THE STATE OF SOUTH CAROLINA

IN THE 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

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S.C. Supreme Court

Opinion No. 4810, (S.C. Ct. App. 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 Recovery Fund III, L.P, WLR Recovery Associates II LLC, and WLR Recovery Associates III LLC,..Respondents.

BRIAN P. MENEZES'S REPLY TO RESPONDENTS' RETURN TO HIS PETITION FOR REHEARING PURSUANT TO RULE 221(a), SCACR

Menezes petitioned this Court for a Rehearing because the Opinion was based upon a misapprehension of the allegations and claims pled in the subject lawsuit. Although this case is overlaid with Delaware law, the basis of this Petition is really a question as to the scope of a release. Menezes understands and accepts that this Court has decided that his claims against the Respondents for the SCI Board's decision to merge SCI and FITG have been released. The focus of the subject Petition, however, addresses actions and conduct that occurred after Menezes signed the release.

This case does not address a typical merger where two companies are combined, and once the decision to merge is made, no other events occur that would serve as a basis to stop the merger from closing. The unique facts of this case provide that after the merger was announced, SCI's merger partner began to financially collapse; the controlling shareholder was aware of that collapse but did not intervene to stop the merger. The controlling shareholder's actionable conduct occurred after the release was executed. Consequently, Menezes claims against the controlling shareholder for those actions have not been released.

In his opening Petition for Rehearing, Menezes articulated in clear form that the subject lawsuit, in addition to challenging the Board's decision, also seeks to hold the controlling shareholder liable for its vote to approve the merger. The basis of that liability flows from the material information that the controlling shareholder had in its possession when it voted to approve the merger. As noted in the opening Petition, the controlling shareholder learned of the rapid deterioration of FITG just weeks before the merger, but did not act. The pleadings in this case show that,

- On October 1, 2006, nearly three weeks before the Merger closed, Ross emailed Gorga regarding FITG's "discouraging weekly report" which show[ed] him that the remainder of 2006 would be "terrible" and commenting that "it seems less and less intelligent to commit vast sums based on lon[g] term forecasts from businesses that continually miss their short term budgets." (FACC, ¶175).

- Gorga replied to Ross, noting the "difficult market" FITG is experiencing in "many of our businesses." (FACC, ¶176).

- . . . [A]n FITG internal email string made the same point as Ross above, but more graphically. (FACC, ¶177).

- Lynn Guest wrote James Payne on October 12, 2006: ". . . September was a Disaster. We lost $680,000 in the month of September. We had made $55 and $174 in the two previous months and now we are at a loss of $451. This is $277 more than I had expected and it is really just about impossible to call this when our wip changes with large numbers. . . . Not very pretty, but it is what it is. Don't like, but it is." (FACC, ¶178).

- Payne replies: "I will call you in about ten minutes but I need to go throw up first!!!!!!" (FACC, ¶179).

These are post-Release, material facts that the controlling shareholder had in its possession before voting to approve the merger. The basis of this Petition is that the Court's Opinion operates to release the controlling shareholder from liability for actions that occurred after the release was signed. It is black letter law that a party may not enter into a contract that releases another party for conduct that has not occurred. CORPUS JURIS SECUNDUM, SCOPE AND EXTENT OF RELEASE § 76 (noting that "a release covering all claims that might later arise between the parties to the release is plainly against public policy, a release will not be extended to cover claims that arise in the future").

It is a critical point that the Respondents have not even attempted to respond to this argument.

I. Menezes Argument is Preserved

In footnote 2 of the Respondents Return, they state that Menezes did not make these arguments at the circuit court. That is not a correct statement. On pages 360-63 of the record, there is a section of Menezes Second Supplemental memorandum that was filed with the circuit court. Menezes detailed with underlined emphasis all of the post-release actions of the Respondent (which includes the controlling shareholder), that served as the basis for his claims. (R.p. 362). Menezes concluded that section by noting that, "[s]ince the underlined breaches took place after the Release and/or related to continuing duties of the defendant, they could not be barred by the Release." (R.p. 363).He went on to state that, "some of them literally are 'discrete' events that come even after the Closing (e.g., items (i) and (j) in the foregoing lists)." (R.p. 363). Items (i) and (j) refer to the dilutive debt for equity swap, and the new credit facility

(respectively). (See also Menezes Petition for Rehearing, p. 10). Moreover, in Menezes brief to the court of appeals, he specifically pointed out that, "[t]he very first cause of action is that the Appellant controlling shareholders breached their fiduciary duty by 'allowing [the Merger] to close notwithstanding the financial condition of FITG.'" (R.p. 1220-21).

This issue is preserved for review.

