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STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT

S.C. SUPREME COURT

Appeal From The Court Of Common Pleas
For Greenville County
The Honorable Edward W. Miller, Circuit Court Judge
C.A. No. 2008-CP-23-2701
South Carolina Court of Appeals
Opinion No. 4820, filed March 23, 2011

Brian P. Menezes, Petitioner,

v.

WL Ross & Co LLC, Wilbur, L. Ross, Jr., Michael J. Gibbons, David H. Storper, David L. Wax, Joseph L. Gorga, Stephen B. Duerk, WLR Recovery Fund II, L.P., WLR Recover Fund III, L.P., WLR Recovery Associates II LLC, and WLR Recovery Associates III, LLC, Respondents.

RESPONDENTS' RETURN TO PETITION FOR REHEARING

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Attorneys for Respondents

In his June 6, 2013 Petition for Rehearing, Plaintiff/Petitioner Brian P. Menezes argues that some of the alleged conduct by some of the Defendants falls outside the scope of the logic in this Court's May 22, 2013 Opinion (the "Opinion" or "Op."). Specifically, he points to certain Respondents/Defendants, whom he bundles together and calls the "controlling shareholder"¹ – and to an alleged "shareholder vote" by these Defendants along with other, supposed, "later and separate acts." (Pet. 2-3.) He tries to carve these away from the rest of the case in a flawed attempt to rescue some of his claims from dismissal.

Tellingly, Plaintiff never argued for this carve-out in the Circuit Court or the Court of Appeals. He treated his claims as a single group and argued that none of them accrued until the merger closed.² Even in this Court, he did not raise the argument except

¹ Although the Petition is careful to use "controlling shareholder" in the singular, the Petition apparently seeks to undo this Court's Opinion with respect to nine Defendants. (See Pet., 2-3.) Except for purposes of the motions at issue on the present appeal, Defendants do not concede that any of these Defendants, several of whom owned little or no SCI or NITG stock, is a controlling shareholder within the meaning of Delaware law.

² The Petition's assertion that Plaintiff made the argument in his "Second Memorandum in Opposition to Defendants' Motion to Dismiss" (see Pet., 11) is incorrect. Nothing in that Second Memorandum suggests any separate treatment of claims against controlling shareholders as opposed to claims against directors. And nothing suggests treating different categories of alleged conduct differently (other than injunction claims, which Plaintiff obviously was not asserting). To the contrary, that Second Memorandum asked the Circuit Court to regard all allegations concerning pre-Release conduct as mere "background" and focus on what Plaintiff called his "central" and "essential" claim (in the singular) that the Merger should not have been allowed to close. (See R. Vol. I, pp. 357-60.) In sum, all Plaintiff did in that Second Memorandum was assert the same flawed argument he made repeatedly in all three courts – namely, that all of his claims accrued after Plaintiff signed his Release. (Compare *id.*, p. 358 (arguing that Plaintiff's "only" claim regarding the merger is that it should not have been allowed to consummate); with R. Vol. 1, p. 257 (arguing that "the relevant question here is when a claim for damages for breach of fiduciary duty in connection with a merger of two corporations 'accrues.'")) This Court has now disposed of that argument once and for all, both as against the director defendants and the shareholder defendants, with its

as a short, last-ditch afterthought at the very end of his Reply Brief. And there was good reason for Plaintiff's reticence. Plaintiff's carve-out is contrary to law and the facts alleged in Plaintiff's own pleadings; it contradicts this Court's express conclusions and the clear Delaware law that this Court applied; it would undermine the policies that underlie, as this Court recognized, the controlling Delaware precedents. The Petition should therefore be denied.

