IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ROSETON OL, LLC and DANSKAMMER OL, LLC,	)	
Plaintiffs,	)	
v.	)	C.A. No. 6689-VCP
DYNEGY HOLDINGS INC.,	)	
Defendant.	)	

ORDER

1. This is an action arising out of a 2001 Sale-Leaseback Transaction in which two of Defendant DHI's subsidiaries sold two electric power plants to Plaintiffs and then immediately leased them back.[1] In connection with that transaction, Plaintiffs entered into two substantially identical Guaranties with DHI, which provided that DHI would make its subsidiaries' lease payments in the event those entities defaulted. The Guaranties included successor obligor provisions that restricted DHI's ability to transfer its property or assets substantially as an entirety.

2. Approximately a decade later, facing significant financial distress, DHI announced plans in July 2011 to enter into the Proposed Transaction that Plaintiffs challenge, which contemplates an internal reorganization and the procurement of a new senior credit facility. As part of the reorganization, substantially all of DHI's profitable

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[1] All defined terms in this Order have the same meaning as they did in the Memorandum Opinion dated July 29, 2011. *See* Docket Item ("D.I.") 39.

power plants would be transferred from existing DHI subsidiaries to new "bankruptcy remote" subsidiaries, except for the two financially weakened power plants purchased by Plaintiffs in the Sale-Leaseback Transaction. On July 22, 2011, Plaintiffs brought this action and requested that this Court grant a TRO to prevent DHI from proceeding with the next step in completing the Proposed Transaction, which was supposed to take place on July 29, 2011. After an Argument held on July 25, I issued a Memorandum Opinion (the "Opinion") on July 29, 2011, finding that Plaintiffs were not likely to succeed in showing that the Proposed Transaction would violate the successor obligor provisions of the Guaranties or constitutes a fraudulent transfer. I also found that Plaintiffs had failed to demonstrate that they would suffer imminent irreparable harm if the Transaction closed on July 29 or that the equities favored entry of a TRO at that point.

3. On July 31, 2011, Plaintiffs simultaneously moved for certification of an interlocutory appeal pursuant to Supreme Court Rule 42 and Court of Chancery Rule 72 of my preliminary rulings in the Opinion and a stay pending that appeal pursuant to Court of Chancery Rule 62(d) and Supreme Court Rule 32(a). They also moved to expedite DHI's response to their applications, and I ordered that response filed by August 2. This Order constitutes my rulings on Plaintiffs' motions.

I. Plaintiffs' Application for Leave to File an Interlocutory Appeal

4. The Complaint accuses DHI of entering into the Proposed Transaction to frustrate Plaintiffs' ability to rely on the Guaranties they received from DHI in the likely event that the Lessees default on their lease obligations to Plaintiffs later this year. In

particular, Plaintiffs contend that the Transaction, especially its plans to ring-fence DHI's profitable indirectly-held power plants in bankruptcy remote entities, constitutes a breach of the successor obligor clauses in the Guaranties, § 4.2, and a fraudulent transfer under DUFTA. For purposes of their application for leave to pursue an interlocutory appeal, Plaintiffs argue that certification pursuant to Rule 42 is appropriate because the Court "den[ied] any form of preliminary injunctive relief without discovery."[2] In addition, they argue that the Court determined several substantial issues and established DHI's right to proceed with the Transaction pending the outcome of this litigation. They further assert that granting their application is necessary to resolve conflicts of law that the Opinion created with other Court of Chancery decisions, and would serve considerations of justice.[3]

5. Plaintiffs' application for interlocutory review is governed by Supreme Court Rule 42, which prohibits certification of an interlocutory appeal unless the order of the trial court: (1) determined a substantial issue; (2) established a legal right; and (3) meets at least one of the criteria specified in Rule 42(b)(i)-(v).[4] Such applications require the trial court to exercise its discretion and "should be granted only in exceptional circumstances, balancing the public interest in 'advancing appellate review of potentially

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2 Pls.' App. for Cert. of Int. Appeal ("Pls.' App.") 7.

