



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE JOHN Q. HAMMONS HOTELS INC.) CONSOLIDATED
SHAREHOLDER LITIGATION) C.A. No. 758-CC
)

**DEFENDANTS' OPPOSITION TO PLAINTIFFS'
MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

Defendants John Q. Hammons Hotels, Inc. JQH Acquisition LLC, JQH Merger Corporation, John E. Lopez-ona, Jacqueline Anne Dowdy, Daniel L. Earley, William J. Hart, Donald H. Dempsey, David C. Sullivan and James F. Moore ("Defendants")¹ hereby oppose Plaintiffs' Motion to Compel Production of Documents. The grounds for Defendants' opposition are as follows:

BACKGROUND

1. On October 24, 2008, Defendants filed a motion for summary judgment based upon a factual record – developed through extensive document production and deposition testimony – that demonstrated that Plaintiffs had not, and could not, state a legally cognizable claim for breach of fiduciary duty against Defendants under Delaware law. As set forth in Defendants' opening brief in support of the motion, the decision of the Company's board to approve the Merger, which was consummated with an unaffiliated third party, approved by an independent special committee and a majority of independent and disinterested directors, and overwhelmingly supported by a majority of the minority Class A shareholders is protected by the business judgment rule.

¹ Although Plaintiffs' motion to compel post-merger information is directed at all Defendants other than Mr. Hammons, most of the Defendants are former directors of the Company that ceased to have any role with the Company after the date of the Merger.

2. Even though the case had been pending for four years, in response to Defendants' summary judgment motion, Plaintiffs initially asserted that discovery should remain open for several additional months to allow them to take additional unspecified discovery. After Defendants refused to agree to open-ended discovery, Plaintiffs took the position that they could not respond to Defendants' motion for summary judgment until they had the opportunity to take limited additional discovery: (1) the deposition of Mr. John Q. Hammons or his representatives regarding the agreements between Mr. Hammons and the acquiror; (2) the depositions of representatives of Lehman Brothers; and (3) possibly the deposition of the Company's former CFO. *See* December 18, 2008 letter from Norman Monhait to The Honorable William B. Chandler, III (Exhibit A) and January 2, 2009, Transcript at 4-6 (Exhibit B). Based on these representations, Defendants consented to this limited additional discovery and the Court entered an order setting March 13, 2009, as the cut-off date for fact discovery.

3. On January 12, 2009, Plaintiffs served their Second Request for Production of Documents (the "Document Requests"), seeking extensive documents relating exclusively to the Company's post-merger financial performance.²

4. On February 11, 2009, Defendants served their objections and responses to the Document Requests. Defendants objected to the Document Requests to the extent they sought post-merger financial information, but agreed to produce the Company's year end audited

² Because the documents sought in the Document Requests are completely unrelated to the three discrete areas of additional discovery Plaintiffs represented they needed to respond to Defendants' Motion for Summary Judgment, Plaintiffs' Motion to Compel should be denied on this ground alone.

financials for 2005 and 2006.³ Plaintiffs rejected this offer and instead filed this Motion to Compel.

ARGUMENT

5. Although the Court of Chancery Rules permit broad discovery, the scope of discovery under Court of Chancery Rule 26(b)(1) is subject to clear limitations as well as the discretion of the Court. For example, it is a well-established principle of Delaware law that a plaintiff's discovery requests "must be related to the allegations in the complaint." *Dann v. Chrysler Corp.*, 166 A.2d 431, 433 (Del. Ch. 196). In addition, Rule 26, by its terms, expressly requires that discovery requests be "relevant to the subject matter of the pending action." *Onti, Inc. v. Integra Bank*, 1999 WL 255908, at *4 (Del. Ch.) ("Parties must limit the scope of discovery to items which are relevant to the subject matter involved in the pending action.").

6. Under well-established Delaware law, post-merger evidence is only admissible "to show that plans in effect at the time of the merger have born fruition." *Gonsalves v. Straight Arrow Publishers, Inc.*, 701 A.2d 357, 362 (Del. 1997). Thus, while Plaintiffs are correct that discovery of "certain" post-merger evidence may be permitted under Delaware law, plaintiffs are required to articulate a sound justification for such discovery. *See, e.g., Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 499 (Del. 2000).

7. Here, the only justification Plaintiffs have offered in support of the production of post-merger information is their belief that Lehman Brothers, the financial advisor to the Special Committee who issued an opinion supporting the fairness of the Merger

³ Defendants asserted this same objection in their October 24, 2006 responses and objections to Plaintiffs' document requests in the appraisal action. *See* October 24, 2006 Responses, General Objection 9 (Exhibit C). It has been almost two and half years since Defendants first asserted their objection to the production of post-merger financial information, but Plaintiffs waited until roughly a month before the close of fact discovery to take issue with it. Plaintiffs' Motion to Compel should be denied on that basis alone.

consideration, inappropriately concluded that, if the Company were to continue as a going concern, it would trade at a discount compared to its peers. Plaintiffs claim they need the post-merger financial information to determine whether Lehman's assumption as to the Company's future results proved accurate.

8. However, the relevant inquiry with respect to Lehman Brothers' decision to apply a discount to the Company is not, as Plaintiffs suggest, whether Lehman Brothers' prediction was ultimately correct. The relevant inquiry is whether Lehman Brothers' decision to apply the discount was reasonable when the decision was made in light of the information available at that time. Delaware law makes clear that directors can only make decisions based upon the information available at the time. They cannot be held liable based upon information that was not known, and could not be known, at the time the decision was made. *See In re Citigroup S'holder Derivative Litig.*, 964 A.2d 106, 126 (Del. Ch. 2009).

9. Furthermore, the post-merger company is fundamentally different from the company pre-merger. For example, the post-merger company has a completely different debt structure and is under the control of different management. Thus, comparing pre-merger financial information with post-merger financial information is like comparing apples to oranges.

10. Even the cases Plaintiffs cite do support their position. For example, Plaintiffs rely on *In re Best Lock Corp. S'holder Litig.*, 2000 WL 1876460, at *6 (Del. Ch. Dec. 18, 2000), for the proposition that post-merger financial information is discoverable in breach of fiduciary duty actions, "which may, ultimately, justify a rescissory damages remedy." However, unlike the plaintiff in *Best Lock*, Plaintiffs have not, and could not, seek rescissory damages. In addition, unlike the petitioner in *Technicolor*, which Plaintiffs cite in support of their position,

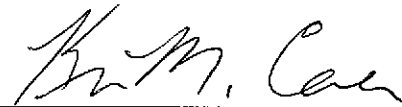
Plaintiffs have asserted no claims regarding pre-merger plans and the outcome of those plans post-merger.

11. Finally, even when a shareholder is able to articulate a rationale for requiring post-merger production, which Plaintiffs have not done, such production is limited both as to the substance of the discovery and as to the time. *Lane Cancer Treatment Centers of America, Inc.*, 1994 WL 263558, at *4 (Del. Ch.) (limiting post-merger discovery for the one-year period following date of merger). In this case, Plaintiffs have not, and cannot, articulate a need for the production any post-merger information relating to the new post-merger entity. Nevertheless, Defendants agreed to produce 2005 and 2006 audited financials. There is absolutely no basis to require the production of any additional documents. Indeed, Plaintiffs have made no effort to justify their request for post-merger financial information for each of the more than 60 hotels owned by the Company or the valuation opinions Plaintiffs seek.

CONCLUSION

12. For the foregoing reasons, Defendants respectfully request that Plaintiffs' Motion to Compel be denied.

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