ARGUMENT

“The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” *Kennedy v. South Carolina Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (S.C. 2001) (quoting Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999)); *see also Checker Yellow Cab Co. v. Checker Cab and Parcel Svc., Inc.*, 287 S.C. 608, 612, 340 S.E.2d 549, 552 (Ct. App. 1986). Rather, the Petitioner's burden is to identify some point that this Court actually overlooked. *See Hicks v. Hicklin*, 187 S.C. 355, 364, 197 S.E. 390, 393 (S.C. 1938) (rejecting argument that points had been overlooked where the “propositions have already been presented to this Court in the printed briefs and in the oral argument”). No such error has occurred here.

(continued...)

holding that the alleged breach-of-fiduciary duty claims actually accrued when the merger terms were fixed by agreement.

I. This Court Considered and Specifically Rejected the Argument Plaintiff is Now Reasserting in His Petition.

This Court's Opinion is straightforward. Under Delaware law, "a claim for breach of fiduciary duty³ accrues at the time of breach," regardless of whether or when any damages occur. (Op., 90.)⁴ "In the merger context, this breach takes place when the directors fix or adopt the terms of a merger contract." (*Id.*) Thus, in this case, "**any alleged breach** occurred when the SCI Board adopted and publicly announced the terms of the merger[.]" (*Id.* (emphasis added).) But Plaintiff now contends that the ruling overlooks his claims against a group of Defendants that he calls the "controlling shareholder," as distinct from Defendants acting as SCI Board members, for conduct including their supposed "vote to approve the merger." Plaintiff is mistaken, as the Opinion speaks directly to this issue.

For one thing, the Petition's repeated references to a "shareholder vote to approve the merger" are not really correct. As this Court recognized, once the merger agreement was fixed and announced, "completion of the merger did not require any further action by SCI shareholders." (*Id.*, 68.) The merger structure was such that no shareholder vote on its terms was required, and none was ever held. (*Id.*) What did occur was a shareholder vote concerning certain merger-related changes to the corporate articles, but this was not a vote to approve the merger *per se.* (*Id.*)

More importantly, as this Court discussed in its statement of "factual/procedural history," all of the "planned procedures at the 2006 Annual Meeting were a formality."

³ The alleged claims against the "controlling shareholder" are based on alleged breach of fiduciary duty. (See Affidavit of Brian P. Menezes (the "Affidavit" or "Aff."), Ex. A ¶ 636.)

⁴ Citations in this Return to the Court's Opinion refer to the page numbers appearing in Shearouse Advance Sheet No. 23 (May 22, 2013).

(Op., 68.) This specifically included the vote to amend the corporate articles. The Opinion notes that, although the vote was a “precondition of the merger,” this “precondition was a mere formality,” because “shareholders owning 75.6% of the company, *i.e.*, [certain of the] Respondents, indicated they intended to adopt such a certificate and re-elect their directors to the SCI Board.” Simply put, the Court saw and addressed Plaintiff’s arguments concerning preconditions to the merger’s closing. Far from overlooking Plaintiff’s listing of alleged conduct after the merger agreement, the Court quoted those allegations at length. (Op., 68-69, n. 1.) But the Court also recognized that the post-agreement process was fixed and set in motion by the merger agreement, such that Plaintiff’s claims accrued when that agreement was signed. *See Hicks*, 187 S.C. at 364, 197 S.E. at 393 (holding that, where in “the consideration of the issues involved in the cause this Court took into account and gave heed to the matters now presented by the petition for rehearing ..., [t]hese points have not been overlooked and have not been misapprehended”); *Meinhard v. Youngblood*, 37 S.C. 231, 16 S.E. 771 (1892) (denying petition for rehearing because, “while it may be true that every question presented by the argument may not have been specifically referred to in the opinion, yet it is clear that the principles laid down in the opinion as controlling the decision necessarily imply that all these questions were considered and determined”).

This analysis encompasses the Wachovia Bank consent document⁵ that the Petition erroneously suggests gave rise to separate claims. The merger agreement set the consent process in motion as part of the approvals leading to the merger's closing. It is thus the merger agreement that constitutes the alleged wrong. Indeed, Plaintiff tacitly concedes that his claims against directors are barred under this Court's Opinion regardless of this bank consent issue. There is no legal or practical reason to conclude that the bank consent somehow revives claims against the alleged controlling shareholders when it does not do so for claims against directors.

