



COURT OF CHANCERY
OF THE
STATE OF DELAWARE

STEPHEN P. LAMB
VICE CHANCELLOR

New Castle County Court House
500 N. King Street, Suite 11400
Wilmington, Delaware 19801

Submitted: November 5, 2008
Decided: November 6, 2008

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***RE: Alpha Natural Resources, Inc. v. Cliffs Natural Resources, Inc.
C.A. No. 4133-VCL***

Dear Counsel:

I have reviewed and considered the papers filed by the plaintiff Alpha Natural Resources, Inc. on November 3, 2008, in support of its motion to expedite this proceeding and supplemental papers filed on November 4, 2008 in support of Alpha's late-filed motion for temporary restraining order, along with the letters submitted in opposition by defendant Cliffs Natural Resources, Inc., and the oral arguments made by the parties by telephonic conference yesterday morning. For the reasons set forth below, I decline to issue a temporary restraining order, but will grant Alpha's motion for expedited proceedings and schedule a hearing date accordingly.

I.

As you know, this action concerns the timing of the special meetings of both Alpha and Cliffs stockholders to consider the pending agreement and plan of merger between Cliffs and Alpha, dated as of July 15, 2008. Those meetings had been scheduled to take place simultaneously on November 21, 2008, as a result of coordinated decision-making by the two corporations' managements and boards of directors. Having the meetings occur simultaneously is necessary, in part, due to the presence of a mutual \$100 million termination fee obligation that is triggered if one corporation obtains the necessary stockholder vote but the other does not. For

that provision to operate fairly, it is important that the two meetings take place at the same time.

Evidently, there is substantial uncertainty whether Cliffs, an Ohio corporation, will be able to secure the two-thirds majority vote required under Ohio law due to the announced opposition of one of its stockholders that holds 15% of the voting power. That uncertainty caused Cliffs' management to recommend to its board that the date for the Cliffs special meeting be pushed back to December 19, 2008 and the record date for the vote be reset to November 19, 2008. At a meeting held on Monday, November 3, the Cliffs board of directors adopted these recommendations. Cliffs publicly announced such changes shortly thereafter.

Alpha became aware of this plan on Thursday, October 30 but delayed filing its complaint until Monday November 3. When it did so, Alpha filed a motion for a preliminary injunction and a motion to expedite proceedings but did not apply for a temporary restraining order, notwithstanding the fact that it knew or had reason to know the Cliffs board was meeting that day. On November 4, after it saw the press release announcing the decision to reschedule the meeting, Alpha filed what it characterizes as a motion for a temporary restraining order. The relief sought in the motion is not, however, a prohibition on Cliffs changing the current *status quo* with respect to the newly scheduled December 19 meeting date. Rather, Alpha's motion seeks an order directing Cliffs to restore the *status quo ante*—that is, that Cliffs be required to reinstate the November 21 meeting date, at least pending a hearing on the motion for preliminary injunction. Alpha's rationale is that, by proceeding with its plan to postpone its meeting despite its awareness of this action, "Cliffs seeks to deprive the Court of the ability to grant meaningful equitable relief to Alpha."

From one perspective, the TRO Alpha seeks is akin to a mandatory preliminary injunction, which could be lifted if Alpha did not succeed at a soon-to-follow preliminary injunction hearing. This is extraordinary relief of a sort that the court does not issue lightly. This court "has consistently applied an exacting standard"¹ in such cases, requiring that "an applicant seeking mandatory preliminary injunctive relief 'clearly establish the legal right he seeks to protect or

¹ DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 10-02[b][6], at 10-46 (2008).

the duty he seeks to enforce.”² This requires more than simply a showing of a reasonable probability of success (as required when seeking a merely prohibitory preliminary injunction). It requires, in addition, a showing that the petitioner is entitled as a matter of law to the relief it seeks based on undisputed facts.³ In this case, Alpha’s argument that Cliffs delayed the meeting in bad faith hinges on the question of whether Cliffs had a good faith reason to believe that such delay would materially increase its chances of obtaining shareholder approval of the merger. This entire inquiry therefore rests on facts that are not only in dispute, but for which there is not now any evidence in the record. Thus, Alpha’s showing falls far short of meeting the requirements for granting mandatory preliminary injunctive relief.

