IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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| JUWELL INVESTORS LIMITED, individually and in its capacity as Seller Representative, | : | |
| Plaintiff, | : | |
| v | : | C. A. No. 2020-0338-JRS |
| CARLYLE ROUNDTRIP, L.P., CARLYLE GRANITE AIV-R L.P., CGP AIV-R L.P., CGP II AIV-R, L.P., AND PURE MAGENTA INVESRMENT PTE LTD., | : | |
| Defendants. | : | |

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Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Thursday, May 14, 2020
2:00 p.m.

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BEFORE: HON. JOSEPH R. SLIGHTS III, Vice Chancellor

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TELEPHONIC RULINGS OF THE COURT ON PLAINTIFF'S MOTION TO EXPEDITE

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APPEARANCES: (Via teleconference)

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-and-
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for Defendant Pure Magenta Investment Pte. Ltd.

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THE COURT: All right.

Given the circumstances here and the need to give the parties guidance, I'm going to go ahead and give you my ruling now. I'm going to deny the motion to expedite. I'll explain my reasons in more detail in a moment, but I'll just note at the outset that the same extraordinary and, to borrow a perhaps overused term, unprecedented circumstances that appear to have given rise to this litigation also, unfortunately, render it -- in my view, at least -- impracticable and, indeed, imprudent to grant the relief the plaintiff has requested.

While I question whether the schedule the plaintiff has proposed would be workable even in the best of times, it is simply not feasible in the times we are in now, where most of the country remains in lockdown due to a pandemic, where international travel is strongly discouraged, and where the health and safety of our people remains at risk.

As a practical matter, what plaintiff seeks is for litigation that would normally play out over the course of 18 months to two years to be adjudicated by trial in less than a month. And while this Court is, I think, as accommodating as any in the

world when it comes to expedited litigation, what the plaintiff seeks here is a bridge too far.

By way of brief background, plaintiff, Juweel Investors Limited, owns approximately 50 percent of GBT JerseyCo Limited -- and I'll refer to the plaintiff here as "Juweel" and GBT JerseyCo as "the company" -- and that's through a seller's representative arrangement.

The company, which operates American Express Global Business Travel, is one of the world's largest travel firms. The defendant, Carlyle Roundtrip L.P., is affiliated with the Carlyle Group, Inc., a private equity and asset management firm. Defendant Pure Magenta Investment Pte Ltd. is a private limited company that is indirectly owned by GIC Ventures Pte Ltd. and ultimately, the government of Singapore. I'll refer to the Pure Magenta group as "GIC."

On December 16, 2019, the parties signed a share purchase agreement or "SPA." That agreement contemplates that the defendants and various affiliated entities would pay Juweel approximately $1.5 billion in a recapitalization for roughly two-thirds of Juweel's approximately 50 percent

ownership interest in the company. The closing of the transaction is subject to certain customary conditions and some not so customary conditions. Several of those conditions are relevant here.

First, the defendants are not obligated to close if a material adverse effect, or "MAE," negatively impacts the company's assets or financial results in between the SPA signing and closing. That MAE condition is subject to certain carve-outs, including if effects on the company are the product of adverse changes to general business conditions, financial markets, or social conditions, among other conditions. Such circumstances would not constitute a MAE unless the adverse changes disproportionately affect the company relative to the other participants in the business travel industry.

Second, the company must have continued to operate in the ordinary course of its business between signing and closing, also a relatively common closing condition.

And, third, in a not-so-common condition, the company must have completed a refinancing and distribution of excess cash prior to closing. At a high level, this condition provides

that the company must have entered into a new credit facility providing a specified amount of aggregate borrowing capacity for the company.

The amount of requisite borrowing capacity depends on whether the company continues to have good-faith negotiations to purchase a specific target company, which Juweel's complaint refers to as "Timber." If negotiations with Timber are ongoing, then the company is required to borrow a certain amount. On the other hand, if good-faith negotiations have ceased, then the company must borrow substantially more.