Moreover, the Court's observation that the post-agreement process was a formality is plainly correct, as it reflects the allegations in Plaintiff's own Complaint. (See R. Vol. I, pp. 11-12, ¶¶ 22-24.)

Since, as noted, WLR and Ross owned directly or indirectly 75.6% of the stock of SCI and 85.4% of the stock of FITG and controlled four of five directors on the SCI Board and five of six directors on the FITG Board, WLR and Ross were in a position cause the Merger to occur regardless of the interests of the minority stockholders, and no action was required of them. *The approval process was a formality.*

(*Id.*, ¶ 22 (emphasis added).) Even in the First Amended Consolidated Complaint that Plaintiff now seeks to add to the record (albeit belatedly and by an incorrect procedure),⁶

⁵ The Petition's references to the Wachovia Bank consent are improper, as that document has been the subject of two motions by Plaintiff to supplement the record on appeal, both of which were denied. (See Exhibits A and B attached hereto (orders denying Plaintiff's motions to supplement).) Additionally, in Footnote 3 of the Petition, Plaintiff identifies the Wachovia Bank consent by citation to "R. pp. 1268-79," implying that the document is properly included in the Record on Appeal. It is not, because both the Court of Appeals and this Court have expressly refused to allow Plaintiff to supplement the Record to include this very document. See *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322 (refusing to consider on petition for rehearing evidence not in the record on appeal). But as shown above, the document makes no difference in any event.

⁶ The Affidavit and attachment are out-of-place because nothing in the Rules authorizes submission of such additional material on a Petition of this type. Defendants

Plaintiff does not withdraw his previous allegation that the approval process was a formality; he simply avoids discussing that process. The Amended Complaint's section headed "**THE MERGER – Background Facts**" devotes *40 pages* to discussing the alleged conduct leading up to the board approvals and merger agreement in August 2006, as compared to a mere *four paragraphs* – less than half a page – concerning events between the merger agreement and the merger closing (all of them concerning nothing more than the Wachovia Bank consent document, discussed above). *Indeed, nowhere in its 726 paragraphs does the Amended Complaint ever specifically mention any shareholder vote.*

This Court was correct, therefore, in concluding that Plaintiff's allegations are "all consanguine with the SCI Board's adoption of the merger terms." (Op. 90-91, n. 15.) Here again, the Petition itself confirms the point. The Affidavit of Brian Menezes filed in support of the Petition cites paragraphs 175 to 178 of the Amended Complaint as supposedly making allegations about the approval process and shareholder vote. (Aff., ¶ 8 (discussing allegations that "should have caused [the controlling shareholder] to vote against the merger").) But the Amended Complaint's very next paragraphs, which Mr. Menezes avoids citing, make it clear that the cited allegations concern alleged failures to

(continued...)

therefore object to this new material. Although Plaintiff apparently relies on Rule 240(c)(3), SCACR, as allowing him to inject new matters into the appellate record, that reliance is misplaced. That rule concerns "motions," not "petitions." See Rule 240(c)(3), SCACR. Its obvious function is as a vehicle for showing facts pertinent to procedural questions or other matters pertinent specifically to an ancillary motion. It surely is not intended to permit unilateral expansion of the Record on Appeal or Certiorari Appendix without prior permission from this Court. To the contrary, a party seeking to add new matters to the record should move for permission to do so – as Plaintiff is well aware, having filed two such motions himself during the course of this appeal. (See Exhibits A and B attached hereto (orders denying Plaintiff's motions to supplement).)

disclose information to SCI or, in particular, the SCI *Special Committee* that recommended the merger *to the SCI Board*. (Aff. at Ex. A, ¶ 180 (emphasis added).) Contrary to Mr. Menezes's suggestion, the allegations do not say a word about any shareholder vote. They concern Board actions, and, again, the Petition does not even try to disturb this Court's ruling as to claims based on Board conduct.

