

January 10, 2011

**BRIEF: Shahbazi v. TD Security: Defendant's
Opposition Brief to Plaintiffs' Motion for Partial
Summary Judgment -- Filed Jan. 7, 2011 -- in the
Delaware Court of Chancery citing Bigler &
Tillman's Void or Voidable? -- Curing Defects in
Stock Issuances Under Delaware Law**

Seth Barrett Tillman, *None*

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B. Denying Plaintiffs Any Remedy Against McAfee For
Alleged Problems Related To The Issuance Of TD's
Preferred Stock Is Supported By Sound Public Policy, The
DGCL And Section 8-202 Of The DUCC.

In *Hildreth*, this Court recognized that, should the target company not have recognized the expectations of the preferred stockholders through the merger, potential buyers “would probably walk away [from the target company] until we kind of settled down the hoo-ha.” *Hildreth*, tr. at 59. The same concern applies to Delaware mergers generally. Granting any relief against McAfee (directly or indirectly through TD) would establish a precedent that would require acquirors to bear the risk that some previously unchallenged technical claim to the capital structure of a target will leave them with incomplete ownership of a company that they bargained

(... Continued)

Ch. July 16, 2010), “[i]t is not a status crime under Delaware law to buy an entity for a price that does not result in a payment to the selling entity’s common stockholders.”

in good faith to acquire. That simply cannot be the law. *See* C. Stephen Bigler & Seth Barrett Tillman, *Void or Voidable – Curing Defects in Stock Issuances Under Delaware Law*, 63 BUS. LAW. 1109, 1148 (2008) (“[W]e suggest that the policy underlying [the DUCC] to validate stock, notwithstanding technical defects in its issuance, in the hands of innocent purchasers for value should be recognized as a principle of law, not solely as a principle of equity, and should be applied by the Delaware courts as such.”) (German Aff. Ex. J).

The policy concerns reflected in *Hildreth* are mirrored in other Delaware statutes, which indicate that third parties, such as acquirors, should be able to rely on the validity of documented corporate actions. For example, Section 105 of the DGCL provides:

A copy of a certificate of incorporation, or a restated certificate of incorporation, or of any other certificate which has been filed in the office of the Secretary of State as required by any provision of this title shall, when duly certified by the Secretary of State, be received in all courts, public offices and official bodies as **prima facie evidence** of: (1) Due execution, acknowledgment and filing of the instrument; (2) **Observance and performance of all acts and conditions necessary to have been observed and performed precedent to the instrument becoming effective**; and (3) Any other facts required or permitted by law to be stated in the instrument.

8 *Del. C.* § 105 (emphasis added). Section 105 was revised in connection with comprehensive amendments to the DGCL in 1967 “to make its scope more definite,” including with respect to “the effect of the instrument” by making the filing “prima facie evidence,” rather than simply “evidence” of the issues addressed therein. Ernest L. Folk, III, *The Delaware Corporation Law: A Study of the Statute with Recommended Revisions* 8-9 (1964) (German Aff. Ex. K). McAfee acted responsibly in its status as an acquiror by merger and obtained copies of the charter documents of the Company filed with the Office of the Secretary of State. The policy underlying Section 105 requires no more of a prospective purchaser.

As another example of the policy concern addressed in *Hildreth* being reflected in Delaware statutory law, Section 8-202 of the DUCC protects purchasers for value, such as McAfee, from claims that stock is invalid.²⁴ Section 8-202 provides in relevant part:

(b) The following rules apply if an issuer asserts that a security is not valid: (1) A security other than one issued by a government or governmental subdivision, agency, or instrumentality, even though issued with a defect going to its validity, is valid in the hands of a purchaser for value and without notice of the particular defect unless the defect involves a violation of a constitutional provision. In that case, the security is valid in the hands of a purchaser for value and without notice of the defect, other than one who takes by original issue.

6 *Del. C.* § 8-202(b)(1). Section 8-202 “embod[ies] the concept that it is the duty of the issuer, not of the purchaser, to make sure that the security complies with the law governing its issue.” U.C.C. § 8-202 cmt. 3. As previous comments to Section 8-202 make clear, “a security ‘is valid’ in the hands of a purchaser for value without notice of a particular defect even if the defect is so serious as to be described as one ‘going to the validity’ of the security.” 8 William D. Hawkland, *UNIFORM COMMERCIAL CODE SERIES 105* (West 2004) (reprinting comment to 1962 official text of Section 8-202) (German Aff. Ex. L).

Plaintiffs apparently seek an order that the Company treat the Challenged Stock as void and, therefore, they are asserting their invalidity claims as if they were acting on the issuer’s behalf. However, Section 8-202 bars the Company from treating the Challenged Stock as void with respect to McAfee. *See W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *12-13 (Del. Ch. Nov. 2, 2007) (declining to issue an order of specific

²⁴ Section 201 of the DGCL incorporates Section 8-202 into the DGCL. *See* 8 *Del. C.* § 201 (“Except as otherwise provided in this chapter, the transfer of stock and the certificates of stock which represent the stock or uncertificated stock shall be governed by Article 8 of subtitle I of Title 6.”).

performance requiring a company to obtain a third-party consent when the Court could not compel the third party to provide such consent). Allowing an exception to Section 8-202 for claims brought by stockholders would completely gut the protection that the provision grants to bona fide purchasers. See *Bigler & Tillman*, 63 BUS. LAW. at 1146 n.214 (citing 8 Del. C. § 144 and stating that “[w]here the corporation is estopped from asserting the invalidity of (purported) stock, the holder of the stock should be similarly estopped, and so should other holders of corporate securities (whether of that class or series or of another class or series)”). Accordingly, this Court should not grant any relief on the Motion against McAfee (directly or indirectly through TD).²⁵

²⁵ McAfee recognizes that none of *Triplex Shoe*, *STAAR Surgical*, *Lieberman* or *Blades v. Wisehart*, 2010 WL 4638603 (Del. Ch. Nov. 17, 2010), addresses Section 8-202. However, simply because an issue was not raised in prior case law does not mean the issue is inapplicable; a contrary rule would punish all future litigants to the extent an initial plaintiff does not make all arguments with respect to a particular issue. In any event, we note that each of those cases dealt with the election of directors under Section 225 of the DGCL or its predecessor, and did not address the fundamental public policy issues raised here and addressed by Section 8-202 – i.e. “[f]rom the perspective of the purchaser, the Delaware legislature’s policy is to validate such stock, not to void it.” *Bigler & Tillman*, 63 BUS. LAW. at 1146 (emphasis in original).