Relatedly, the company must have a first lien net leverage ratio equal to two times adjusted EBITDA, but the measurement date for the leverage ratio also hinges upon whether good-faith negotiations to acquire Timber are ongoing. If negotiations continue, the company's leverage ratio is measured based upon financial projections that assume the Timber transaction will close. If negotiations are broken off, then the company must satisfy the leverage ratio before closing.

Of course, as I've noted, since the parties signed the SPA, the world has confronted human

and economic devastation caused by a coronavirus pandemic that, by all accounts, remains largely unchecked. In the midst of the preparations to close, the company was forced to undertake cost-cutting measures, as the travel industry has been particularly hard hit by the global economic and social response to the pandemic. While the parties paint very different pictures of the company's true financial condition, Juweel concedes the company has implemented a business plan to respond to the virus which includes significant cost-cutting measures.

As noted, the parties signed the SPA in December of 2019. Notwithstanding the onslaught of the coronavirus throughout the late winter and spring, Juweel maintains that the parties continued to proceed as if the SPA would close as scheduled. Indeed, from Juweel's perspective, all closing conditions other than those that could not occur until closing were met on April 3, 2020.

With this in mind, Juweel prepared a closing timeline that contemplated an April 30, 2020, closing date and circulated that timeline to defendants. But on an April 8 call discussing the timeline, "one of Carlyle's Managing Directors,

announced ... that Carlyle believed an MAE had occurred, that it had hired outside counsel, and that it did not intend to close." That's a quote from paragraph 66 of Juweel's complaint. "When asked, ... GIC's Senior Vice President, confirmed that GIC agreed with Carlyle's position." Also a quote from the same paragraph.

Juweel has pled that Carlyle and GIC's representatives thereafter continued to assert that they believed a MAE had occurred based on the coronavirus-related decline in the company's financial performance. Specifically, paragraphs 67, 78, and 79 of the complaint allege that Carlyle and GIC stuck to their guns in the emails exchanged on April 10 and April 14, continuing to maintain that a MAE had occurred.

As it had promised to do, Carlyle hired outside litigation counsel, who began exchanging emails with Juweel on April 16. In an April 20 email, which is attached as Exhibit D to Juweel's complaint, Carlyle's counsel provided Juweel with a detailed list of closing conditions that it asserted had not and could not be satisfied. In the midst of defendants' unequivocal statements that they did not intend to

close, the parties continued to exchange emails regarding their competing legal positions and interpretations of the SPA during late April. The parties amended the SPA to move the closing date to May 7 as discussions continued.

On April 29, defendants reiterated their position that key closing conditions had not been and could not be satisfied and stated again that they would not close. As pled in the complaint, on April 29, 2020, defendants made clear that they would not fulfill their obligations to close. "Carlyle's litigation counsel emailed a letter to Juweel, asserting that the 'Sellers had not satisfied and cannot satisfy their conditions precedent to the Closing' for all of the purported reasons set forth in Carlyle's letter of April 20 .... Carlyle's litigation counsel further stated that 'any additional dialogue will not be productive.'" That's a paraphrased quote from paragraph 108 of the complaint.

GIC's litigation counsel emailed a similar letter on the same date. Yet for some reason, Carlyle still attempted to set up another closing checklist call on May 4. Predictably, defendants responded that they did not see any point in joining

that meeting. During this entire period from early April onward, the parties were careening towards a June 30 deadline after which an international syndicate of lenders that had promised to facilitate the refinancing would no longer be contractually bound to do so.

Juweel, perhaps justifiably, believes it will be impossible to find replacement financing, given the recent negative developments in the financial markets. Here, I stress that Juweel was aware of this all-important deadline on April 8, when defendants first stated that they intended not to close. Apparently defendants' message finally hit home on May 6, when Juweel filed the complaint in this action accompanied by a motion to expedite. Juweel asked the Court to order defendants to perform under the SPA on or before June 30.