As for Plaintiff's attempts to carve out post-closing transactions, such as NITG's obtaining a new credit facility and a certain debt-for-equity swap, these, too, founder on Plaintiff's own pleadings. Plaintiff's Complaints, including the newly injected Amended Complaint, refer to these transactions merely as "negative *consequences* of the merger," – events that were "cause[d]" by, and "a *result* of," the merger. (See, e.g., *id.*, ¶¶ 539-40 (emphasis added).) Plaintiff points to these events as effects of the merger and as alleged damages, not as independent claims. (See, e.g., *id.*, ¶ 552.) Even more telling, Plaintiff has never before relied on these post-closing events as supposedly separate claims but has consistently argued, rather, that his claims accrued *when the merger closed*. (See, e.g., Petitioner's Br., 32 ("[T]his Court should find that Menezes's claim accrued at the closing of the merger[.]").) Plaintiff may not change his theory on rehearing in an attempt to reopen decided issues. See *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322.

II. This Court Correctly Applied Delaware Law in Dismissing All of Mr. Menezes's Alleged Claims.

The Opinion's treatment of pertinent Delaware law is likewise comprehensive and does not overlook any of the arguments in the Petition. As to the current Petition, the critical issue is when the breach of fiduciary duty claims against the controlling shareholders accrued, *i.e.*, could have been brought. The Opinion recognizes that Delaware law treats "all" alleged breach-of-fiduciary duty claims based on a merger, like

the one at issue here, as accruing at the time the merger terms are fixed by agreement. (Op., 68.) The Petition's attempt to limit this holding so that it applies only to claims against directors is unfounded and contrary to Delaware law.

The Delaware authorities setting forth the accrual rule show that it applies to claims against controlling shareholders just as it does to claims against directors. See *Dieter v. Prime Computer, Inc.*, 681 A.2d 1068 (Del. Ch. 1996) (in claim against directors and controlling shareholder, holding that plaintiffs who purchased stock after merger announcement were barred because claim accrued before the purchase); see also *Kahn v. Seaboard Corp.*, 625 A.2d 269 (Del. Ch. 1993) (holding claims against directors and controlling shareholder based on non-merger transaction accrued when contract was entered into).⁷ It also applies even where a shareholder vote may follow the board's action in fixing the merger terms by agreement. See *Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163 (Del. Ch. 2002) (holding plaintiff lacked standing to assert claim for breach of fiduciary duty because claim arose when directors approved merger, not when plaintiff became aware of the merger or the alleged wrongdoing, notwithstanding that shareholder vote came later); 2 Edward P. Welch, *et al.*, *Folk on the Delaware General Corporation Law* § 327.3.2 (5th ed. 2006 & Supp. 2013) ("both a proposed merger and a proposed supermajority voting provision have been held to be consummated when their terms were fixed and announced by the board of directors, **and not to be continuing transactions up to the time of stockholder approval.**") (emphasis added).⁸

⁷ *Kahn* is a decision that came after *Van Gorkom* and that, as this Court indicated at page 76, footnote seven, of its Opinion, the Court of Appeals relied upon, along with other authorities, as the basis for its decision in this case. See *Menezes v. WL Ross & Co., LLC*, 392 S.C. 584, 593, 709 S.E.2d 114, 119 (Ct. App. 2011).

⁸ The *Folk* treatise recently went through another revision, which has kept the above-quoted language unchanged.