3 *Id*.

4 Supr. Ct. R. 42; *In re Pure Res., Inc.*, 2002 WL 31357847, at *1 (Del. Ch. Oct. 9, 2002).

case dispositive issues' while 'avoiding fragmentation and delay when interlocutory review is unlikely to terminate the litigation or otherwise serve the administration of justice.'"[5] Ultimately, however, the decision as to whether to accept such an appeal is reposed in the Supreme Court under Rule 42.[6]

6. To satisfy Rule 42, an interlocutory order must establish a legal right.[7] "A legal right is established when a court determines an issue essential to the positions of the parties regarding the merits of the case, *i.e.*, 'where one of the parties' rights has been enhanced or diminished as a result of the order.'"[8] That is, "a legal right is established where the court determines an issue essential to the position of the parties regarding the merits of the case."[9] Plaintiffs argue that the Court's denial of their application for a TRO established a legal right in DHI's favor because it permitted DHI to proceed with its restructuring pending the outcome of this litigation and decided an issue relevant to the ultimate merits of this case.[10] The scope of the Court's Opinion, however, was narrow. Plaintiffs asked for temporary injunctive relief to stop the Transaction from proceeding

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5 *In re Pure Res., Inc.*, 2002 WL 31357847, at *1 (citing Donald J. Wolfe, Jr. and Michael A. Pittenger, Corporate and Commercial Practice in the Delaware Court of Chancery, § 14-4 at 14-5 (2000)).

6 *See Pfizer, Inc. v. ICI Ams., Inc.*, 1984 WL 8263, at *1 (Del. Ch. Nov, 28 1984).

7 *O'Brien v. IAC/Interactive Corp.*, 2009 WL 2998531, at *2 (Del. Ch. Sept. 14, 2009).

8 *Id*.

9 *Id*. (internal quotation marks omitted).

10 Pls.' App. 7.

on July 29 or thereafter until a preliminary injunction motion could be heard. As DHI noted in a July 10, 2011 press release, it anticipated completing the process of seeking lenders for a new senior secured credit facility and the relevant internal reorganization at the end of July 2011.[11] Based on the preliminary record before me, I determined that injunctive relief was not warranted to stop the Transaction from proceeding. Thus, DHI is permitted to proceed with the Transaction at its own risk. Moreover, contrary to Plaintiffs' contentions here, I did not decide any issue as a matter of law in the Opinion; rather, I made preliminary assessments of the probability of Plaintiffs succeeding on their breach of Guaranties and DUFTA claims at trial. In certain situations, this Court has indicated that a denial of preliminary injunctive relief establishes a legal right for the party who successfully fended off an injunction to proceed with the conduct the plaintiff sought to enjoin.[12] On that limited basis, I assume the Opinion may have established a legal right for DHI to close on the Transaction and, thus, met that requirement of Rule 42. Nevertheless, my ruling in that regard as to the merits of DHI's defenses was provisional only.

7. Next, Plaintiffs must show that the Order determined a "substantial issue." This requirement is satisfied when an interlocutory order decides a main question of law which relates to the merits of the case, and not to collateral matters.[13] Plaintiffs contend

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11 *See* Alicks Aff. Ex. 4 at 2.

12 *See Pfizer*, 1984 WL 8263, at *1.

