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OF THE
STATE OF DELAWARE

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Re: *The Ravenswood Investment Company, L.P. v. Winmill*
C.A. No. 3730-VCN
Date Submitted: August 31, 2011

Dear Counsel:

Ravenswood has moved, pursuant to Court of Chancery Rule 59(e), to alter or amend this Court's memorandum opinion and order issued on May 31, 2011.[1] Ravenswood also has sought reargument under Court of Chancery Rule 59(f). Finally, Ravenswood has moved for leave to amend the Complaint. This is the Court's decision on those motions.

[1] *Ravenswood Inv. Co., L.P. v. Winmill*, 2011 WL 2176478 (Del. Ch. May 31, 2011) (the "May 31 Order"). The Court presumes familiarity with that opinion and will generally employ the same nomenclature as used there.

I. CONTENTIONS

Ravenswood makes three arguments regarding the May 31 Order. First, Ravenswood argues that the May 31 Order contains a material mathematical error. Ravenswood suggests that the Court dismissed its claims regarding the adoption of the Performance Equity Plan, in part, because "even if all options authorized under the plan were to be granted to the Defendants they would not obtain a majority interest in the Class A shares."[2] The May 31 Order went on to state, in a footnote, that "[e]ven if all options authorized under the Performance Equity Plan were eventually issued to the Defendants and all repurchases authorized by the stock buyback plan . . . were eventually completed, the Defendants would still own only about 47% of the Class A shares."[3] Ravenswood contends that that statement is incorrect. It argues that if the Performance Equity Plan and the stock buyback plan were to be fully implemented, then the Defendants would hold over 53% of Winmill's total shares. Ravenswood appears to contend that the fact that the Defendants could hold 53% of Winmill's total shares, as opposed to 47%, is

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[2] May 31 Order, 2011 WL 2176478, at *4.
[3] *Id.* at *4 n.50.

important because the greater percentage suggests more strongly that "[t]he combination of the stock buybacks and options grants constitutes a rolling 'going private' scheme by a controlling stockholder devoid of any of the required substantive or procedural protections."[4]

Second, Ravenswood appears to attack the Court's determination in the May 31 Order that the only allegation the Complaint made with regard to the Performance Equity Plan was that it had a dilutive effect on public shareholders' equity. Ravenswood suggests that the Court reached that determination in part because it interpreted the Complaint to say that "the Performance Equity Plan only authorizes the Board to grant stock options with an exercise price not lower than the market value as of that event."[5] But Ravenswood argues that the Complaint said "fair value" not "market value." Moreover, Ravenswood argues that it "would and could allege under facts presently in the [C]omplaint that basing an option program, particularly one of this magnitude, on the extreme daily fluctuations present [in] any illiquid 'pink sheet' market, [with] odd lots trading at greatly

[4] Compl. ¶ 35.
[5] 2011 WL 2176478, at *4 (citing Compl. ¶ 25).

varying prices . . . was a breach of fiduciary duty and a fundamental flaw in the plan."[6] Because it could make such allegations on the pled facts, Ravenswood argues that it should be given an opportunity to amend the Complaint to present them.

In addressing Ravenswood's derivative claim that the stock buyback harmed Winmill, the Court determined that "Ravenswood ha[d] not alleged with sufficient particularity facts indicating that the Defendants were interested parties to the stock buybacks or that the decision to engage in the buyback program was not the product of a valid business judgment."[7] The Court went on to explain that it might have reached a different outcome "[h]ad the Complaint included particularized allegations regarding the effects of the buyback program on the Defendants' and the [c]lass's rights to vote their Class A shares."[8]

Third, Ravenswood seems to contend that the Complaint did contain particularized allegations regarding the class's voting rights and, thus, that demand should have been excused as to the claim that the stock buyback harmed Winmill.

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[6] Pl.'s Mot. to Alter or Amend a Judgment ("Pl.'s Mot. to Alter") at ¶ 3.
[7] May 31 Order, 2011 WL 2176478, at *5.
[8] *Id.*

Ravenswood argues that the Court should have considered the Performance Equity Plan in connection with the stock buyback. Ravenswood further contends that because the combined effect of the Performance Equity Plan and the stock buyback "is to provide Defendants absolute voting control in those circumstances where the Class A shares would have a vote . . . they have established that demand is excused."[9]

In responding to Ravenswood's arguments, the Defendants first address Ravenswood's request to amend the Complaint to present new allegations regarding the adoption of the Performance Equity Plan. The Defendants argue that, under Court of Chancery Rule 15(aaa), when Ravenswood was faced with the Defendants' motion to dismiss, it had two options: amend the Complaint or file an answering brief. Ravenswood chose to stand on the Complaint and file an answering brief. Because Ravenswood chose to stand on the Complaint, the Defendants contend that, any subsequent dismissal of claims in the Complaint would be with prejudice "unless the Court, for good cause shown, shall find that

[9] Pl.'s Mot. to Alter at ¶ 4.

dismissal with prejudice would not be just under all the circumstances."[10] This Court dismissed Ravenswood's claim that the adoption of the Performance Equity Plan was not entirely fair, and the Defendants argue that Ravenswood has not demonstrated good cause as to why that dismissal should not be with prejudice. Thus, the Defendants contend that Ravenswood is not permitted, under Rule 15(aaa), to amend the Complaint.

