

Alan Kahn v. Kevin McCarthy, et al., C.A. No. 4054 (Del. Ch. Sept. 24, 2008) (C. Chandler)

The Court of Chancery held that plaintiff was not entitled to a temporary restraining order prohibiting defendants from proceeding with a merger because he failed to show a probability of success on the merits of his claim that additional disclosure regarding the Department of Treasury's Troubled Asset Relief Program was material to stockholders. Plaintiff is a stockholder of defendant PFF Bancorp, Inc. (PFF), a diversified financial services company that holds a portfolio of mortgages. In light of the financial crisis of 2007 and early 2008, PFF's mortgage portfolios declined. PFF's board of directors determined that a merger with FBOP Corporation was the best alternative for PFF and its stockholders. The United States Treasury recently announced the creation of a Troubled Asset Relief Program, where the Federal Government would purchase certain mortgage assets held by financial institutions. The Court recognized that details of the Relief Program are still uncertain and that it was unclear when (or if) Congress would approve the Program. Plaintiff claimed that PFF's assets had a higher value after the announcement of the Relief Program than that reflected in the proxy statement, that the Board breached their fiduciary duties by failing to update the proxy statement to reflect the proposed Relief Program, and that the Board had a duty to delay the stockholder vote until the proxy statement had been amended to reflect the alleged change in value. The Court disagreed and found that the Board presented PFF stockholders with adequate disclosures in the proxy statement. The Court reiterated the fact that the proposed Relief Program was incomplete and that Congress had not approved the plan nor decided on the contents, and as such the Board was not required to make calculations on "speculative" stock value increases at that time. Because of the speculative nature of the proposed Relief Program, any further disclosure would have been merely conjectural. Accordingly, the Court held that plaintiff would not prevail on the merits of his claim and denied the motion for a temporary restraining order.

The full opinion is available [here](#).



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Submitted: September 24, 2008
Decided: September 24, 2008

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Re: *Alan Kahn v. Kevin McCarthy, et al.*
Civil Action No. 4054-CC

Dear Counsel:

Plaintiff in this action, Alan Khan, is requesting that this Court enter a temporary restraining order ("TRO") prohibiting defendants from proceeding with or consummating the merger of PFF Bancorp, Inc ("PFF") with and into FBOP Corporation (FBOP). Defendants in this case, PFF and the individual directors of PFF, oppose the TRO and have filed a motion to stay the proceedings in this Court.

Plaintiff alleges that the stockholders of PFF will suffer imminent and irreparable harm if the stockholder vote required to approve the merger occurs without amended disclosure in the proxy statement that was distributed to stockholders on August 26, 2008. The disclosures plaintiff seeks are related to a proposed relief program that was recently proposed by Secretary of the Treasury Henry M. Paulson. Because plaintiff has failed to show a probability of success on

the merits of his claim, the motion for a temporary restraining order is denied and the motion to stay is granted.

PFF is a diversified financial services company headquartered in Rancho Cucamonga, California. PFF conducts its business principally through a wholly owned subsidiary, PFF Bank & Trust (the “Bank”), an institution with branch offices located throughout Southern California. On June 13, 2008, PFF entered into an agreement and plan of merger with FBOP (the “Agreement”). The terms of the Agreement call for PFF stockholders to receive \$1.35 in cash for each share of common stock they own at the time of the merger. In connection with the merger, FBOP agreed to immediately loan PFF \$7 million in exchange for a secured convertible note and pledge agreement to maintain the Bank’s “adequately capitalized” regulatory status. The merger is conditioned on approval of a majority of outstanding shares of PFF common stock and Series A preferred stock, voting as a class. The stockholder vote on the merger is scheduled for September 25, 2008.

The events precipitating the merger are of particular relevance in this case. Like many other banks and financial institutions, PFF experienced a deterioration in its business and finances during 2007 and early 2008. PFF holds a portfolio of mortgages, including residential mortgages. Recent changes in the real estate and credit markets have led to a decline in the value of many mortgage related assets.

In light of these events the board of directors of PFF (the “Board”) began considering strategic alternatives, including a sale of PFF. The result of this process was the Agreement with FBOP. The Board determined that a merger with FBOP was the best alternative for PFF and its stockholders, especially in light of recent market uncertainty and potential regulatory issues faced by PFF.

