

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TRAVELCENTERS OF AMERICA LLC, :

Plaintiff, :

vs. :

Civil Action
No. 3516-CC

TIMOTHY E. BROG, JEFFREY S. :
WALD, E2 INVESTMENT PARTNERS :
LLC, LOCKSMITH VALUE :
OPPORTUNITY FUND LP, THE :
EDWARD ANDREW GROUP INC., :
PEMBRIDGE VALUE ADVISORS LLC :
and LOCKSMITH CAPITAL :
MANAGEMENT LLC, :

Defendants. :

E2 INVESTMENT PARTNERS LLC and :
LOCKSMITH VALUE OPPORTUNITY FUND :
LP, :

Counterclaim Plaintiffs, :

vs. :

TRAVELCENTERS OF AMERICA LLC, :

Counterclaim Defendant. :

Court of Chancery Courthouse
34 The Circle
Georgetown, Delaware 19947
Friday, April 4, 2008
9:00 a.m.

BEFORE: HON. WILLIAM B. CHANDLER, III, Chancellor.

THE COURT'S RULING

CHANCERY COURT REPORTERS
500 North King Street - Suite 11400
Wilmington, Delaware 19801-3759
(302) 255-0525

2008 APR -7 PM 3:55

ROY/D SASME LLP

1 APPEARANCES:

2 ROBERT S. SAUNDERS, ESQ.
3 LINDA ELIZABETH BEEBE, ESQ.
4 RONALD N. BROWN, III, ESQ.
5 Skadden Arps Slate Meagher & Flom LLP
6 For Plaintiff TravelCenters of America LLC

7 DAVID S. EAGLE, ESQ.
8 Klehr Harrison Harvey Branzburg & Ellers LLP
9 -AND-

10 DAVID C. BURGER, ESQ.
11 of the New York Bar
12 Robinson Brog Leinwand Greene Genovese &
13 Gluck, P.C.
14 For Defendants and Counterclaim Plaintiffs

15
16
17
18
19
20
21
22
23
24

1 THE COURT: Counsel, I appreciate your
2 indulgence in giving me a few minutes to think about
3 this.

4 I have, of course, listened carefully
5 to the testimony today. Before today I had an
6 opportunity to review your written submissions, your
7 briefs on the matter, and throughout the trial I
8 followed carefully and closely the exhibits that have
9 been introduced and offered to the Court and the
10 documents on various issues.

11 You know, yesterday, I issued an
12 opinion, a letter decision in the case that really was
13 addressed principally to the question of whether or
14 not the expert witness proffered by the plaintiffs,
15 Professor Thomas, could testify at trial and whether
16 his testimony would be admissible. But in the course
17 of that letter, I did something else. I tried to
18 signal to everyone very clearly that limited liability
19 companies are creatures of contract. They are
20 entities governed strictly by the language set forth
21 in their LLC agreements. It's that language that will
22 in large part govern and control my decision today.
23 And my decision today is that the notice that was
24 submitted by E² in this case is invalid because it

1 violates Section 9.7 of the LLC agreement.

2 Section 9.7 of TravelCenters of
3 America LLC agreement and the validity of E²'s
4 December 31, 2007 notice of intent to nominate
5 Messrs. Brog and Wald for election to the TCA board
6 and to present other proposals at TCA's 2008 annual
7 meeting are the center of this controversy.

8 As I mentioned, I listened carefully
9 to the testimony of the four fact witnesses and the
10 one expert witness. I've considered carefully their
11 testimony and their demeanor in the course of doing
12 so, and I've concluded, as I said, that the notice
13 that was faxed to TravelCenters on December 31 is
14 invalid and insufficient under Section 9.7 of the LLC
15 agreement and therefore has no force or effect. I've
16 reached this conclusion for a number of reasons. I
17 don't intend to identify every single reason, but I
18 will pause long enough to identify a few of the
19 reasons why I believe the notice is invalid.