The Defendants then address Ravenswood's request to alter or amend the May 31 Order or, in the alternative, for reargument. The Defendants suggest that there are two major problems with Ravenswood's request. First, Ravenswood never alleged that the combined effects of the Performance Equity Plan and the stock buyback would affect its voting power. Second, Ravenswood's analysis assumes an event that has not occurred: namely, that Winmill will repurchase all of the shares it is authorized to acquire under the stock buyback, and none of those shares will be acquired from the Defendants. The Defendants further contend that Ravenswood failed to allege, in the Complaint, any factual basis for the Court to

[10] Defs.' Opp. to Pl.'s Mot. to Alter or Amend a Judgment ("Defs.' Opp. to Pl.'s Mot. to Alter") at ¶ 3 (citing Ct. Ch. R. 15(aaa)).

consider two separate issues—the Performance Equity Plan and the stock buyback—as part of a single scheme. They argue that the Court considered viewing the two actions as one scheme, but implicitly rejected that approach when it analyzed each issue separately.[11]

II. ANALYSIS

A. *Amending the Complaint*

Court of Chancery Rule 15(aaa) provides, in relevant part:

> [A] party that wishes to respond to a motion to dismiss under Rules 12(b)(6) or 23.1 by amending its pleading must file an amended complaint, or a motion to amend in conformity with this Rule, no later than the time such party's answering brief in response to either of the foregoing motions is due to be filed. In the event a party fails to timely file an amended complaint or motion to amend under this subsection (aaa) and the Court thereafter concludes that the complaint should be dismissed under Rule 12(b)(6) or 23.1, such dismissal shall be with prejudice . . . unless the Court, for good cause shown, shall find that dismissal with prejudice would not be just under all the circumstances.

[11] The Court did not consider the Performance Equity Plan and the stock buyback as part of a single scheme because the Complaint does not contain any allegations that would tie the two efforts together. The Complaint merely states, as a conclusion: "[t]he combination of the stock buybacks and options grants constitutes a rolling 'going private' scheme by a controlling stockholder devoid of any of the required substantive or procedural protections." Compl. ¶ 35. The Complaint does not explain why the Performance Equity Plan and the stock buyback should be viewed as a single scheme nor does it delineate the missing "required substantive or procedural protections" attendant to the "'going private' scheme."

"Rule 15(aaa) was written to . . . requir[e] plaintiffs, when confronted with a motion to dismiss . . . , to elect to either: stand on the complaint and answer the motion; or, to amend or seek leave to amend the complaint before the response to the motion was due."[12] When Ravenswood was faced with the Defendants' motion to dismiss, it chose to stand on the Complaint and answer the motion. Ravenswood's claim that the Defendants breached their fiduciary duties by adopting the Performance Equity Plan was dismissed in the May 31 Order. Ravenswood's motion could be read to say that dismissal should not be with prejudice because the Court said that the exercise price of options issued pursuant to the Performance Equity Plan had to be at least market value while the Complaint alleges that options could be issued for "mere" fair value. Ravenswood makes no other argument as to why dismissal of this claim should not be with prejudice. Although the definitions of fair value and market value are not equivalent and it is possible in this case that market value would have been higher (or lower) than fair

[12] *Braddock v. Zimmerman*, 906 A.2d 776, 783 (Del. 2006).

value,[13] a board of directors does not breach its fiduciary duties by adopting an incentive plan that issues stock at fair value.[14] There has been no showing that dismissal with prejudice would not be just and, thus, Ravenswood may not now amend the Complaint to make new allegations regarding the adoption of the Performance Equity Plan.

B. *Amending the May 31 Order*

"Under Rule 59(e), a motion to alter or amend a judgment may be granted 'if the plaintiff demonstrates (1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to correct a clear error of law or to prevent manifest injustice.'"[15] Under Rule 59(f), a motion for reargument may be granted if the moving party demonstrates that "the Court's

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[13] Given the lack of a liquid market for Winmill's shares, it would seem more likely that fair value would be greater than market value

[14] Whether the issuance in this case was actually fair is an on-going issue. *See* May 31 Order, 2011 WL 2176478, at *3 ("The Defendants' motion does not seek dismissal of Ravenswood's claim related to the actual granting of options under the Performance Equity Plan.") (citation omitted).