On June 18, 2008, a PFF stockholder filed a class action lawsuit in Los Angeles Superior Court against PFF, its directors, and FBOP, styled, *Maiman v. PFF Bancorp, Inc.*, Case No. BC392833 (Cal. Super. Ct.) (the “California Action”). The complaint in the California Action alleged, among other things, that the directors of PFF breached their fiduciary duties and obligations to PFF’s stockholders by (1) failing to maximize stockholder value in connection with the merger with FBOP and (2) failing to disclose all material information to PFF stockholders. The parties to the California Action reached an agreement regarding additional information to be included in the proxy statement and filed a stipulation of settlement on September 16, 2008. A hearing for preliminary approval of the settlement is scheduled for October 8, 2008.

As has been widely reported in the national media, Secretary of the Treasury Henry M. Paulson recently announced a Troubled Asset Relief Program (the “Relief Program”), pursuant to which the United States Federal Government would purchase certain mortgage assets held by financial institutions. The details of the Relief Program are not yet known, and it is unclear when, or if, Congress will act to approve the Relief Program.

On September 23, 2008, the Board met and discussed the potential Relief Program and determined, in light of the uncertain nature of the Relief Plan and the financial and regulatory issues facing PFF, that the merger with FBOP was still in the best interests of PFF and its stockholders. The Board also determined that it was in the best interests of PFF and its stockholders that the special meeting for the purpose of seeking stockholder approval for the merger go forward as scheduled on September 25, 2008.

Plaintiff alleges that the directors of PFF breached their fiduciary duties by failing to update the proxy statement to reflect the proposed Relief Program and any changes in the finances of PFF that may have resulted. Plaintiff claims that PFF’s troubled assets now have a value higher than that reflected in the proxy statement and that the Board has a duty to delay the stockholder vote in order to amend the proxy statement. Plaintiff requests that this Court issue a TRO preventing PFF or the Board from proceeding with the scheduled stockholder vote. As explained below, I decline to issue the temporary restraining order.

To issue a temporary restraining order, the Court generally considers three factors: “the imminence and significance of plaintiffs claim of irreparable injury; the probable merits of plaintiffs claim; and the risks to defendant in the event a restraining order were issued and it ultimately was determined that the restraining order was improvidently issued.”¹

Plaintiff will not prevail on the merits of his claim because plaintiff has failed to show that the disclosures regarding the Relief Program are material to PFF stockholders. On its face, it appears that the Board has presented PFF stockholders with adequate disclosures in the proxy statement, which contains all material available and ascertainable information needed in such a solicitation. The proposed Relief Program, as it currently exists, is incomplete and Congress has not yet approved the plan or decided on its contents. It is unknown when, or if Congress will approve the Relief Program. Also, any conjecture as to the final

¹ *Newman v. Warren*, 684 A.2d 1239, 1244 (Del. Ch. 1996).

contents of the Relief Program is purely speculative. It would be impossible to impose upon the Board an obligation to predict the outcome of Congressional deliberations and then to apply, *ex ante*, such speculation into their valuation models. Although it is possible the Relief Program will ultimately benefit PFF and lead to an increase in shareholder value, the Board would be unable to make that calculation at this time. Thus, I conclude that plaintiff is unlikely to prevail on the merits of his claim that additional disclosure regarding the Relief Program is material to PFF stockholders.

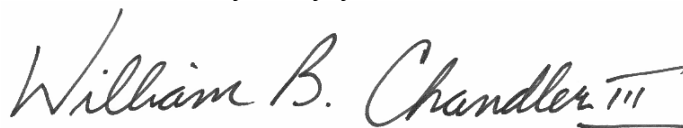
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“The Court’s right to grant a stay is within the exclusive discretion of the Court. The Court’s discretion to issue a stay is ‘inherent in every court and flows from its control over the disposition of causes on its docket.’”² I conclude that the most judicially efficient way to proceed is to stay the action here and to allow the plaintiff to proceed with the action in the California Superior Court.

For the above stated reasons, I grant defendants’ motion for a stay and deny plaintiff’s motion for a temporary restraining order.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in black ink and is positioned above the printed name.

William B. Chandler III

WBCIII:meg

² *In Re TGM Enterprises, LLC*, 2008 WL 4261035, at *1 (Del. Ch. Sept. 12, 2008) (citing *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 683 (Del. 1964) (discussing the Court’s control over its own docket and the Court’s right to use discretion in deciding whether to grant a stay)).