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Case No. 12913-VCMR

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOHN TOEDTMAN, Plaintiff, v. DANIEL A. POTTER and MICHAEL J. VIETEN, Defendants, and SILVERLINING HOLDING CORP. Nominal Defendant.	)	C.A. No. 12913 VCMR

DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to Chancery Court Rule 12 (c) Defendants Daniel A. Potter and Michael J. Vieten move for judgment on the pleadings in this summary Section 225 proceeding. As a matter of law, Plaintiff's 59 written consents do not represent a majority of the issued and outstanding stock of Silverling Holding Corp. (the "Company") on the record date of November 15, 2016.

I. RELEVANT BACKGROUND

On November 16, 2016, the Plaintiff, John Toedtman ("Toedtman"), one of three directors of the Company, filed a Verified Complaint seeking an *in rem* expedited determination pursuant to 8 Del. C. § 225 that the 58 {sic 59} consents

he filed "represent[] a majority of the issued and outstanding shares entitled to vote," (Ver. Compl. ¶¶ 5, 6, 7, Exhibit B) and that pursuant to 8 Del. C. § 228 those consents duly removed the Defendants, Daniel A. Potter ("Potter") and Michael J. Vieten ("Vieten"), from the Company's Board of Directors and elected Robert C. O'Mara director.

On November 16, 2016, predicated solely on the sworn averments of his Verified Complaint, Toedtman filed a motion for a Status Quo Order "akin to a temporary restraining order" (Motion at 4) that would broadly enjoin Potter in his capacity as the Company CEO, Treasurer, Chairman and along with Vieten as the two controlling directors from conducting business in the Company's ordinary course and from authorizing any issuance of stock that would alter "the status quo regarding ownership interests in" the Company.

Toedtman also filed a motion to expedite contending that "[a] majority of stockholders have acted by written consent to remove the Defendants" and that to "allow the Company to conduct its business in an orderly fashion," resolution of the claims made in his Verified Complaint were appropriate for a summary disposition.

On November 29, 2016, finding good cause, presumably predicated on Toedtman's sworn allegations that his 59 consents represented a majority of the issued and outstanding stock eligible to vote for directors, the Court granted

Toedtman's motion. As directed, the parties conferred and the Court scheduled a summary hearing for March 27, 2017.

On December 12, 2016, the Defendants filed their brief in opposition to Plaintiff's motion for a Status Quo Order. In support, Defendants filed the December 12, 2016 affidavits of Daniel A. Potter ("Potter Aff."), Michael J. Vieten ("Vieten Aff."), Nikki J. Anderson, the Company's Secretary and keeper of its stock ledger ("Anderson Aff."), and Patrick Tenney, the Company's Director of Pipelining Operations (US) ("Tenney Aff.").

On December 16, 2016, Toedtman filed a reply in support of his motion for a status quo order ("Reply"). In support of the Reply, Toedtman filed the December 16, 2016 affidavits of John Toedtman ("Toedtman Aff."), Jeorg Klaube ("Klaube Aff."), and Joseph Tomasek ("Tomasek Aff."). In his Reply, Toedtman contended he has:

> a colorable claim to have removed Defendants from the Board [and that t]he normal rule…that the Company is entitled to rely upon its stock ledger… [cannot apply in this case and that f]act disputes exist over three categories of shares as outlined in the Toedtman and Klaube Affidavits.

Reply at 3-4.

The three purported disputed categories of shares were: (i) the 462,501 unissued shares that the Verified Complaint alleged should have been issued to six of the consenting shareholders at some unspecified times; (ii) all shares issued

"after the September 13, 2016 [Board of Directors] meeting that …[Toedtman contends were issued] to entrench the Defendants;[1]" and, (iii) 200,000 of the 245,000 shares issued May 4, 2014 on Certificate 49 to Ms. Anderson and Certificate 52 to Richard Bedard were now subject to questions of authenticity notwithstanding that in his Verified Complaint Toedtman had attested all 245,000 to be issued and outstanding.[2] Toedtman Aff. ¶30; Reply at 1-7. According to Toedtman:

> a colorable claim has been stated ... if the … [462,501 unissued shares] are counted, and the improper … [1,116,500 shares issued to Mr. Potter and to Ms. Anderson for release of their wage claims and the 253,825 shares issued after the September 13th Board of Directors meeting to 7 investors] and the … [200,000 so-called] Unauthenticated Shares are not [counted]as of October 10, 2016, the Plaintiff had a majority of consenting stockholders, and Plaintiff wins this case.

