IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: NATIVE AMERICAN ENERGY GROUP, INC.	)	C.A. No. 6358-VCL

MEMORANDUM OPINION

Date Submitted: May 5, 2011
Date Decided: May 19, 2011

Vernon R. Proctor, Proctor Heyman LLP, Wilmington, Delaware; *Attorney for Petitioner*.

LASTER, Vice Chancellor.

Petitioner Native American Energy Group, Inc. ("New Energy Group" or the "Corporation") is a Delaware corporation whose shares trade on the over-the-counter quotation board, otherwise known as the "pink sheets." New Energy Group filed this action in an effort to cure a flaw in its capital structure. There are no defendants. Because it seeks an impermissible advisory opinion, the action is dismissed without prejudice for lack of jurisdiction.

I. FACTUAL BACKGROUND

The facts are drawn from New Energy Group's "Verified Petition for Declaratory Relief Pursuant to 8 *Del. C.* § 225(b)" and from the documents incorporated by reference in that pleading. For purposes of analysis, I have assumed the truth of the petition's allegations and granted New Energy Group the benefit of all reasonable inferences.

A. Old Energy Group

On January 18, 2005, New Energy Group's predecessor was formed as a Nevada corporation named "Halstead Energy Corporation." One week later, on January 25, its name was changed to Native American Energy Group, Inc. I refer to this entity as "Old Energy Group."

At the time Old Energy Group was formed, there already was a defunct, publicly registered corporation named Halstead Energy Corporation. That entity was formed in the 1980s and issued shares to the public. It ultimately filed for bankruptcy in 1999. I refer to the bankrupt entity as "Old Halstead."

On February 7, 2005, Old Energy Group listed its shares for trading on the Nasdaq over-the-counter market using Old Halstead's CUSIP number.[1] Three days later, on February 10, Old Energy Group engaged in a 1-for-200 reverse stock split. Old Energy Group's post-split shares traded under a new symbol, "NVMG."

B. The Halstead Shares

At the time Old Energy Group's shares began trading, the Depository Trust & Clearing Company ("DTC") held 1,037,714 shares of Old Halstead common stock. In connection with the February 2005 reverse stock split, DTC erroneously delivered the Old Halstead shares to Old Energy Group's transfer agent. The transfer agent in turn erroneously issued 5,195 shares of Old Energy Group common stock to DTC. I refer to the resulting shares as the "Old Halstead Shares," because they derived from the shares of Old Halstead common stock.

Old Energy Group's reverse stock split did not contemplate the issuance of Old Energy Group shares for the Old Halstead shares. DTC's delivery of the 1,037,714 shares of Old Halstead common stock and the transfer agent's issuance of the post-reverse-split Old Halstead Shares were understandable administrative errors prompted by the unconventional means by which Old Energy Group sought to access the public

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[1] "CUSIP stands for Committee on Uniform Securities Identification Procedures. A CUSIP number identifies most securities, including: stocks of all registered U.S. and Canadian companies, and U.S. government and municipal bonds. The CUSIP system . . . facilitates the clearing and settlement process of securities. The number consists of nine characters . . . that uniquely identify a company or issuer and the type of security." U.S. Securities and Exchange Commission, CUSIP Number (Jan. 31, 2006), http://www.sec.gov/answers/cusip.htm.

markets. Because of the administrative errors, Old Energy Group's post-reverse-split float contained 5,195 shares that were not validly issued. Once beneficial owners traded in Old Energy Group's shares, it became impossible to identify the problematic Old Halstead Shares.

C. The SEC Suspends Trading In Old Energy Group's Shares.

On March 13, 2008, the Securities and Exchange Commission suspended trading in Old Energy Group's shares. The SEC alleged that Old Energy Group and twenty-five other companies had usurped the identities of defunct or inactive publicly traded corporations using a tactic known as "corporate hijacking." According to the SEC's press release,

> [i]n conducting the corporate hijacking, certain persons appear to have incorporated each of the 26 companies using the same name as a then defunct or inactive publicly-traded corporation. For identification purposes, each class of an issuer's publicly-traded securities is assigned a ticker symbol by Nasdaq Reorganization and a CUSIP number by the Standard & Poor's CUSIP Bureau. These same persons appear to have usurped the CUSIP numbers and ticker symbols assigned to the defunct or inactive corporations' publicly-traded securities for use by the newly-incorporated entities. They then appear to have obtained new CUSIP numbers and ticker symbols in lieu of the old ones, also for use of the newly incorporated entities, by apparently representing falsely that they were duly authorized officers, directors, or agents of the original publicly-traded corporation.

U.S. Securities and Exchange Commission, SEC Suspends Trading of 26 Companies to Combat Corporate Hijackings (Mar. 13, 2008), http://www.sec.gov/news/press/2008/2008-41.htm. It does not appear that Old Energy Group's shares ever resumed trading.

In response to the SEC's stop-trading order, Old Energy Group's management conducted an investigation. According to the petition, they discovered that "while

management initially received a public listing and ticker symbol in February 2005, a Form 15c2-11 had never been properly filed on behalf of [Old Energy Group] by [its] attorney, nor, apparently, did [the attorney] seek the consent of [Old Halstead] to use its name, CUSIP number and ticker symbol." Pet. ¶ 5. The petition avers that Old Energy Group's management "knew that an inactive company had been previously assigned the CUSIP number and ticker symbol that NAEG used, but believed that NAEG's attorney had obtained the necessary consents and approvals to use such name and CUSIP number." *Id.* ¶ 6.

D. The Flight Management Merger

With the SEC's stop-trading order blocking their ability to use Old Energy Group to access the public markets, those who controlled Old Energy Group sought another publicly registered vehicle. By merger agreement dated October 19, 2009, Old Energy Group merged with and into Flight Management International, Inc. ("Flight Management" or "FMGM"), a Delaware corporation. As recited in the merger agreement, Flight Management was "a company with no current operations," but its shares were listed on the pink sheets under the symbol "FMGM." Pet'r's Mem. of Law in Supp. of Req. for Decl. Relief, Ex. 1 at 1.

The merger agreement provided as follows:

> 6. **Share Conversions.** Each outstanding share of NAEG shall be converted into 0.0001 share(s) of FMGM (10,000 old for 1 new).
>
> 7. **Conversion of NAEG Share Certificates or Shares in Street Name.** FMGM understands and agrees to accept and honor all properly presented stock certificates of NAEG's shareholders and exchange

> them for stock certificates of FMGM, on the same basis of conversion (10,000 old common shares for 1 new common share) as stipulated herein.
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> 8. **Fractional Shares.** FMGM agrees that any fractional share created as part of the merger or share conversion will cause FMGM to issue one full share. A stock certificate shall be considered properly presented when physically provided to the FMGM's Transfer Agent.

Pet'r's Mem. of Law in Supp. of Req. for Decl. Relief, Ex. 1 at 2.

A certificate of merger was filed on October 21, 2009, with an effective date for the merger of October 23, 2009. After the merger, Flight Management changed its name to "Native American Energy Group, Inc.," and this is the entity that I have referred to as "New Energy Group." *Id.* New Energy Group contemporaneously changed its symbol from "FMGM" to "NAGP." The petition recognizes that as a result of the merger, the issued and outstanding shares of New Energy Group include shares resulting (in whole or in part) from the invalidly issued Old Halstead Shares.

E. The Global Lock

On May 27, 2010, DTC suspended trading and settlement services in New Energy Group's shares, a regulatory action colloquially known as a "Global Lock" or "Chill." *See* Pet. ¶ 13. DTC advised New Energy Group that the Global Lock was imposed due to DTC's uncertainty about the validity of the Old Halstead Shares.

In an effort to address the Global Lock, the New Energy Group board of directors acted by unanimous written consent on March 28, 2011, to acknowledge and confirm that the capital stock of New Energy Group currently includes 10 shares derived from the Old Halstead Shares. The resolution stated, in pertinent part:

> WHEREAS, the Board acknowledges and confirms that the capital stock of the Company currently includes 10 (ten) freely tradable shares of common stock of the defunct Halstead Energy Corporation which were erroneously commingled with the Company's common stock in February 2005, (the "Subject Shares"); and
>
> WHEREAS, the Board has determined that it is necessary and in the Company's best interest to officially recognize the status of the Subject Shares as being part of the Company's outstanding shares and legitimate free-trading float; and . . .
>
> WHEREAS, the Board understands that DTCC will consider removal of the "global lock" on the transfer of the Company's Common Stock once the Company obtains a court order confirming that the Subject Shares may be included within the Company's public float; and . . .
>
> NOW, THEREFORE, BE IT RESOLVED that the Subject Shares shall, from and after the date hereof, be recognized as freely transferable shares of the Company's outstanding Common Stock . . . .

Pet. Ex. B. The consent was executed by Joseph G. D'Arrigo, Raj S. Nanvaan, and Richard Ross. *Id.*

Also on March 28, 2011, D'Arrigo and Nanvaan took action by written consent in their capacity as stockholders to approve the following resolution:

> **RESOLVED**, that the ten (10) freely tradable shares of common stock of the defunct Halstead Energy Corporation that were erroneously commingled with the Company's Common Stock in February 2005 shall, from and after the date hereof, be recognized as freely transferable shares of the Company's outstanding Common Stock.

Pet. Ex. C. The consent recites that D'Arrigo and Nanvaan each own (i) 5,045,751 shares of Energy Group common stock and (ii) 250,000 shares of Series A Convertible Preferred Stock. The petition avers that New Energy Group has issued approximately 29 million common shares, but only 500,000 shares of preferred stock, all of which are held by D'Arrigo and Nanvaan. Pet. ¶ 19. Under the certificate of designations for the preferred

stock, each share of preferred stock carries 1,000 votes. The signatories to the written consent thus exercised 510,091,502 votes in favor of the resolution out of total outstanding voting power of approximately 529,000,000 votes. Between March 31 and April 7, 2011, Broadridge Financial Solutions, Inc. mailed notice of the action taken by written consent to New Energy Group's non-consenting stockholders of record as of March 28, 2011.

F. This Litigation

On April 8, 2011, New Energy Group filed this litigation seeking a declaration pursuant to Section 225(b) of the Delaware General Corporation Law (the "DGCL"), 8 *Del. C.* § 225(b), that "the action taken by the holders of a majority of the voting power of the Company with respect to the Subject Shares is valid" and "from and after the date of the Court's order, the ten Subject Shares shall be recognized as part of the tradable issued and outstanding Common Stock of the Company." Pet. at 7. New Energy Group served itself with the petition by effecting service on its registered agent. Even though DTC had imposed the Global Lock eleven months earlier, New Energy Group contended that it needed an expedited ruling because "[u]nder the terms of a settlement agreement in an investor lawsuit filed against the Company in a New York state court, the Company must eliminate the Global Lock by May 7, 2011, or that litigation will continue." Pet. ¶ 24. New Energy Group subsequently obtained an extension of that deadline.

II. LEGAL ANALYSIS

This Court has an independent obligation to consider whether it can properly exercise jurisdiction over a matter, "regardless of whether the issue has been raised by the

parties."[2] When a party seeks a declaratory judgment, as New Energy Group has done, the Court must determine whether an "actual controversy" exists sufficient to warrant adjudicating the dispute. *Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 662-63 (Del. 1973); *accord Ackerman v. Stemerman*, 201 A.2d 173, 175 (Del. 1964) ("The existence of an actual controversy between the parties is a jurisdictional fact in actions for declaratory judgments . . . .").

> (1) It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; (4) the issue involved in the controversy must be ripe for judicial determination.

Stroud v. Milliken Enters., Inc., 552 A.2d 476, 479-80 (Del. 1989) (quoting *Rollins*). A request for a declaratory judgment "is not to be used as a means of eliciting advisory opinions from the courts." *Stroud*, 552 A.2d at 479 (quoting *Ackerman*).

New Energy Group creatively invokes Section 225(b) as a jurisdictional platform for seeking unopposed declaratory relief. In 2008, the General Assembly amended Section 225(b) to authorize a corporation to file a petition in the Court of Chancery to "determine the result of any vote of stockholders upon matters other than the election of directors or officers." 8 *Del. C.* § 225(b). According to New Energy Group, its

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[2] *IBM Corp. v. Comdisco, Inc.*, 602 A.2d 74, 77 n.5 (Del. Ch. 1991); *accord Chavin v. H. H. Rosin & Co.*, 246 A.2d 921, 922 (Del. 1968) ("Lack of jurisdiction may be raised at any time on motion of the court . . . ."); *see also* Ct. Ch. R. 12(h)(3) ("Whenever it appears by suggestion of the parties *or otherwise* that the court lacks jurisdiction of the subject matter, the Court *shall* dismiss the action." (emphasis added)).

stockholders have voted to ratify the Old Halstead Shares, and it can ask this Court to "determine the result" of that vote by ruling on whether the shares are now validly issued.

The 2008 amendment had a far more limited ambition and effect. Prior to the amendment, Section 225 only authorized a stockholder (or member of a non-stock corporation) to bring a summary proceeding to determine the result of a stockholder vote. *See* Jeffrey R. Wolters & James D. Honaker, *Analysis of the 2008 Amendments to the Delaware General Corporation Law*, at 3 (2008). Even when faced with a ripe dispute, a corporation arguably lacked standing to seek a judicial determination under Section 225(b) and had to await the filing of an action by a stockholder.[3]

The 2008 amendment addressed this problem in a targeted way by granting the corporation standing to sue. The legislative synopsis described the amendment in precisely these terms, stating that the bill "amend[ed] § 225(b) to include the corporation itself as a permissible applicant in an action brought under that subsection." 76 Del. Laws ch. 252, § 3, synopsis (2008). Commentators observed that the amendment "enables a corporation to apply to the Delaware Court of Chancery to determine the result

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[3] *See Agranoff v. Miller*, 734 A.2d 1066, 1070-71 (Del. Ch. 1999) (noting that "[t]o [the Court's] knowledge, neither this Court nor the Delaware Supreme Court has passed upon the question of whether a corporation whose leadership is in doubt may bring a § 225 action," but not addressing question because plaintiffs dropped argument that corporation had standing); *Insituform of N. Am., Inc. v. Chandler*, 534 A.2d 257, 270 n.11 (Del. Ch. 1987) (Allen, C.) (declining to rule on issue, but noting that corporation was "noticeably absent from [the] listing of parties with standing to institute such an action"); *see also In re Chelsea Exch. Corp.*, 159 A. 432, 436 (Del. Ch. 1932) (addressing predecessor statute; "[W]hatever jurisdiction the section confers can be invoked only on the application of a stockholder, and the cross-petitioners, whatever the true fact may be, do not allege themselves to be stockholders. One of them is the corporation itself.").

of any vote on any matter submitted for a vote of stockholders . . . , unless the matter is the election of directors," and noted that this Court previously had questioned the corporation's standing to bring an action under Section 225. Wolters & Honaker, *supra*, at 2-3 (citing *Insituform* and *Agranoff*).

Prior to the 2008 amendment, this Court recognized that Section 225 was not intended to enable parties to manufacture grounds for an advisory opinion. In *Palmer v. Arden-Mayfair, Inc.*, 1978 WL 2506 (Del. Ch. July 6, 1978), the chairman of the board of Arden-Mayfair, Inc. sued the corporation under Section 225 in his capacity as a stockholder to obtain an order declaring that only one class of directors would stand for election at the next annual meeting. At the time, a competing faction asserted in parallel litigation in California that the laws of that state invalidated the classified board and required that all directors stand for election. *Id.* at *1. The corporation answered the complaint, admitted its allegations, and consented to the relief sought. *Id.* at *4. This Court recognized that the dispute (to the extent there was one) did not concern "the validity of any prior election" in the sense of determining the outcome of a contested vote. *Id.* at *7. The Court held that it went "beyond the purpose of [§] 225 . . . to use [the statute] as a means of seeking, in effect, declaratory relief under circumstances such as these, particularly where no actual controversy exists." *Id.*

Nothing in the 2008 amendment or associated commentary suggests a legislative intent to alter the basic nature of Section 225(b) by overruling *Palmer* and creating a means by which a corporation can seek an advisory opinion from this Court. The

amendment granted standing to corporations to initiate a proceeding under Section 225(b) when there is an actual controversy warranting relief — no more and no less.

As in *Palmer*, there is no actual controversy over New Energy Group's board and stockholder consents. No one disputes that the board validly acted by unanimous consent in compliance with Section 141(f) of the DGCL, 8 *Del. C.* § 141(f). No one disputes that holders of shares with the requisite voting power took action by written consent as contemplated by Section 228(a) of the DGCL, 8 *Del. C.* § 228(a). New Energy Group does not ask for declarations on these issues.

If there were an actual controversy over the outcome of a stockholder vote that turned on the validity of the Old Halstead Shares, then this Court could adjudicate the issue in a summary proceeding under Section 225(b). *See, e.g.*, *Blades v. Wisehart*, 2010 WL 4638603 (Del. Ch. Nov. 17, 2010) (ruling on validity of share issuances in context of contested Section 225 action). According to the petition, however, the Old Halstead Shares played no role in the outcome of the vote. New Energy Group contends that as a result of (i) unidentified reverse and forward splits engaged in by Old Energy Group pre-merger and (ii) the conversion ratio used in the merger, the Old Halstead Shares currently comprise only 10 out of approximately 29 million shares issued by New Energy Group.[4]

[4] The 10 share figure assumes that Old Halstead Shares always traveled as a unitary block. One could as easily hypothesize that the Old Halstead Shares were distributed evenly throughout Old Energy Group's capitalization, such that many more New Energy Group shares would be tainted by the inclusion of one or more Old Halstead Shares. To use the conversion by merger as an example, a converted block could have contained 9,999 valid Old Energy Group shares and one invalid Old Halstead Share, resulting in a post-merger share of New Energy Group derived in part from an invalidly

Rather than seeking a ruling on a contested vote, New Energy Group asks this Court to determine in the abstract whether non-unanimous stockholder ratification can validate invalidly issued shares.

A decree answering that question hardly presents the type of routine relief that this Court could grant administratively as a matter of course. The Delaware Supreme Court has admonished this Court to tread cautiously when asked to validate shares. In *Waggoner v. STAAR Surgical Co.*, 1990 WL 28979 (Del. Ch. Mar. 15, 1990), the Court of Chancery held that the plaintiffs were entitled to vote common stock that they received from the conversion of preferred stock, even though the preferred stock was not validly issued because the board never approved the resolutions regarding its issuance. *Id.* at *3-4. Then Vice Chancellor (now Justice) Jacobs reasoned that "even if the issuance of those shares were technically invalid as a matter of corporate law, [the plaintiffs] are equitably entitled to an order, akin to specific performance, treating the common stock as if it were validly issued, and declaring them entitled to vote those shares." *Id.* at *3. On appeal, the Delaware Supreme Court reversed, explaining that "[t]he issuance of corporate stock is an act of fundamental legal significance having a direct bearing upon questions of corporate governance, control and the capital structure of the enterprise" and "[t]he law properly requires certainty in such matters." *STAAR Surgical Co. v.*

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issued share. One could readily posit similar states of the world for the unidentified forward and reverse splits in which Old Energy Group allegedly engaged, such that fissures of invalidity would permeate the New Energy Group capital structure. For purposes of this decision, I have accepted as true New Energy Group's allegation regarding the number of shares affected.

Waggoner, 588 A.2d 1130, 1136 (Del. 1991). The Delaware Supreme Court refused to "trivialize" compliance with the statutory requirements by invoking equitable considerations, *id.*, and "emphasize[d] that our courts must act with caution and restraint when granting equitable relief in derogation of established principles of corporate law." *Id.* at 1137 n.2. New Energy Group's unopposed petition and supporting memorandum of law do not identify any authority to support the notion that non-unanimous stockholder approval could validate invalidly issued shares and accomplish by controller *fiat* what this Court could not decree after a full trial on the merits.

New Energy Group's application instead reveals that the corporation has a true adversary against which it could litigate: DTC. According to New Energy Group's papers, "the interest of NAEG in obtaining removal of the 'global lock' and in enabling thereby a renewal of the electronic transferability of its shares, *is obviously adverse to DTC's interest in preserving that lock for assumed regulatory purposes*." Pet'r's Mem. of Law in Supp. of Req. for Decl. Relief at 5-6 (emphasis added). New Energy Group's ability to trade on the pink sheets through DTC depends upon the contractual relationship between New Energy Group and DTC. *See Angelo, Gordon & Co. v. Allied Riser Commc'ns Corp.*, 822 A.2d 1065, 1072 (Del. Ch. 2002) ("[T]he ability to 'trade' on an exchange depends on the existence of a listing agreement between the issuer and the exchange and the presence of an effective SEC registration statement covering those shares."). If New Energy Group believes that its securities have been issued validly and that DTC breached its contractual obligations by imposing the Global Lock, then New

Energy Group can seek relief against DTC. In that action, there would be true adversity and a litigable controversy.

Finally, in determining whether to award relief in the present procedural posture, this Court of Equity can take into account New Energy Group's efforts to access the public markets without an initial public offering. Delaware has no interest in facilitating reverse mergers with defunct but still publicly registered shell corporations as a means to circumvent the regulatory protections provided by the federal securities laws. *See Klamka v. OneSource Techs., Inc.*, 2008 WL 5330541, at *2 (Del. Ch. Dec. 15, 2008) (declining to appoint custodian that would allow Delaware corporation to be used for reverse merger to bypass traditional public registration process); *Clabault v. Caribbean Select, Inc.*, 805 A.2d 913, 918 (Del. Ch. 2002) (declining to order annual meeting pursuant to 8 *Del. C.* § 211(c) where order would allow Delaware corporation to be used to bypass traditional public registration process). The individuals who control New Energy Group could accomplish their objective "easily and properly . . . through new corporate and other appropriate filings." *Klamka*, 2008 WL 5330541, at *2.

III. CONCLUSION

This Court lacks jurisdiction to render what would be an advisory opinion. The action is dismissed without prejudice. **IT IS SO ORDERED.**