13 *O'Brien*, 2009 WL 2998531, at *2.

that the Opinion determined a question of law in that it held that Plaintiffs lacked a probability of success on the merits of their breach of contract and DUFTA claims. In particular, they argue that the Court "decided a host of legal questions" regarding its construction of the Guaranties and DUFTA.[14] In fact, I did not make any such decisions as a matter of law in the Opinion. Rather, I applied the probability of success standard in assessing Plaintiffs' claims on the merits and found that they were unlikely to succeed on them at trial. For example, I found that Plaintiffs were unlikely to succeed in showing that § 4.2 was ambiguous at trial, not that it is unambiguous.[15] Thus, my provisional conclusions as to the merits of Plaintiffs' claims were just that: provisional. Moreover, I reached them by applying the law to facts that I assessed on only a preliminary basis.[16] Rather than definitively deciding that the transfers of assets to GasCo and CoalCo as part of the Proposed Transaction did not violate § 4.2 of the Guaranties or DUFTA, I concluded that Plaintiffs had not established a likelihood of success on the merits of those issues and that, even assuming they had, they did not demonstrate that they face

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14 Pls.' App. 7.

15 *See* Op. at 32 ("Thus, I find that Plaintiffs are unlikely to show that the phrase 'properties and assets' is ambiguous and that it refers to properties and assets held by DHI's indirectly owned subsidiaries.").

16 *Cf. Telcom-SNI Invs., L.L.C. v. Sorrento Networks, Inc.*, 2001 WL 1269320, at *1 (Del. Ch. Oct. 9, 2001) ("Even though [the Court's preliminary] conclusions were under the reasonable probability of success standard and, thus, not final resolutions, they reflect a determination of substantial issues because of the significance of the act of construing the corporate charter and because they are not premised upon an application of the law to facts which have only been preliminarily assessed.").

imminent irreparable harm in the absence of a TRO. Thus, even if this Court decided a substantial issue in the Opinion within the meaning of Supreme Court Rule 42, any such decision was provisional in nature.

8. Finally, to obtain certification for an interlocutory appeal, Plaintiffs also must show that one of the criteria in Supreme Court Rule 42(b) is satisfied. Plaintiffs appear to rely on two such criteria. First, they contend that under Rule 41(b)(ii), which is incorporated by reference by Rule 42(b), several of this Court's determinations of law in the Opinion are inconsistent with other pertinent decisions of the Court of Chancery.[17] Second, Plaintiffs contend that certification of an interlocutory appeal here would serve considerations of justice under Rule 42(b)(v).[18] I discuss each in turn.

9. As to the first ground, under Rule 41(b)(ii), the Supreme Court may accept an application for certification of a question of law if "the decisions of the trial courts are

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[17] *See* Pls.' App. 8; Supr. Ct. R. 41(b)(ii) ("Certification will be accepted in the exercise of the discretion of the Court only where there exist important and urgent reasons for an immediate determination by this Court of the questions certified. A certification will not be accepted if facts material to the issue certified are in dispute. A certificate shall state with particularity the important and urgent reasons for an immediate determination by this Court of the question certified. Without limiting the Court's discretion to hear proceedings on certification, the following illustrate reasons for accepting certification: . . . (ii) *Conflicting decisions.* The decisions of the trial courts are conflicting upon the question of law.").

[18] Supr. Ct. R. 42(b)(v) ("No interlocutory appeal will be certified by the trial court or accepted by this Court unless the order of the trial court determines a substantial issue, establishes a legal right and meets 1 or more of the following criteria: . . . (v) *Case Dispositive Issue.* A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice.").

conflicting upon the question of law."[19] Generally, for court decisions to be "conflicting upon [a] question of law," they must disagree about legal standards. Courts will not be found to have made conflicting decisions on a question of law if they merely found factual distinctions that dictated differing outcomes under the same legal standard.[20] In support of their motion for interlocutory appellate review, Plaintiffs argue that this Court's decision to apply the probability of success on the merits standard, as opposed to the colorable claim standard, to their motion for a TRO conflicts with other decisions of this Court. They make the same assertion as to the Court's allegedly incorrect interpretations of fraudulent transfer law under DUFTA and the "substantially as an entirety" language of § 4.2 of the Guaranties. Turning first to the Court's decision to apply the probability of success standard, I find that Plaintiffs' argument lacks merit. They argue that, as a matter of law, I should have applied the colorable claim standard because I did not give Plaintiffs an opportunity to take discovery and, thus, it would be unfair to hold them to the higher burden of establishing a likelihood of success on the merits.