Reply at 7.

On December 19, 2016, the Court heard the parties on Toedtman's motion for a Status Quo Order. See January 5, 2017 Certified Transcript ("Status Quo Hearing Tr.").

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[1] Toedtman's entrenchment theory focuses on 918,250 shares issued to Potter and 198,250 shares issued to Ms. Anderson for release of their wage claims through December 31, 2015 in the amounts of $734,580.00 and $158,600.00, respectively, (See Potter Aff. ¶28, ¶34 and Exhibit H; Vieten Aff. ¶12; Anderson Aff. ¶10) but also includes 253,825 shares issued after the September 13th Board of Directors meeting to 7 investors. Toedtman Aff. ¶30.

[2] See Exhibit B, Verified Complaint.

At the hearing, among other things, Defendants argued: (i) Plaintiff had no likelihood of success on the Verified Complaint's allegations that the consents signed by non-party creditors purporting to vote certain unissued shares should be counted to attain a majority of outstanding stock; and, (ii) the unpleaded claims referenced in Plaintiff's Reply assailing the 1,116,500 shares issued to Potter and to Ms. Anderson for release of their wage claims and the 200,000 so-called Unauthenticated Shares were not in the case. Status Quo Hearing Tr. at 14:8-14, 16:15-24, and 17-20.

At the hearing, acknowledging he had not "amended th[e] complaint to add a challenge to the other shares," *id.* at 39, the Plaintiff informed the Court at this point "we figure all the shares are on the table." *Id*. at 39-40. The Plaintiff argued he had a likelihood of success, if following a trial:

- 1,116,500 shares issued to Potter and to Ms. Anderson for release of their wage claims were voided;
- 253,825 shares issued after the September 13th Board of Directors meeting to 7 investors were voided;
- 200,000 of the undisputed 245,000 outstanding shares on two registered certificates were voided for lack of authenticity; and

- the 462,501 unissued shares which in his verified complaint Toedtman alleged should have been issued to six non-parties were counted.

Status Quo Hearing Tr. at 5-6, 38-40.[3] At the hearing, the Plaintiff conceded that even assuming he succeeded in all his new, unpleaded claims, he still:

> need[s] an order in equity ultimately to prevail in this case. We will need to count shares that we're arguing are—should have been duly issued and outstanding shares counted in this proceeding.

Id. at 28.[4]

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[3] For the purposes of this motion only, as it is a Motion for Judgment on the Pleadings, the actual number of issued shares of the Company as of the record date, which the Defendants assert to be 10,392,489 is not material. See Anderson Aff. at ¶ 3, Exhibit B. Defendants reserve the right to have all shares as reflected in the Certified Stock Ledger considered for the purposes of this action, and nothing herein shall be deemed as a waiver of any rights held by the Defendants or an admission that any portion of the Certified Stock Ledger is inaccurate or incomplete.

[4] This is a simple matter of arithmetic. As of August 31, 2016, it is undisputed there were a total of 9,022,164 issued and outstanding shares. See Verified Complaint, Exhibit B; Anderson Aff. ¶ 9, Exhibit B. Therefore, hypothetically voiding and deducting both all shares issued after September 13, 2016 and 200,000 of the shares issued to Ms. Anderson and Mr. Bedard on May 4, 2014, leaves an electorate (9,022,164 minus 200,000) equal to 8,822,164. To have a majority of such an electorate requires 4,411,082 votes. Because Toedtman's consents represent 4,439,726 issued and outstanding shares, even if he should prevail on his new claims, Toedtman has no claim unless all the 473,751 "unissued shares" are deemed to be part of the issued and outstanding electorate and 462,501 of those "unissued shares" are counted. See Verified Complaint ¶ 8 ("we included [the votes of] six (6) Company investors and creditors … to whom Defendant Potter has not issued stock certificates, representing … 462,521 {*sic* 462,501}uncertificated and paid for Company common shares"); See also Verified Complaint, Exhibit B.

