matter, while not non-existent, were marginal and certainly were not consistent with the new enthusiasm to move the case forward which Plaintiffs, in opposition to Advent's Rule 41(e) motion, asserted was motivating them and which persuaded the Court to deny the motion under Rule 41(e). The Plaintiffs' counsel met with Advent's representatives; they negotiated and submitted a scheduling order; they noticed two depositions and, despite the availability of one of the deponents, they never took any deposition.

[8] *See, e.g.*, *Stearns v. Div. of Family Servs.*, 23 A.3d 137, 142 (Del. 2011) ("Court of Chancery Rule 41(b) recognizes the 'inherent power' of a trial court to dismiss for failure to prosecute. This power 'falls within the domain of the [Court of Chancery's] discretion.'") (quoting *Yancey v. Nat'l Trust Co., Ltd.*, 633 A.2d 372, 1993 WL 370844, at *3 (Del. 1993) (ORDER)); *Paron Capital Mgmt., LLC v. Crombie*, 2012 WL 214777, at *7 (Del. Ch. Jan. 24, 2012) ("Rule 41(b) may apply where there has been a failure to prosecute, a party has violated court rules or orders, or the plaintiff's evidence is insufficient as a matter of law.").

Those acts cannot be reconciled with the Plaintiffs' commitment to move forward with this matter. In addition, although the milestones established in the scheduling order had not been reached by the time Plaintiffs' counsel sought to withdraw, it is clear at least that those milestones associated with witness identification and discovery would not have been satisfied by Plaintiffs even if their counsel had not sought to withdraw.[9] In short, a serious breach of the Court's scheduling order by the Plaintiffs became inevitable. Perhaps Advent should have waited until the deadlines had been missed in order to file its motion, but, as a practical matter, there seems to be no good reason for the Court to insist upon such technical compliance. In short, dismissal of this action is warranted under Rule 41(b) both because the Plaintiffs have not prosecuted it and because their failure to comply with the scheduling order—one to which they agreed without any pressure from the Court—was inevitable.

[9] Although various deadlines were approaching, there is no reason to believe that the decision of Plaintiffs' counsel to seek to exit their representation of the Plaintiffs was motivated by those impending deadlines.

A word about prejudice is also necessary. In the June 30 Decision, the Court acknowledged that "Advent has likely suffered some adverse effects as a result of the Plaintiffs' delay and may bear some prejudice because the events giving rise to this action primarily occurred nearly a decade ago."[10] The prejudice suffered by Advent, as of June 2011, was real, but when balanced against the Court's "preference for resolving cases on the merits" and the Plaintiffs' apparent commitment to renew "their efforts to diligently prosecute this matter,"[11] the prejudice suffered by Advent did not tip the balance in June 2011 in favor of dismissal. The Court does not doubt that, in the spring of 2011, the Plaintiffs anticipated pursuing this matter with some vigor. For whatever reason, that expectation was not met. Instead, the prejudice to Advent from the Plaintiffs' inability to proceed with this action in a diligent manner has continued to mount. That prejudice appears in many forms, including: additional costs; extensive turnover in personnel, which makes finding the appropriate witnesses more difficult; and the simple fact that the passage of a decade from the events in question will dim memories. Prejudice suffered by a party at the hands of a non-

[10] June 30 Decision, 2011 WL 3273253, at *2.
[11] *Id.*

diligent adversary has a cumulative aspect but is inevitable when litigation drags on—as this proceeding has—for some seven years.

Court of Chancery Rule 41(b) is one source of this Court's inherent power "to manage its docket to prevent unnecessary and wasteful delay."[12] The Court acted in accordance with its "preference for resolving cases on the merits" when it denied Advent's Rule 41(e) motion in June 2011. With the relative inactivity of Plaintiffs in the interim and their failure to take the steps necessary to comply with the scheduling order to which they agreed, coupled with the ongoing and mounting prejudice to Advent, the balance has tipped. Dismissal is now warranted and, indeed, necessary for the orderly administration of the judicial process.

Accordingly, for the foregoing reasons, pursuant to Court of Chancery Rule 41(b), this action is dismissed.[13]

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[12] *Tooley v. AXA Fin., Inc.*, 2009 WL 1220624, at *2 (Del. Ch. Apr. 29, 2009); *see also Solow v. Aspect Resources, LLC*, 2012 WL 904683, at *2 (Del. Mar. 19, 2012).

[13] Advent has also argued that dismissal under Rule 41(e) is appropriate. That is a question that the Court need not resolve. Because the Plaintiffs took some action within the last year, the "no action" standard of Rule 41(e) may not have been strictly satisfied. In addition, the Court does not address whether the denial of a motion under Rule 41(e) automatically—even if undesirably—conferred upon Plaintiffs another year to fritter away.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K