In the week after Juweel filed its complaint, Carlyle and Pure Magenta each filed their own complaints, which are largely mirror images of Juweel's pleading. Carlyle's is a seven-count complaint seeking declarations that it is not obliged to close because multiple conditions precedent to its obligations under the SPA, including those I've noted,

have not been satisfied. Pure Magenta's pleading is a similar complaint that pleads at least ten separate reasons why it believes closing conditions remain unfulfilled. In addition to filing their own complaints, defendants have, obviously, filed oppositions to the motion to expedite.

While the standards governing a motion to expedite are well settled, I think it's useful to dwell on two particular aspects of those standards that are, in my view, dispositive of plaintiff's motion. When a party moves for expedition, this Court must conduct a truncated determination of the merits of the underlying claims to determine if they're colorable claims, meaning nonfrivolous claims. A low burden, to be sure, and one I think that is readily satisfied here.

The movant also must demonstrate a possibility of a threatened irreparable injury if the matter is not expedited. Given the nature of the claims here and the parties' contractual recognition that breaches of the SPA will cause harm that would justify specific performance and/or injunctive relief, I'm satisfied that standard, on a clear day, would also be satisfied. The fact that refusal-to-close

cases are routinely expedited is a product of the Court's recognition that such circumstances readily fit within the standards for expedition. This case, at least in that regard, is no exception.

However, what we also know from our cases, going back decades, is that motions to expedite implicate a balancing of interests. Chancellor Allen's 1994 decision in *Giammargo v. Snapple Beverages* is a favorite of those seeking expedition, who often quote the Chancellor's observations that this Court traditionally "has acted with a certain solicitude for plaintiffs seeking expedition."

But what Chancellor Allen also tells us there, as has been observed by many other judges of this court, is that the standards for expedition must be considered against the backdrop of the burden imposed on the parties, the Court, and the public, when this Court orders that parties litigate on an expedited schedule. Whether one considers this an additional element in the motion to expedite paradigm or simply a frame of reference through which the Court must view the two more basic elements, this Court has emphasized that when determining whether to expedite, it will balance the hardships imposed by expedition

against the irreparable harm the plaintiff alleges.

In the midst of the COVID-19 crisis, responsible balancing must take into account how potential irreparable harm balances against the cost and, importantly, the risks of moving forward at break-neck pace during a pandemic. This is not a view I hold alone. Others on this Court, including Vice Chancellors McCormick and Laster, in *Snow Phipps Group v. KCAKE* and *Conduent Business Services v. Skyview Capital*, respectively, both decided earlier this spring, have expressed these same concerns.

The second aspect of the motion to expedite standard that bears some emphasis here is that, "Critical [to the motion to expedite] inquiry is whether a true exigency exists that is not caused by a lack of diligence of the plaintiff .... Although this Court acts with a certain solicitude for plaintiffs and motions for expedited proceedings are routinely granted, this is not the case where the plaintiff has not acted diligently." I draw this language directly from Chancellor Chandler's decision in *In re General Motors Shareholders Litigation* from 2003.

As I have noted, I think these two principles compel a denial of Juweel's motion, even

assuming arguendo it has stated colorable claims and demonstrated some degree of irreparable harm. To explain why, I'll begin with what I see as the cost of expediting this case on the schedule Juweel proposes. Per our Supreme Court's 2014 *C&J Energy* decision, neither party disputes that I will need to convene a full trial to adjudicate Juweel's claims.

As a matter of pure logistics, then, Juweel's motion asks that I compel the parties to collect, review, and produce likely thousands of documents from multiple custodians, some of which may not reside in this country, secure documents from several third parties, take likely dozens of depositions, including several witnesses located outside of the United States, engage in expert discovery, draft pretrial briefs -- which I would expect -- convene a multi-day trial while the courthouse, by order issued today, remains closed, issue a post-trial decision, and then allow time for an appeal, which I would absolutely do here given that several of my determinations would be legal in nature, subject to de novo review. To prevent the losing party from taking an appeal, in my view, would be unacceptable.

And all of what I've just outlined is meant to occur within the next 48 days. To allow for an appeal, this would mean a trial, in my view, in early to mid June, and that trial, in my view, would likely need to last at least three days, and very likely five days, given what's at issue.