10. In that regard, Plaintiffs cited a number of cases merely reciting the applicable standards for a TRO and a preliminary injunction and appear to focus on one

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19 Supr. Ct. R. 41(b)(ii).

20 *See Brown v. City of Wilm. Zoning Bd. of Adjustment*, 2007 WL 2122046, at *3 (Del. Super. July 23, 2007) ("The Court's decision did not conflict with other decisions of this court, but rather found factual distinctions in those decisions that dictated a different outcome here.").

case, *Mitsubishi Power Systems Americas*,[21] as supporting their view that my determination as to the applicable standard is inconsistent with other decisions of this Court. That case is distinguishable, however. In *Mitsubishi*, the plaintiff entered into a manufacturing contract with BBIG to provide wind turbines in exchange for cash, which the defendant was to pay in progress installments to the plaintiff.[22] Babcock's operating subsidiary, BBIPL, guarantied these payments. Beginning approximately in May 2008, BBIG failed to make its progress payments, "apparently" due to the effects of the global recession on BBIPL. Compounding the problem, in February 2009, the plaintiff learned that BBIPL had entered into an agreement with a syndicate of lenders under its senior secured credit facility to sell all of its and its subsidiaries' assets and provide the sale proceeds to those lenders. The plaintiff also discovered that Babcock had been placed in the Australian equivalent of chapter 11 bankruptcy and that "assets of BBIG were being dissipated in order to pay off BBIPL's senior secured lenders."[23] On notice that its interests in the relevant contract and guaranty might be compromised by BBIG's financial distress, the plaintiff then attempted to obtain information about certain asset transfers BBIG had made to affiliates during the previous year. Upon receiving no response and also hearing that Babcock planned to sell certain of its U.S. assets

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21 *Mitsubishi Power Sys. Ams., Inc. v. Babcock & Brown Infrastructure Gp. US, LLC*, 2009 WL 1199588 (Del. Ch. Apr. 24, 2009).

22 *Id*. at *1-2.

23 *Id*.

imminently, the plaintiff brought suit against BBIG, among others, and sought a TRO to enjoin it from making any additional asset transfers other than in the ordinary course. Relying on *Insituform Technologies, Inc.*,[24] the defendants urged the court to apply the heightened preliminary injunction standard to the plaintiff's motion. Vice Chancellor Lamb rejected this contention, explaining that:

> *Insituform*, however, stands for the proposition that "[w]here . . . the applicant [for a temporary restraining order] has had the opportunity to develop evidence and present a record from which the court may 'responsibly make a more informed judgment concerning the merits,' . . . "the elements of the equitable test is something akin to the traditional preliminary injunction formulation.'" There is no reason to believe here that the discovery process set in motion merely a week ago has been completed, nor that [the plaintiff] has had an opportunity to develop the fact record to the degree necessary for the court to "responsibly make a more informed judgment concerning the merits." Thus, the court will apply the normal "colorable claim" standard to the merits analysis here.[25]

11. My determination to apply the probability of success standard in this case is consistent with the legal analysis in *Mitsubishi*. Unlike in *Mitsubishi* where the plaintiff had very little information about the alleged fraudulent transfers taking place out of the public eye with respect to BBIG, Plaintiffs here had access to much of the important information concerning the purported transfers in the Proposed Transaction. For example, they had access to DHI's Form 8-K, which publicly disclosed the details of that Transaction and the mechanics by which the profitable power plants would be transferred

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[24] *Insituform Techs., Inc. v. Insitu, Inc.*, 1999 WL 240347 (Del. Ch. Apr. 19, 1999).