20 First, the December 31 notice fails to
21 identify Mr. Golub as a participant, as is required
22 under Regulation 14(a) and Section 14(a) of the
23 Federal Exchange Act. The evidence presented today
24 clearly demonstrates that Golub is, among other

1 things, the source of E²'s funding, the sole member of
2 E², and his investment power over E² is clear and that
3 Golub could remove Brog, for example, as a manager of
4 E² at any time and for any reason. And for these and
5 for a number of reasons and circumstances that have
6 been recited at length today, I'm satisfied that the
7 notice violated Section 9.7 by failing to disclose
8 that Golub is a participant in the proxy solicitation.

9 I further find that the notice
10 violated item 5(b)(2) of Schedule 14(a) because it
11 failed to disclose that Golub gave his permission to
12 Brog to use E² for the purpose of proposing Brog and
13 Wald for election, and because Golub commented and
14 approved on the notice in which this proposal was
15 made, making Golub a party to an understanding
16 pursuant to which a nominee for an election as
17 director is proposed to be elected and therefore
18 governed by that securities law provision in Section 9
19 of the LLC.

20 I note as well that the notice does
21 not disclose Golub's beneficial interest and that of
22 his affiliates. The evidence satisfies me that his
23 beneficial interest in E² and Locksmith Value in a
24 number of different ways is clear, and therefore his

1 interest as a shareholder-associated person was
2 necessary to be disclosed as well. Accordingly, the
3 notice is invalid because of these deficiencies
4 standing alone, but there are others.

5 Second, the notice violates Section
6 9.7 of the LLC agreement because it failed to disclose
7 Brog's earlier violation of the federal securities
8 laws. Item 401 of Schedule 14(a) requires disclosure
9 of any involvement in certain legal proceedings during
10 the past five years that are material to an evaluation
11 of the ability or integrity of any director or person
12 nominated to become a director.

13 In this circumstance the SEC staff
14 had, as a matter of fact, concluded that Mr. Brog had
15 violated the federal securities laws in 2006 in
16 connection with the Gyrodyne Company proxy
17 solicitation. This determination by the SEC has never
18 been withdrawn or vacated. It's materiality is clear,
19 if not based on the uncontroverted testimony of
20 Professor Thomas, then by the very implicit admission
21 of Mr. Brog himself who acknowledges its materiality
22 by his conduct; namely, his contact with the SEC in an
23 effort to have the determination of his violation
24 withdrawn or rescinded or qualified. But of course,

1 it was not rescinded, withdrawn or qualified. That
2 conduct by Mr. Brog, it seems to me, plainly
3 demonstrates the materiality of the SEC's finding or
4 declaration as to Mr. Brog, and clearly shows its
5 materiality to the shareholders or directors of TCA.

6 In passing, I think it unarguable that
7 Mr. Brog was a participant within the meaning of the
8 federal securities laws in the Gyrodyne proxy
9 solicitation process by virtue of being a nominee for
10 election, a fact that made it incumbent upon him to
11 insure compliance with all SEC rules and regulations.

12 Third, E²'s December 31, 2007 notice
13 also violated Section 9.7 because it failed to
14 adequately disclose the principal occupation and
15 employment of Mr. Wald during the past five years;
16 specifically, it failed to identify Wald's employment
17 with Spinback or WorkMarket, or what those businesses
18 were; that he had multiple occupations, or that he had
19 no occupation, are, in either event, material facts
20 that I find a shareholder or a director of
21 TravelCenters of America would certainly want to know
22 and would have a right to know. Frankly, this seems
23 to me self-evident; but to the extent it isn't, I
24 credit expressly the testimony of TCA's expert,

1 Professor Thomas, on this issue, as well as those
2 other issues of federal securities law requirements
3 and materiality to the extent those issues are
4 questions of fact.

5 Now, finally, for now, Section 9.7
6 governs notices for nominations or for other business
7 to be properly brought before an annual meeting. It
8 contains a certificate requirement. Under the
9 mandatory language of Section 9.7(a)(2), no
10 shareholder may give notice to nominate directors or
11 to present other proposals unless the shareholder
12 holds a certificate for all shares owned by such
13 shareholder, and a copy of these certificates shall
14 accompany such shareholders notice to the secretary in
15 order for such notice to be effective.

16 Section 9.7(a)(2) states further that
17 this stock certificate requirement would be
18 inapplicable unless shareholders are entitled to
19 receive a certificate evidencing the shares owned by
20 them. It's undisputed by the parties that the notice
21 at issue in this case was not accompanied by a copy of
22 the stock certificate of E².