Compounding this logistical challenge is the sheer breadth and complexity of the legal issues the parties raise in their pleadings and the multiple factual issues that are attached to the legal issues. The defendants have identified multiple conditions to closing that allegedly have not been and cannot be satisfied, including SPA Section 8.1(c), which is the refinancing condition; SPA Section 8.2(d); which is the no material adverse effect condition; SPA Section 5.2, which is the ordinary course of business condition; and SPA Section 8.2(a), which is the no material breach of reps and warranties condition, the so-called bring-down condition. That's just some of them. There are many others pled in the pleadings before the Court.

In his 2001 decision in *In re IBP Shareholder Litigation*, then-Vice Chancellor Strine describes just one of those issues -- whether a MAE

has occurred -- as "dauntingly complex." As noted, this case implicates the MAE issue and all of its contours, as well as multiple other nuanced legal disputes and factual disputes directly related to the defendants' obligation or not to close this transaction.

Of particular note, the defendants allege that the refinancing and distribution required by Section 5.10(d) of the SPA has not been completed. As I alluded to previously, Section 5.10(d) contains alternative obligations, depending upon whether a proposed acquisition of the entity referred to as Timber is still being actively pursued in good faith. If the transaction is not being pursued, the company is required, prior to the closing, to conduct a refinancing and a distribution to its shareholders to obtain a net indebtedness at a higher number than would otherwise be the case. The effect of these requirements is to increase the leverage of the acquired business and reduce the cash on the balance sheet that the purchasers would be obliged to pay for.

Defendants allege the Timber acquisition is not being pursued in good faith. According to Carlyle, the transaction can't go

forward, given the severe strains that have been placed on the company's business over the past many months. More to the point, Carlyle's consent is needed for the transaction and Carlyle has given notice that it will not give that consent.

If the Timber transaction doesn't happen, then, as just mentioned, it is alleged under Section 5.10(d) of the SPA the company is required to complete a refinancing and distribution resulting in net indebtedness at a designated amount. And Juweel acknowledges in its complaint at paragraphs 87 and 92 that it will not complete the refinancing and distribution under that section.

I mention all of this not to foretell any particular view of this claim but to preview what will be a fact-intensive dispute that directly involves a separate potential transaction with a third party not before the Court that will have to be explored while the parties are simultaneously discovering the facts relating to the alleged problems with this transaction.

Despite the extraordinary cost, burdens, and challenges associated with expedition here, Juweel largely brushes this aside in its motion,

stating summarily that it is "confident" that the parties can "narrowly tailor" discovery and "take advantage of technological innovations." That's a paraphrased quote from the motion. This pithy statement, in my view, seriously underestimates the pound of flesh that Juweel's proposed schedule would extract on the parties, third parties, and, to a lesser extent, the courts. And frankly, it just blinks at the reality of what we're confronting.

UNIDENTIFIED SPEAKER: So all of that say our approach --

THE COURT: We need folks to mute their lines, please. Thank you.

To quote Chancellor Bouchard, "Even under the best of circumstances -- and I mean by that before the COVID-19 pandemic -- it would be an extraordinary feat to prepare for a trial in this case, a MAE case, in five or six months, given the number of potential issues to be tried and the international scope over the case. And I have no doubt that whatever may have been the minimum amount of time necessary to get to trial before the pandemic, more time will be necessary now." That's a quote from the Chancellor's April 17 rulings in *The We Co. v.*

*Softbank Group* case.

I am cognizant that Juweel has a significant economic interest in seeing the SPA close rather than merely pursuing damages after a termination, but I echo the concerns Vice Chancellor McCormick expressed in *Snow Phipps*, that the pace of this case would force people -- by court order, mind you -- would force people involved in this lawsuit to engage in behavior that might well risk their health, making the cost of expedition much greater than usual. In this regard, I think it is wholly unrealistic to think that a case like this can be prepared for trial, and then appeal, from counsel and the clients' living rooms without the need for travel, likely international travel, and as if the systems that drive the litigation train are operating business as usual.