As directed by the Court following the hearing, the parties conferred about the form of a status quo order. See December 20 and 29, 2016 correspondence, Exhibits A, B and C to Defendants' January 10, 2017 letter submission to the Court.

On January 10, 2017, the Plaintiff filed a letter and his proposed Status Quo Order. That same day, the Defendants filed a letter with exhibits A, B, and C along with their form of a proposed order.

The Plaintiff did not file an amended complaint as of right under Chancery Court Rule 15;[5] and, on January 11, 2017, the Defendants filed their answer to Plaintiff's Verified Complaint.

[5] On January 20, 2017, the Plaintiff provided Defendants' with proposed amendments to his Verified Complaint and asked Defendants to stipulate to its late filing. The proposed amended complaint would add those claims postulated in Plaintiff's December 16, 2016 Reply. On January 24, 2017, the parties conferred and Defendants explained the new claims would be futile unless, as Plaintiff had conceded in open court, he prevailed on his theory that 462,501 votes of unissued shares were counted and that Defendants would be filing a dispositive motion predicated on the ineligibility of those 462,501 votes. Defendants proposed the parties stipulate both to the amended complaint and to stay all discovery pending the Court's resolution of Defendants' Motion for Judgment on the Pleadings. Defendants postulated that if the 462,501 voters were out, no discovery would be needed, but if those votes were in the case, discovery concerning the other shares would then, as a general matter, be fair game for discovery. Therefore, it would be more efficient for the parties and reduce the cost of discovery to await resolution of Defendants' dispositive motion. But Plaintiff disputed whether his claim to include and count 462,501 votes from the six non-parties could be decided as question of law. And, even assuming that such dispositive issue could be decided as a matter of law for the stated reason the Court has scheduled a trial in this summary proceeding on March 27, 2017, the Plaintiff would not agree to stay discovery on

On January 12, 2017, the Court entered a Status Quo Order.

Defendants have also filed a motion to stay discovery pending the outcome of this motion. See note 5 *supra*.

II. APPLICABLE STANDARDS

Chancery Court Rule 12 (c) provides.

> **(c) Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

It is black letter law a complaint must give fair notice of a claim to survive summary judgment. *Emerald Partners v. Berlin*, 726 A. 2d 1215, 1220 (Del. 1999) citing *Michelson v. Duncan*, 407 A. 2d 211, 217 (Del. 1979).

III. APPLICABLE SUBSTANTIVE LAW; ARGUMENT.

Section 225. Toedtman's 225 action is an expedited, *in rem* proceeding in which this Court exercises jurisdiction over the defendant controlling directors, Potter and Vieten, "only for the limited purpose of determining the corporation's *de*

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either the Verified Complaint's "unissued shares" claim or the "entrenchment" and "authenticity" claims in his proposed amended complaint. Plaintiff declined Defendants' proposed stipulation but did commit to negotiating an expedited briefing schedule on this motion. Defendants will conditionally stipulate to allowance of Plaintiff's Rule 15 motion to amend in the event this motion is denied.

jure directors and officers." *Genger v. TR Investors, LLC*, 26 A.3d 180, 199–200 (Del. 2011). As the plaintiff, Toedtman "bears the burden of proving by a preponderance of the evidence that …[he] is entitled to relief." *In re IAC/InterActive Corp.*, 948 A.2d 471, 493 (Del. Ch. 2008).

A. A section 228 prima facie case requires proof of the number of shareholders of record on November 15, 2016, the date on which Toedtman's consents were delivered in hand to the Company's registered Delaware office; and that those consents in the requisite form and substance constitute a majority of the record electorate.