23 Though defendants had presented
24 evidence that they may have encountered difficulty in

1 obtaining the stock certificates, they have not
2 demonstrated that they were not entitled to receive
3 such certificates. On the contrary, Mr. Portnoy
4 testified that the board adopted a resolution "that
5 company shares be issued in certificated form."
6 Although later modified, Mr. Portnoy testified that
7 the November 2007 TravelCenters' board meeting minutes
8 reflect that shareholders are entitled to certificates
9 for the shares they own and that such certificates
10 would be available if requested.

11 I find that, as of the date of notice,
12 December 31, 2007, E² neither held a certificate for
13 the shares it owned nor attached a copy of the
14 certificate to the notice. Accordingly, because E²
15 did not comply with Section 9.7(a)(2), I must conclude
16 that E²'s notice is invalid. On this note, I point
17 out that I'm not persuaded by the arguments the
18 defendants have made that it was impossible to obtain
19 a certificate. This contention is belied, in my
20 opinion, by Portnoy's testimony that other
21 shareholders did, in fact, obtain such certificates,
22 and by plaintiff's exhibits which show the same thing.

23 Additionally, though the defendants
24 did encounter difficulty in obtaining a certificate,

1 they essentially backed themselves into their own
2 corner. Mr. Brog did not authorize his broker to seek
3 a certificate until on or around December 11. What's
4 more, it's undisputed, however, that he bought
5 shares -- for Pembridge at least -- 100 shares earlier
6 in November. So there was ample time for Mr. Brog or
7 Pembridge, or any shareholder who wanted a certificate
8 to ask for a certificate.

9 If the designees, the brokers or the
10 broker's broker were unable to obtain a certificate,
11 I'm unsure why no effort was made to contact
12 TravelCenters of America directly to demand a
13 certificate. In any event, not until December 21,
14 just five business days before the deadline for filing
15 a notice, did that broker, the defendants' agent,
16 attempt to obtain a certificate. In this case the
17 defendants are sophisticated investors who agreed to
18 be bound by an LLC agreement that explicitly and
19 unambiguously requires them to attach copies of
20 certificates to any notice submitted to the company.
21 Defendants chose to delay the perhaps hypertechnical
22 but nevertheless necessary process of obtaining the
23 certificate. This Court is unwilling to excuse or
24 countenance that neglect. I therefore reject the

1 argument of defendants that their failure to attach
2 the certificate is somehow excused.

3 For all of those reasons, the notice
4 that was sent to TravelCenters by E² on December 31,
5 2007 is invalid and of no force and effect.

6 To that end, counsel, I have entered a
7 form of order, and I'm now signing that order that
8 implements the Court's ruling, as you just heard me
9 announce it. I'm handing that to the clerk of the
10 court. It will be available to you, if you like a
11 copy today, or it will be e-filed and available to you
12 electronically.

13 There is only one other issue
14 outstanding. I have not overlooked it. I know there
15 is an issue with respect to the attorneys' fees in
16 connection with the discovery dispute. I'll rule on
17 that by Monday and advise you accordingly.

18 If there is nothing further, if there
19 is something I overlooked, please tell me now. I hear
20 nothing.

21 Thank you very much for being
22 available.

23 Court's in recess.

24 (Court adjourned at 5:00 o'clock p.m.)

CERTIFICATE

1
2 I, DIANE G. MCGRELLIS, Official Court
3 Reporter of the Chancery Court, State of Delaware, do
4 hereby certify that the foregoing pages numbered 3
5 through 11 contain a true and correct transcription of
6 the proceedings as stenographically reported by me at
7 the hearing in the above cause before the Vice
8 Chancellor of the State of Delaware, on the date
9 therein indicated.

10 IN WITNESS WHEREOF I have hereunto set
11 my hand at Wilmington, this 7th day of April, 2008.

12
13 /s/ Diane G. McGrellis

14 -----
15 Official Court Reporter
16 of the Chancery Court
17 State of Delaware

18 Certification Number: 108-PS
19 Expiration: Permanent
20
21
22
23
24