[25] *Id*. (internal citations omitted).

to GasCo and CoalCo. Second, Plaintiffs presumably had control over much of the information relevant to their intentions as to the meaning of the Guaranties in the Sale-Leaseback Transaction because they were parties to that transaction and actively negotiated it. In addition, they had access to information about how "ring-fenced" entities generally operate and the possible ways in which their bankruptcy remote status detrimentally could have impacted Plaintiffs from a financial standpoint. Yet, Plaintiffs chose not to submit any expert testimony as to how this could have been the case, choosing instead to rely on nonexpert attorney affidavits. Concededly, the record did not include *every* relevant detail, including the new credit agreements that DHI and its affiliates either have negotiated or are negotiating with new senior lenders. But, as Vice Chancellor Lamb indicated in *Mitsubishi*, all that is required at the preliminary stage of a motion like Plaintiffs' is that I be convinced the record is sufficient to permit me to make a responsibly informed judgment as to the merits. Because most of the important facts were publicly available, subject to Plaintiffs' control, or otherwise accessible to them, and many of the important contracts were part of the preliminary record, I concluded based on this Court's precedents that the preliminary injunction standard was more appropriate to apply under the circumstances of this case.

12. Plaintiffs next argue that the Court incorrectly interpreted Delaware's fraudulent transfer law under DUFTA and the "substantially as an entirety" language of § 4.2 of the Guaranties, and that these interpretations are at odds with other decisions of the Court. These arguments, however, merely rehash the same points Plaintiffs advanced in their TRO briefs. For example, Plaintiffs argue that the fact that the structure of the

Proposed Transaction singles out Roseton and Danskammer from the group of profitable power plants to be transferred to bankruptcy remote entities demonstrates an actual intent to hinder Plaintiffs' ability to collect as creditors of DHI. Based on the record before me, I rejected this contention in the Opinion, finding that the structure of the Transaction potentially could provide DHI with financial benefits and that there was no persuasive evidence of a subjective intent by DHI to frustrate Plaintiffs' standing as creditors of DHI and the Lessees.[26] Thus, Plaintiffs have not shown that this decision is inconsistent with another decision by this Court.

13. Plaintiffs also argue, again, that the Proposed Transaction violates 6 *Del. C.* § 1304(a)(2) because it is constructively fraudulent. In particular, they contend that my preliminary finding that DHI is not transferring any of its assets because it does not directly own the power plants at issue would "effectively eviscerate fraudulent transfer law in the corporate context."[27] Yet, Plaintiffs cite no case law for this proposition, let alone case law that is inconsistent with my provisional finding.

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[26] Op. at 46-47. Plaintiffs suggest that the Court confused the standards that apply to § 1304(a)(1) by looking to the likely benefit to the defendant or injury to the plaintiff instead of evidence of the defendant's subjective purpose. Pls.' App. 15. This argument misses the mark. In the Opinion, I concluded provisionally that there was no direct evidence of a subjective intent by DHI to hinder Plaintiffs as creditors and that the fact that the Proposed Transaction likely would benefit DHI and, perhaps, Plaintiffs as well, supported my preliminary conclusion that it was not a sham, designed only to achieve a fraudulent purpose.

[27] Pls.' App. 16.

14. Furthermore, Plaintiffs reiterate their argument that the Guaranties' purpose was to allow Plaintiffs access to "all of DHI's revenue sources," including the profitable assets held indirectly by its subsidiaries. In the Opinion, I found that Plaintiffs are not likely to succeed in showing that the Guaranties contain this obligation. Plaintiffs do not allege that the Court's provisional finding is inconsistent with another decision by this Court, but rather repeat their mantra that the Court's interpretation would render the Guaranties "meaningless and entirely deprive PSEG of its bargained for protections" in § 4.2. I based my conclusions on the application of well-settled principles of contract interpretation to the facts of this case. The fact that Plaintiffs believe that I applied those principles incorrectly to those facts, however, does not satisfy Rule 41(b)(ii).[28] While Plaintiffs disagree with this Court's determinations as to the probability of success on their merits arguments, no novel or unsettled law informed the Court's interpretations of the Guaranties or DUFTA. In any event, "[t]hat a trial court may have been (or was) wrong is not the standard for interlocutory review."[29] Thus, for the same reasons stated in the Opinion, I remain convinced that Plaintiffs have failed to show a probability of

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[28] *See Bond Purchase, L.L.C. v. Patriot Tax Credit Props., L.P.*, 1999 WL 669358, at *6 (Del. Ch. Aug. 16, 1999) ("application of a settled contract principle to a new or unique fact situation does not create 'issues of first impression' for the Supreme Court [in the context of a motion under Court of Chancery Rule 62] . . . .").