Not surprisingly, the Petition fails to cite any case holding that controlling shareholder claims accrue at a different time than claims against the directors who approved the terms of the merger.⁹

Indeed, disparate treatment of when controlling shareholder claims accrue would be illogical given the nature of the claims and controlling shareholder liability. It is axiomatic that corporations act through their officers and directors. A claim against a controlling shareholder is thus a claim that the shareholder influenced the officers and directors to take some action contrary to the corporation's best interests. *Shandler v. DLJ Merch. Banking, Inc.*, CIV.A. 4797-VCS, 2010 WL 2929654, *16 (Del. Ch. July 26, 2010) (stating "the premise of controlling stockholder fiduciary responsibility is to hold the controller liable for actions [it] causes using its control of the company's board[.]").¹⁰ It follows that liability of a controlling shareholder is "largely coextensive with the liability faced by the corporation's directors." *Id.* (holding that controlling shareholder "cannot be held liable for a breach of the duty of care when the directors are

⁹ The Petition's attempt to re-argue *Teachers' Retirement Sys. of La. v. Aidinoff*, 900 A.2d 654 (Del. Ch. 2006) misses the mark. That case affirms the controlling rule that "when a contract is contended to have resulted from fiduciary misconduct, the statute of limitations begins running at the time of the decision to contract, as the date of the key wrong." *Aidinoff*, 900 A.2d at 666. The rule did not apply in *Aidinoff* because that case involved not a merger agreement with a subsequent "formality" of an approval process but rather a service contract that could be terminated annually and thus required recurring new decisions each year by the board. Thus, among other distinctions, *Aidinoff* did not involve the potential mischief of plaintiffs buying their way into a strike-suit by purchasing shares after a merger announcement.

¹⁰ Plaintiff's Complaints are replete with claims that the alleged controlling shareholder influenced the SCI Board to approve the merger. (*See, e.g.*, R. Vol. I, p. 11, ¶ 22.).

exculpated”).¹¹ Yet Plaintiff’s view of the law would yield the bizarre result that this “coextensive liability” somehow accrues at different times.

This anomaly is not merely theoretical but would impose significant real-world complications. Shareholder actions seeking to enjoin corporate mergers involving a controlling shareholder are commonplace, and it is equally routine for the plaintiffs in such actions to name as defendants all of the alleged fiduciaries – officers, directors and controlling shareholders. *See, e.g., In re MFW Shareholder Litig.*, C.A. No. 6566–CS, 2013 WL 2436341, *1 (Del. Ch. Mar. 11, 2013) (addressing claims initially brought as injunction action against directors and controlling shareholder). But if Plaintiff’s view of the law were correct, such actions could not proceed in such simple, unified and orderly fashion. They would have to be split in two, because at the injunction stage – *i.e.*, before the merger closes – no claims would have arisen yet against the controlling shareholder. In other words, Plaintiff’s view would entail marked inefficiencies and the risk of inconsistent or contradictory rulings, requiring, as it would, multiple proceedings against different defendants challenging the very same merger. This is inimical to Delaware law, and it makes no sense. *See In re SunGard Data Sys., Inc. S’holders Litig.*, No. Civ. A. 1221-N, 2005 WL 1653975 at *2 (Del. Ch. July 8, 2005) (holding “the optimal time to bring a disclosure claim in connection with a proposed merger, or in a like context where

¹¹ In *Shändler*, the directors were exculpated from all duty-of-care claims under a provision in the corporate articles; thus the claims against the controlling shareholder based on those duty-of-care allegations failed as well. To the extent other fiduciary duty claims were allowed to proceed against the directors, such claims were also possible against the controlling shareholder. *See Shändler*, 2010 WL 2929654 at *1, 12-16. In short, as the opinion states, the claims against both sets of defendants were “coextensive.” *Id.* at *16. The same reasoning applies here, and calls for all the claims against the directors and alleged controlling shareholder based on an allegedly unfair transaction to be treated the same.

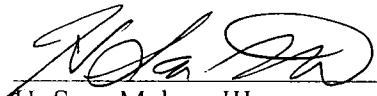
the company requests shareholder action or approval, is before the stockholder vote is taken and the deal closes.”) (emphasis added).