It would be one thing if Juweel had done all that it could do to relieve some of the extraordinary time constraints in this case by filing its complaint on or soon after April 8, when defendants unequivocally stated "that [they] believed an MAE had occurred, that [they] had hired outside counsel, and that [they] did not intend to close." Again, a paraphrased quote from paragraph 66 of the

complaint. Given the extraordinary time pressures Juweel knew the parties were under, compounded by the COVID-19 pandemic, which was at full strength by then, I think it's fair to expect that Juweel should have acted with the utmost diligence by putting the parties and the Court on notice of its intent to seek specific performance at the first sign of trouble.

Juweel knew that the June 30 deadline was fast approaching, and nothing would have prevented the parties from continuing to seek a negotiated resolution of their disagreement after a complaint had been filed. That's hornbook laches, particularly where discussions are not yielding bilateral progress. I'll point to Am. Jur Equity at Section 132 as just one example of spelling out that basic concept. Yet Juweel waited for a month to file its complaint. Even if Juweel had filed in April, it still would have been a Herculean task to convene trial in time for a decision and final judgment and then for an appeal, even if expedited, to run its course before the June 30 deadline.

Juweel's delay exponentially compounds the difficulty of the task. And while I'm not usually a fan of laches arguments on motions to expedite, I

think the delay here, under these unique circumstances, is an independent reason to deny the motion. This Court's decision in *BMEF San Diego* from 2014 and *Intrepid Investments LLC* from 2013 support that conclusion.

This is especially true given that delay here asymmetrically prejudices the defendants. As multiple Delaware cases have held, including Vice Chancellor Laster's *Akorn* decision from 2018, the party seeking to excuse performance bears the burden of proving justification for termination, including, in this case, that a MAE has occurred. Here, that means defendants would likely bear the burden of proof on this key issue at trial. Given this dynamic, the fact that plaintiff has taken several weeks off the litigation clock has caused obvious prejudice to these defendants and cannot be excused.

Delaware courts are still open, and we still take contractual commitments seriously and will specifically enforce them when appropriate, even on expedited schedules. Having said that, we can't provide the perfect remedy for every problem in all circumstances. Today, while Juweel has colorable claims and may suffer at least some degree of

irreparable harm from the denial of this motion, I cannot order time to stop, I cannot shrink the amount of work that would be required to get Juweel where it wants to go, and I cannot, obviously, end the COVID-19 pandemic. A nontrivial portion of the blame for the Court's inability to grant the relief Juweel seeks here is attributable to its own delay.

For all of those reasons, the motion to expedite, in my view, must be denied.

I'm certainly amenable to some form of expedited resolution of the dispute and certainly would be open to hearing from counsel about some other proposed path to resolution, but a full-blown trial on all issues raised in the various pleadings to occur in time to allow a final -- meaning appealed -- judgment to be entered before June 30, I just don't think is even possible. But I'll leave the parties to have that discussion and decide what next steps should be taken. Again, my plan is today to enter an order denying the motion.

That completes my ruling on the record. I'm obviously not seeking reargument, but I'm certainly happy to open the floor up to any questions that parties might have for clarification or for next

steps.

And I'll start with plaintiff.

MR. NAGY: This is Tibor Nagy speaking, Your Honor. None from us, and thank you again for your time and your consideration.

THE COURT: All right. Thank you.

And on behalf of the defendants?

MR. POLKES: This is Mr. Polkes, Your Honor. Nothing from us. Thank you so much for hearing our case.

MR. NACHBAR: And this is Mr. Nachbar. Nothing from us, other than we would request a copy of the -- at least the ruling part of the transcript as soon as we can possibly get it.

THE COURT: All right. Well, I want to thank you all for your excellent submissions, your excellent arguments this afternoon, and also for jumping on this call as our way of having the hearing. This probably would have been one I would have liked to have with you in person in court, but obviously that wasn't possible, so I thank you for accommodating us in this way.

I wish everyone continued safety, sanity, and with that, we are adjourned.

(Hearing concluded at 4:11 p.m.)