[15] *Adams v. Calvarese Farms Maint. Corp.*, 2011 WL 383862, at *1 n.3 (Del. Ch. Jan. 13, 2011) (quoting *Chrin v. Ibrix, Inc.*, 2005 WL 3334270, at *1 (Del. Ch. Nov. 30, 2005)).

decision was predicated upon a misunderstanding of a material fact or a misapplication of the law."[16]

Ravenswood's first argument as to why the Court should alter or amend the May 31 Order or, in the alternative, grant reargument, is that if the Performance Equity Plan and the stock buyback plan are fully implemented, the Defendants will hold 53% of Winmill's total shares, not 47% as the Court stated in the May 31 Order. It does appear that the Court made a mathematical error in footnote fifty of the May 31 Order, and that the parties agree on that point.[17] That error, however, was not material. The Court dismissed Ravenswood's claim regarding the adoption of the Performance Equity Plan because the only allegation the Complaint made with regard to that plan was that it had a dilutive effect on public shareholders' equity.[18] The Court explained that "[a]ny options plan, however, has a dilutive effect on shareholders' equity, and this effect alone does not render an

[16] *Fisk Ventures, LLC v. Segal*, 2008 WL 2721743, at *1 (Del. Ch. July 3, 2008) (citations and internal quotations omitted).
[17] *See* Pl.'s Mot. to Alter at ¶ 2; Defs.' Opp. to Pl.'s Mot. to Alter at ¶ 7.
[18] May 31 Order, 2011 WL 2176478, at *4. The Court has denied Ravenswood's request to amend the Complaint to present new allegations regarding the adoption of the Performance Equity Plan. *See supra* pp. 8-9.

options plan unfair."[19] Even if the Defendants eventually acquire 53% of Winmill's stock, Ravenswood's only claim regarding the adoption of the Performance Equity Plan will be that it had a dilutive effect. That effect alone does not render the plan unfair.[20] Thus, the Court will not further revisit its dismissal of Ravenswood's claim that the Defendants breached their fiduciary duties by adopting the Performance Equity Plan.

Ravenswood's second argument is that the Complaint contained particularized allegations regarding the class's voting rights. Thus, according to Ravenswood, demand should have been excused with regard to its claim that the

[19] May 31 Order, 2011 WL 2176478, at *4 (citations omitted).

[20] At oral argument, counsel for Ravenswood discussed a recent decision of our Supreme Court, *Central Mortgage Company v. Morgan Stanley Mortgage Capital Holdings, LLC*, 27 A.3d 531 (Del. 2011). Counsel argued that *Central Mortgage* "re-emphasized" that Delaware has notice pleading, and that "even vague allegations are to be accepted as true." Oral Argument Transcript at 5. Counsel then argued that Ravenswood had met that standard. Ravenswood, according to its counsel, provided the Defendants with notice of its claims arising out of the Performance Equity Plan and the stock buyback. *Id.* at 6. Counsel may very well be correct about the holding in *Central Mortgage*, but the reason Ravenswood's claims regarding the adoption of the Performance Equity Plan and the stock buyback were dismissed was not because they were supported by vague allegations. Those claims were dismissed because they were based on the incorrect premises that, to allege a lack of fairness, a plaintiff need only plead that a performance plan has a dilutive effect and that a stock buyback plan has a concentrating effect. May 31 Order, 2011 WL 2176478, at *4-5. The Court still finds that Ravenswood's claims regarding the fairness of the Performance Equity Plan and the stock buyback were based on those faulty premises and, thus, that those claims were correctly dismissed.

stock buyback harmed Winmill. As discussed immediately above, Ravenswood's only claim regarding the adoption of the Performance Equity Plan is that it had a dilutive effect.[21] Moreover, the Complaint did not include any particularized allegations regarding the effects of the stock buyback on the class's voting rights.[22] Thus, the Complaint does not contain particularized allegations regarding voting rights.

Ravenswood also attempts to grapple with this issue by stating that "in those circumstances where the Class A shares *would* have a vote . . . ,"[23] the Performance Equity Plan and stock buyback ensure that the Defendants have absolute voting control. Although, under Delaware law, the Class A shares would have a vote on certain fundamental transactions, such as a merger, "[t]he Court [did] not address whether a claim that those voting rights were harmed by adoption of the Performance Equity Plan [or the stock buyback] might survive a motion to dismiss. This is because the Complaint itself contains no such allegations."[24] Thus, the

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[21] *See supra* note 18 and accompanying text.
[22] May 31 Order, 2011 WL 2176478, at *5.
[23] Pl.'s Mot. to Alter at ¶ 4 (emphasis added).
[24] May 31 Order, 2011 WL 2176478, at *4 n.49. *See also* Compl. ¶ 3 ("The Class A and Class B common stock are identical in all respects except for voting rights, which are vested solely in the

Court will not further revisit Ravenswood's claim that the stock buyback harmed Winmill.

III. CONCLUSION

For the foregoing reasons, Ravenswood's motion to alter or amend the May 31 Order, its motion for reargument, and its motion to amend the Complaint are denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

Class B common stock. The Defendants own or control all of the Class B common stock and thus own or control all of the voting with respect to the Company.")