Moreover, treating controlling shareholder claims differently would also contradict the policy goals of the Delaware rule on accrual. As this Court wrote, the rule aims to allow actions to proceed as soon as a merger is announced, instead of requiring claimants to wait for actual damages, so that potential harms may be prevented before they occur. (Op., 90.) There is no policy reason for applying this rule differently when the defendant is a controlling shareholder. Similarly, the accrual rule exists to prevent entrepreneurial plaintiffs from “purchas[ing] a lawsuit.” (*Id.*) But Plaintiff’s approach would frustrate this intention in controlling shareholder cases, as the argument Plaintiff is making here would be theoretically available in any case with a controlling shareholder, and plaintiffs would therefore be free to buy risklessly into any such merger. Anyone could purchase shares after a merger announcement but before the closing, wait for the closing, and then, if the outcome were not to their liking, file suit. In sum, Plaintiff’s argument would open the door to precisely the type of conduct that the Delaware precedent, upon which this Court’s Opinion is based, forbids.

CONCLUSION

For the reasons stated above, Brian P. Menezes’s Petition for Rehearing should be denied.

Respectfully submitted,



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Attorneys for Respondents.

June 17, 2013

EXHIBIT A

The South Carolina Court of Appeals

Brian P. Menezes,

Respondent,

v.

WL Ross & Co. LLC, Wilbur L. Ross,
Jr., Michael J. Gibbons, David H.
Storper, David L. Wax, Joseph L.
Gorga, Stephen B. Duerk, WLR
Recovery Fund II, L.P., WLR Recovery
Fund III, L.P., WLR Recovery
Associates II LLC, and WLR Recovery
Associates III LLC,

Appellants.

The Honorable Edward W. Miller
Greenville County
Trial Court Case No. 2008-CP-23-2701

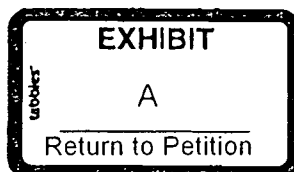
ORDER

The Motion to Supplement the Record on Appeal was not filed in a timely fashion and is therefore denied.

"Motion Denied."

s/ *H. R. Wan*
s/ *Daniel G. Pieper*
s/ *U. K.*

IT IS SO ORDERED.



Columbia, South Carolina
4/12/2011

cc: H. Sam Mabry, III, Esquire
Charles M. Sprinkle, III, Esq.
James Derrick Quattlebaum, Esquire
Joseph N. Finley
Michael J. McConnell
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EXHIBIT B



The Supreme Court of South Carolina

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September 23, 2011

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Re: Menezes, Brian P. v. WL Ross & Co

Dear Counsel:

The following Order has been endorsed on your Motion for Leave to Supplement Record on Appeal in the above entitled case on appeal.

"Motion denied.

s/ Costa M. Pleicones A.C.J.
For the Court

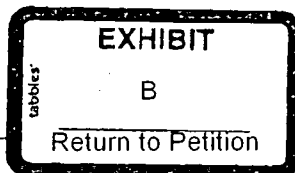
Chief Justice Jean H. Toal, not participating

September 23, 2011."

Please be advised that by copy of this letter we are advising all interested parties of the action by the Court.

Very truly yours,


CLERK



Menezes, Brian P. v. WL Ross & Co
Page Tow
September 23, 2011

DES/lda

cc: William D. Herlong, Esquire
II. Sam Mabry, III, Esquire
Charles M. Sprinkler, III, Esquire
Michael J. McConnell, Esquire
Joseph E. Finley, Esquire

**STATE OF SOUTH CAROLINA
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WLR Recover Fund III, L.P., WLR Recovery Associates II LLC, and WLR
Recovery Associates III, LLC, Respondents.

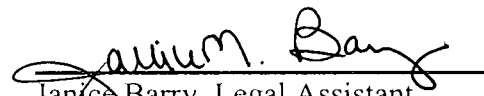
PROOF OF SERVICE

I hereby certify that I have served true and correct copies of *RESPONDENTS' RETURN TO PETITION FOR REHEARING* by mailing copies of said document to his attorney of record via regular U.S. Mail, postage prepaid, and via electronic mail, this the 17th day of June, 2013, to the addresses shown below:

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