It is black letter law that "each stockholder shall be entitled to 1 vote for each share of capital stock held by such stockholder." 8 Del. C. §212(a) (emphasis added). Only record holders can vote shares at shareholders' meetings. *Drob. v. Nat'l Mem. Park, Inc.*, 41 A.2d 589 (Del. Ch. 1945). Shares have not been "issued" for purposes of voting until custody and control of the certificate has passed. *Norton v. Digital Applications, Inc*., 305 A. 2d 656 (Del. Ch. 1973). The Company is entitled to recognize the exclusive right of solely the registered owners to vote. 8 Del. C. § 219(c) ("The stock ledger shall be the only evidence as to who are the stockholders entitled by this section...to vote in person or by proxy at any meeting of stockholders."). *See American Hardware Corp. v Savage Arms. Corp.*, 136 A.2d 690 (Del. 1957); *Boris v. Schaheen*, 2013 WL 6331287, at *18 (Del. Ch. Dec. 2, 2013) (same) citing *Testa v. Jarvis*, 1994 WL 30517, at *6 (Del. Ch. Jan. 12, 1994, revised Jan. 12, 1994) ("Where the company's ledgers show record

ownership, no other evidence of shareholder status is necessary."). The Company's stock ledger is the final authority as to who is entitled to vote. *Magill v. North Am. Refractories Co.*, 128 A. 2d 233 (1956).

In reliance on a set of by-laws authenticated by his attorney Joseph Tomasek, the Plaintiff argues the Record Date for determining the eligible electorate is October 10, 2016, the date of the first written consent. Dec. 16, 2016 Reply at 6. Section 5.4 of the Company's by-laws as attested to by Mr. Tomasek[6] provides in relevant part:

> the record date for determining stockholders entitled to express consent to corporate action in writing without a meeting, when no prior action by the Board of Directors is necessary, shall be the day on which the first written consent is expressed.

See Tomasek Aff., Exh. JT-1 at 9.

Because it is undisputed the Board of Directors did not set a record date, this by-law provision is contrary to, and hence superseded by, 8 Del. C. § 213(b) which provides in relevant part:

> If no record date has been fixed by the board of directors, the record date for determining stockholders entitled to consent to corporate action in writing without a meeting, when no prior action by the board of directors is required by this chapter, shall be the first date on which a signed written consent setting forth the action taken or proposed to be taken is delivered to the corporation by delivery to its registered office in this State, its principal place of business or an officer or agent of the corporation having custody of the book in which proceedings of meetings of stockholders are recorded.

[6] Defendants neither admit nor deny the authenticity of these by-laws.

Therefore, the record date is November 15, 2016 when Toedtman's 59 consents were hand delivered to the Company's registered office in Delaware. Ver. Compl. ¶ 5; 8 Del. C. §213(b). *See* Potter Aff. ¶36 (consents delivered to Company's Needham, Massachusetts offices on November 17, 2017).

B. Toedtman's Verified Complaint fails to state a claim for which relief can be granted.

In his Verified Complaint Toedtman avers under oath that the 58 [*sic* 59] consents that he filed "represent[] a majority of the issued and outstanding shares entitled to vote." Ver. Compl. ¶¶ 5, 6 (emphasis added). The Verified Complaint mistakenly postulates that as of the record date there are a total of 9,022,164 "issued and outstanding shares" for which the Company has issued certificates. Exh. B, Ver. Compl.[7] On that presumed universe of eligible "issued and outstanding shares," the votes of the registered owners of 4,511,082 shares (50%) would be required under 8 Del. C. § 228 to remove and elect directors.

To reach the requisite 4,511,082 shares to constitute a majority as of the record date, however, Toedtman relies on 473,751 shares of stock that have never been issued that he asserts should have been issued to third parties and contends

[7] Toedtman's attested-to list of registered stockholders is the August 31, 2016 certified capitalization table provided to him following his flawed September 13, 2016 removal of solely Potter based on his mistaken "estimated" number of outstanding shares. See Anderson Aff. ¶9, Exh. B and compare to Exh. B, Verified Complaint.

that with 462,521 (*sic* 462,501) of these unissued shares included in his written consents, he has a majority. Ver. Compl. ¶¶ 7, 8 and Exhibit B. See note 4 *supra*. Without these shares—regardless of whether shares issued after August 31, 2016 and before the record date are considered—the consent action fails to reach the requisite majority. Excluding the unissued shares, Toedtman's consents represent 4,349,726 issued and outstanding shares.[8] With an eligible electorate of 9,022,164 issued and registered shares, that is only 48.21%, not the required majority.