II. The Respondent's Challenge to the Pleadings

Instead of responding to the legal argument advanced by Menezes—that is, that post-release conduct of the controlling shareholder could not have been released—the Respondents instead attempt to re-plead his complaint. According to the Respondents, Menezes did not challenge the controlling shareholder vote because in his complaint he "devotes 40 pages" discussing the background facts leading up to the merger (Return, at p.6), and not enough time—"a mere four paragraphs"—discussing events between the announcement of the merger and the closing. (*Id.*) That statement is only correct, however, if one does not look at other sections of the complaint. For example, a different section of the complaint includes the five bullet point paragraphs quoted above. The Respondents go on to conclude with bold and italicized letters that Menezes does not even mention the shareholder vote in his entire complaint. (Return, at p.6). That statement is also not correct, as demonstrated by Menezes opening petition wherein he outlined his challenge to the controlling shareholder's decision (1) to allow the merger to close, and (2) approving the merger. (Menezes Petition, pp. 4, 8).

The inescapable takeaway from the Respondents efforts to re-plead Menezes' complaint is that the question raised in the subject Petition for Rehearing is not a question of law. It is a question of fact, and respectfully, that question should be decided in the first instance by the circuit court.

III. The Respondents' Response on the Law Ignores the Facts

The Respondents legal response is written in a manner that ignores the unique facts of this case. On August 29, 2006, the SCI Board voted to approve the merger. On September 28, 2006, Menezes signed a release. After signing the release, the losses at FITG began to escalate at a significant and alarming rate. The controlling shareholder knew this information, yet abandoned its fiduciary duties and voted for the merger on October 20, 2006. It is against the backdrop of those unique facts that the Respondents legal arguments must be analyzed.

The Respondents correctly point out that the fiduciary duties of a controlling shareholder are based upon the legal reasoning that a controlling shareholder has the ability to control and influence the decisions of the company's board of directors. (Respondents Return, p.9). They go on to assert that "liability of a controlling shareholder is [, therefore,] 'largely coextensive with the liability faced by the corporation's directors.'" (Respondents Return, p.9 (citing *Shandler v. DLJ Merch. Bank*, 2010 WL 2929654 (Del. Ch. July 26, 2010)). The Respondents then conclude that Menezes' Petition for Rehearing argument "would yield the bizarre result that this 'coextensive liability' somehow accrues at different times." (Respondents Return, p.10). That conclusion, however, is where Menezes' allegations depart from the Respondents argument—said differently, that conclusion is where the Respondents begin to ignore the unique facts of this case.

The Respondents argument rests upon the false premise that Menezes only challenges the SCI Board's vote to approve the merger. But as Menezes articulated in detail in his opening Petition, that is not a correct statement. Menezes also challenged the later and separate conduct of the controlling shareholder. The later and separate conduct of the controlling shareholder does

not involve the SCI Board. Consequently, those allegations of wrongdoing are not "coextensive" with the Board's conduct. For that reason, those separate claims must accrue at different times.

The Respondents also attempt to distract this Court from the straightforward argument Menezes articulates, by presenting a "sky is falling" response to his Petition:

> [I]f Plaintiffs view of the law were correct, [merger challenges] 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. 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.

(Respondents Return, p.10). Those arguments have nothing to do with this Petition.[1] This case addresses the scope of a release. Menezes does not assert, nor could he, that a controlling shareholder cannot be sued at the announcement of a merger in an effort to stop a merger. The operative point here is that after Menezes signed the release, the controlling shareholder made decisions and took actions that were in violation of its fiduciary duties.

CONCLUSION

Menezes pointed out in his opening Petition that this case was decided below at the pleading stage. Accordingly, this Court is required to determine whether in the light most favorable to the complainant and with every doubt resolved on his behalf, he states a valid claim for relief. *Freemantle v. Preston*, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012). Based upon this standard, the Court erred in holding that the post-Release conduct of the controlling shareholder cannot serve as a basis for liability.

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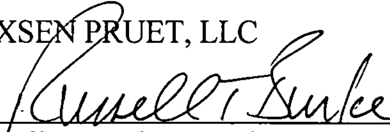
[1] The Respondents also contend that one could "purchase" a lawsuit if the Court finds that the post-release conduct of the controlling shareholder has not been released. That argument also has nothing to do with this petition. Menezes owned stock in SCI prior to the Release.

Respectfully submitted,

NEXSEN PRUET, LLC



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PROOF OF SERVICE

I certify that on this 24th day of June, 2013, I have served the **Reply to the Return to Menezes' Petition for Rehearing** upon all counsel of record by depositing a copy of same in the United States mail, postage prepaid, and addressed as follows:

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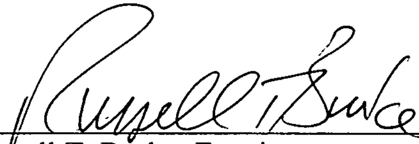

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