Alpha is correct that there are circumstances that would lead a court of equity to disregard unilateral and peremptory actions taken by a defendant after receipt of notice of an application for injunctive relief. Nevertheless, the mere filing of a complaint seeking an injunction does not operate as a temporary restraining order. Where, as is true in this case, the plaintiff is aware of a plan to act on a particular date and wants to disrupt that plan, it is not enough merely to file suit. Such a plaintiff should, ordinarily, seek a temporary restraining order in advance of the time that action is scheduled to be taken. Here, Alpha was first alerted to Cliffs’ plan to postpone its meeting date on Thursday, October 30, 2008. Alpha learned then of the plan for the Cliffs board to meet on Monday, November 3 to consider that postponement. Alpha could have immediately sought a temporary restraining order prohibiting Cliffs from taking any action to postpone its meeting date until such time as this court had opportunity to consider the issue. Instead, Alpha took the time to write a 116 paragraph, 35 page complaint that it

² *Id.* (quoting *Bertucci’s Rest. Corp. v. New Castle County*, 836 A.2d 515, 519 (Del. Ch. 2005); see also *Stahl v. Apple Bancorp, Inc.*, 579 A.2d 1115, 1120 (Del. Ch. 1990).

³ See *Chadha v. Szeto*, 1993 WL 498186, at *2 (Del. Ch.) (“The burden imposed on the movants in a Preliminary Mandatory Injunction hearing is indeed great. . . . This Court should, in the exercise of its discretion, deny a Motion for a Preliminary Mandatory Injunction where there is a bona fide dispute as to an essential issue and there has been no opportunity for discovery.”) (citing *Data General Corp. v. Digital Computer Controls, Inc.*, 297 A.2d 437 (Del. 1972); *Steiner v. Simmons*, 111 A.2d 374 (Del. 1955); *Stahl*, 579 A.2d 115); *Stahl*, 579 A.2d at 1120; DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 10-02[b][6], at 10-46 to -47 (2008). Cf. *Hollinger Int’l v. Black*, 844 A.2d 1022, 1060 n.80 (Del. Ch. 2004) (“[P]rior case law suggests that this court cannot issue a preliminary injunction requiring redemption of a shareholder rights plan unless the court finds that the injunction is based on *undisputed facts.*”) (emphasis added).

served only after the Cliffs board meeting had convened. Even then Alpha did not move for a TRO, instead filing only a motion to expedite and a motion for a preliminary injunction.

In the circumstances, the court does not regard Cliffs' decision to proceed according to the plan disclosed to Alpha to be inequitable or a usurpation of the court's jurisdiction. For this additional reason, the motion for a temporary restraining order will be denied.

II.

In order to grant a motion for expedited proceedings, the court merely needs to find that "the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury."⁴ There is no question here that the plaintiffs have articulated a colorable claim: (1) that Cliffs breached Section 5.1(b)(ii) of the merger agreement by postponing its shareholder meeting in bad faith, and without a reasonable belief that this would materially enhance the likelihood of the approval of the merger by the stockholders, therefore failing to hold its meeting "as soon as practicable"; and (2) that Cliffs breached Section 5.1(b)(iii) of the merger agreement by not consulting with Alpha in postponing its shareholder meeting, thus failing to "use its reasonable best efforts to hold the [Cliffs] Stockholders Meeting and the [Alpha] Stockholders Meeting at the same time on the same day." As for irreparable harm, the parties have stipulated that "irreparable damage would occur in the event that any of the provisions of [the merger agreement] were not performed in accordance with their specific terms or were otherwise breached."⁵ The court will therefore grant Alpha's motion for expedited proceedings. Accordingly, the court hereby orders limited discovery as to the basis for and reasonableness of Cliffs' decision to postpone its shareholder meeting, and will schedule a preliminary injunction hearing for November 18, 2008 at 2:00 p.m. in Courtroom 12B.

As a practical matter, however, given the court's refusal of a temporary restraining order, the scope of relief possibly available to Alpha at the preliminary injunction hearing will be quite limited. As I now understand the practicalities of the situation, if Alpha establishes its entitlement to relief, the most likely form of order would be one preliminarily enjoining Cliffs from further postponing or

⁴ *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *2 (Del. Ch.).

⁵ Merger Agreement § 8.9.

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adjourning the meeting beyond December 19, 2008 without the consent of Alpha or leave of court. Given the need to hold the two meetings simultaneously, it is most unlikely that the practicalities of the situation would permit any effort to advance the Cliffs meeting from the December 19th date. This leads me to observe that, if Cliffs is prepared to stipulate to such relief, the need for the expedited discovery and hearing would be obviated.

* * *

For the foregoing reasons, the plaintiff's motion for a temporary restraining order is DENIED; the plaintiff's motion for expedition is GRANTED on the terms described herein. IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor