

December 9, 2008

BRIEF: Noe v. Kropf: Plaintiffs' Memorandum of Law -- Filed December 9, 2008 -- in the Delaware Court of Chancery citing Bigler & Tillman's Void or Voidable? -- Curing Defects in Stock Issuances Under Delaware Law

Seth Barrett Tillman



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WILLIAM M. NOE and
O. RUSSELL CRANDALL,

Plaintiffs,

v.

ROBERT KROPF, JAMES R.
HERBERT, TRACY GNAGY,

Defendants,

and

AMERISTAR NETWORK, INC.,

Nominal Defendant

and

TURNAROUND ADVISORS, LLC,

Intervenor

C.A. No. 4050-CC

**PLAINTIFFS' REPLY IN SUPPORT OF
THEIR MOTION FOR DEFAULT JUDGMENT,
MOTION FOR JUDGMENT ON THE PLEADINGS
AND MOTION FOR ATTORNEYS' FEES AND COSTS**

Plaintiffs William M. Noe and O. Russell Crandall ("Plaintiffs"), by their undersigned attorneys, hereby file this reply in support of their motion (a) for the entry of default judgment pursuant to Court of Chancery Rule 55(b) against defendants Robert Kropf ("Kropf"), James R. Herbert ("Herbert") and Tracy Gnagy ("Gnagy," together with Kropf and Herbert, "Defendants") in connection with Count I of the Verified Complaint Pursuant To Section 225 And Section 227 Of The Delaware General Corporation Law (the "Complaint" or "Compl.") filed in the above-captioned action ("Action"), which seeks relief under Section 225 of Delaware's General Corporation Law (the "DGCL"), 8

16. Moreover, Turnaround's argument that Delaware law is moving away from the DGCL's position (a rigid rule of cancellation) and towards the UCC's position (a rule that stock with technical defects, which is held by an innocent third-party purchaser, should not be cancelled) simply is inaccurate and is in conflict with Delaware law. See An. Br. at 13-19. In fact, Turnaround's position primarily (if not exclusively) is based upon the theories set forth in a law journal article, in which the authors recognize that their theories are in conflict with current Delaware law. See C. Stephen Bigler and Seth Barrett Tillman, Void or Voidable? -- Curing Defects in Stock Issuances Under Delaware Law, 63 Bus. Law. 1109, 1148-49 (2008). As demonstrated in this Motion, there is no evidence that Delaware courts are moving away from this rigid rule as suggested by Turnaround, and, as the Delaware Supreme Court held in 2007, and as this Court held in 2002, shares of stock issued in violation of Section 151 are void and legal nullities as a matter of law. See Motion at ¶ 19 (citing Hildreth v. Castle Dental Centers, Inc., 939 A.2d 1281, 1283 (Del. 2007), and Superwire.com, 805 A.2d at 909 (quoting Staar Surgical, 588 A.2d at 1136)).

17. Finally, Turnaround attempts to resurrect its fatally flawed legal argument by relying upon the decision of this Court in MBKS Co. Ltd. v. Reddy, 924 A.2d 965 (Del. Ch. 2007). Specifically, Turnaround relies upon MBKS in support of its assertion that shares of stock issued in violation of Section 151 may be voidable (and subject to cure) rather than void (and not subject to cure). See An. Br. at 13-14. In addition, Turnaround relies upon MBKS in support of its assertion that Section 8-202 of the UCC trumps Section 151 of the DGCL and over eighty years of Delaware law. See Motion at ¶