[29] *W. Willow-Bay Ct., LLC v. Robino-Bay Ct. Plaza, LLC*, 2007 WL 4357667, at *3 (Del. Ch. Dec. 6, 2007).

success on their claims and, similarly, that my rulings do not provide a basis for interlocutory appeal under Supreme Court Rule 42(b) or 41.[30]

15. Finally, Plaintiffs argue that certification would serve considerations of justice. First, they assert that this Court's improper application of the preliminary injunction standard here before they have had an opportunity to take discovery has deprived them of any meaningful opportunity to obtain preliminary relief. Second, Plaintiffs contend that "[t]here will be no opportunity for the Delaware Supreme Court to address the legal issues at stake outside the context of interlocutory review. The only time for review is now."[31]

16. Certifying this case for interlocutory appeal, however, would not serve considerations of justice. In particular, such a certification would not advance the "principles of judicial economy that the procedures in Supreme Court Rules 41 and 42 are intended to protect."[32] The issue before me on Plaintiffs' application for a TRO was whether I should enjoin DHI from proceeding with the Proposed Transaction on or around July 29, 2011, the date when the next phase of the Transaction was set to close. As to this narrow question, I denied Plaintiffs' request for relief for the reasons stated in

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30 Plaintiffs' arguments about irreparable harm and the balance of the equities similarly rehash their previous contentions and lack merit for the same reasons discussed in the Opinion.

31 Pls.' App. 8

32 *See Murray v. Am. Suzuki Motor Corp.*, 2010 WL 629530, at *3 (Del. Super. Feb. 17, 2010).

the Opinion. The Opinion does not constitute a final decision on the merits as to the validity or invalidity of the Transaction. Likewise, it does not preclude Plaintiffs from pursuing their claims in this action by taking discovery and, for example, seeking a prompt trial on the merits. The alleged detrimental effects of the Transaction on Plaintiffs' ability to obtain the bargained-for value of the Guaranties presumably will not be felt until the time, if ever, that the Lessees default and the chain reaction envisioned by Plaintiffs actually begins and causes them to have to execute on a judgment against DHI based on the Guaranties, assuming the Lessees are insolvent. The first of these anticipated defaults apparently will not occur until November 2011, at the earliest, when Roseton is required to make an approximately $75.5 million dollar lease payment to Plaintiffs.[33] On the other hand, DHI has presented credible evidence that it is important, given the instability faced by the global credit markets, for it to proceed without delay in securing senior financing. In these circumstances, I find that this case does not present such an exceptional situation that considerations of justice dictate allowing an interlocutory appeal of my denial of Plaintiffs' motion for a TRO, notwithstanding the general policy disfavoring piecemeal appeals.

II. Plaintiffs' Motion for an Injunction Pending Appeal

17. Because I have denied Plaintiffs' motion for certification of an interlocutory appeal and for the same reasons I stated in the Opinion for denying their

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[33] *See* Aff. of Marc Sherman ¶ 13.

motion for a TRO, I also deny Plaintiffs' motion for an injunction pending the requested appeal.

III. Conclusion

For the reasons stated, therefore, **IT IS HEREBY ORDERED** that:

A. Plaintiffs' motion for certification of an interlocutory appeal is denied; and

B. Plaintiffs' motion for an injunction pending appeal is denied.

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Vice Chancellor Donald F. Parsons, Jr.