Therefore as a matter of law his verified complaint fails to state a claim for which relief can be granted because only record holders can vote shares and there are no set of facts Toedtman can prove entitling him to relief. *See* 8 Del. C. §213(b).

C. As a matter of law Toedtman's Verified Complaint fails to state a claim for which relief can be granted concerning the alleged breach by the Company of certain contracts with six non-party creditors.

Contending "he has no adequate remedy at law," Ver. Compl. ¶14, Toedtman's complaint seeks to invoke equity to secure a declaratory judgment that his 59 consents constitute a majority of the Company's issued and outstanding shares of stock on the record date. *Id.* ¶¶13, 17.[9] Acknowledging that at law the

[8] See Anderson Aff. ¶3, Exhibit A showing the arithmetic calculation of the sum derived from the Verified Complaint, Exhibit B.

[9] It is undisputed that even assuming the voiding of the shares Toedtman would now seek to attack under his proposed amended complaint, unless in equity Toedtman can include the 462,501 votes of what he calls the unissued shares, there

consents do not constitute a majority of the issued and outstanding shares, Toedtman contends he should be able to invoke equity on behalf of six creditors without their appearance in the case and have the Court first adjudicate at law that the individual contracts of each of these six non-parties has been breached and then in equity decree specific performance requiring the Company to issue the shares adjudged due on the date of the breach; and, in order to be included in the eligible electorate such decree must issue *nunc pro tunc* to one or more dates preceding the record date. *Id.* ¶¶11-14, 17.

Accepting as true Toedtman's allegations, each contract holder has claim at law against the Company for breach of contract. A plaintiff who seeks specific performance of a contract for the sale of Delaware corporate stock is not necessarily entitled to such a decree if money damages are deemed adequate relief. *See*, e.g., *U.S. Dimension Products, Inc. v. Tassette*, 290 A. 2d 634, 635 (Del. 1972).

And of course, whether each individual claimant who might sue would be entitled to an equitable decree depends on the specific individual circumstances and would be subject to the usual equitable defenses, including by way of example and not limitation: (i) laches, *i.e.*, an awareness of the claim, coupled with an unreasonable delay in bringing the claim and consequent prejudice to defendant;

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are no set of facts he could prove entitling him to relief. See note 4 *supra* and text accompanying note 4.

(ii) acquiescence, *e.g.*, an awareness of some improper act by the nominal defendant yet "stand[ing] by without objection and allowing the … [the affected party] to act in a manner inconsistent with the claimant's properly {*sic* property} rights;" (iii) waiver; (iv) equitable estoppel; and (v) unclean hands. *Keyser v. Curtis*, No. CIV.A. 7109-VCN, 2012 WL 3115453, *15-*18 (Del. Ch. July 31, 2012), aff'd sub nom. *Poliak v. Keyser*, 65 A.3d 617 (Del. 2013).

In all events, Toedtman lacks standing to assert these claims. Del. Ch. R.17 provides in relevant part:

> **(a) Real Party in Interest.** Every action shall be prosecuted in the name of the real party in interest.

Yet, Toedtman has not sought to join any of these six necessary parties as party plaintiffs and the Nominal Defendant Company as a party defendant.

Toedtman cannot properly invoke the equity jurisdiction of this Court to seek to bring into the case simple contract claims of non-parties. Cf. *Hillsboro Energy, LLC v. Secure Energy, Inc.*, 2008 Del. Ch. LEXIS 145, at *5, 6 (Del. Ch. Oct. 3, 2008) ("one cannot parade a duck around and call it a swan")("To be clear, this Court will not permit a party to bring a claim in equity when a sufficient legal remedy exists…").

IV. CONCLUSION.

For the foregoing reasons, Defendants Daniel A. Potter and Michael J. Vieten request the Court to grant them judgment on the pleadings.

Dated: January 26, 2017

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