[*1] SCANNED ON 5/24/2005

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED Justice PART 60

Cable Satisfaction [redacted]

-v-

Rothschild Inc.

INDEX NO. 600122-05E

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

The Motion Papers (#001) are filed under **SEAL**, pursuant to a Confidentiality Order.

FILED

MAY 24 2005

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/23/05

J.S.C. BERNARD J. FRIED J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[* 2]

FBEM

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED J.S.C. PART 60

Justice

Cable Satisfaction International

INDEX NO. 600171/05

MOTION DATE

- v -

MOTION SEQ. NO. 001

Rothschild Inc. et al

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion for a preliminary injunction is decided in accordance with the accompanying memorandum decision.

SO ORDERED

FILED

MAY 24 2005

COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 5/23/05

BERNARD J. FRIED J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

----------X

CABLE SATISFACTION INTERNATIONAL, INC., and CATALYST FUND LIMITED PARTNERSHIP I,

Plaintiffs,

Index No.: 600127-2005

-against-

ROTHSCHILD, INC. and N.M. ROTHSCHILD & SONS CANADA SECURITIES LIMITED,

Defendants.

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FRIED, J.:

By Order to Show Cause, plaintiffs, Cable Satisfaction International Inc. ("CSII") and Catalyst Fund Limited Partnership I ("Catalyst"), initially sought a Temporary Restraining Order[1] and a preliminary injunction enjoining the defendants, Rothschild Inc. and N.M. Rothschild & Sons Canada Securities Limited ("Rothschild") from utilizing what is alleged to be "confidential and highly sensitive information, which the plaintiffs entrusted to" Rothschild in connection with a restructuring transaction involving Cabovisão-Televisão por Cubo, S.A. ("Cabovisão"). The aid of this court is sought to prevent Rothschild from using this information inconsistent with a plan of

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[1] The request for a Temporary Restraining Order was rendered moot by an agreement between the parties: when this matter was first heard on January 13, 2005, it was adjourned to January 14, 2005, to enable the parties to work out a Stipulation to resolve the request for a Temporary Restraining Order. On January 14, 2005 the parties stated that they had, in principle, reached an agreement, which was reduced to a "So Ordered" Stipulation, and later modified on March 22, 2005 in a superseding "So Ordered" Stipulation.

reorganization of CSII approved by the Canadian Superior Court for the Province of Quebec, District of Montreal, a purpose of which plan was "to complete a recapitalization of CSII" (Ex. C to Complaint, § 2.1[a]). For the reasons set forth below, this request for a preliminary injunction is denied.

According to the complaint, Rothschild, now retained by Cabovisão to find new equity investors, is "setting up a data room" where it will be in "breach of its obligations to CSII, including its misuse of CSII's confidential information, [which] will result in irreparable harm to CSII" (Complaint, ¶ 82). It is further alleged that "Rothschild cannot be trusted to avoid using CSII's confidential information as it works for Cabovisão on a transaction that is at odds with Rothschild's [fiduciary] obligations and commitments to CSII" (Complaint, ¶ 83). Similar claims are made by Catalyst (Complaint, ¶¶ 92, 93)

Following expedited discovery, I received evidence in the form of depositions, affidavits[2] and exhibits. I heard argument on February 2nd, and was advised by the parties that there would be no witnesses presented nor additional evidence offered. Thereafter, Rothschild submitted translated copies of two subsequent decisions of the Commercial

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[2] One of the affidavits is from Ahmad Fadami, Director of Cabovisão. Plaintiff objects to my considering this affidavit inasmuch as Mr. Fadami was not produced for deposition. I agree that this affidavit should not be considered. There is no valid explanation why Rothschild was able to obtain Mr. Fadami's affidavit, and not arrange for him to be available for a deposition.

Court of Lisbon, Portugal, filed in a related lawsuit.

Plaintiff Catalyst, a Canadian investment fund, is presently a creditor of plaintiff CSII, a publicly traded Canadian holding company. CSII's wholly owned subsidiary, Telemax B.V. ("Telemax"), a Netherlands corporation, is the owner of 100% of the equity of Cabovisão, a Portuguese company. Cabovisão is Portugal's second largest provider of cable television, broadband and internet services.

In 2000, Cabovisão was the borrower on a $175 million syndicated senior secured loan, which was most recently amended on July 21, 2003. Telemax is a party to that credit facility as guarantor, and in connection with the Cabovisão loan, it executed an Irrevocable Power of Attorney, dated August 18, 2003, in favor of the lenders, and pledged its Cabovisão stock as security. This Power of Attorney permits the Security Agent to sell Telemax's Cabovisão shares, to "administrate and manage" the Cabovisão equity, and to "represent [Telemax] before Cabovisão"

On December 2, 2002, it was announced that Cabovisão was in default on the loan, although that default was waived. Thereafter, by letter dated, October 21, 2003, the Facility Agent for the loan notified Cabovisão and Telemax that Cabovisão was in default, and that it constituted an Event of Default under the loan agreement. The Facility Agent also advised that it would not further extend the due date; and that it would "carry out the exercise of the corporate rights inherent to the Shares, which

include the right to call, attend and vote in General Meetings of [Cabovisão]".

After the December 2nd notification, defendant Rothschild was retained for a potential restructuring by letter agreement, dated January 10, 2003 ("Agreement"), addressed to CSII and Cabovisão, and signed by Fernand Belisle, Chairman, on behalf of both entities. Although Telemax was referred to in the Agreement, it was not a signatory. This Agreement was signed by Neil A. Augustine, Managing Director of Rothschild Inc., and Daniel Labreque, President of N. M. Rothschild & Sons Canada Securities Limited. The opening sentence of this Agreement refers to CSII, Cabovisão, and Telemax B.V. "collectively the Company". (Emphasis in original). It goes on to state that Rothschild is "retain[ed]...as financial advisor and investment banker to the Company in connection with a possible restructuring of the businesses and/or certain liabilities of the Company".

According to the Agreement, Rothschild agreed to "keep confidential information relating to and provided by or on behalf of the Company...which is not public knowledge" (unless "required by law or any regulatory authority or exchange"), and undertook "to take reasonable steps to protect the confidentiality of all such confidential information". (Section 2). The Agreement further provided that Rothschild did not have "authority to bind, represent or otherwise act as agent for the Company." And that "by providing the services contemplated [by the Agreement], Rothschild will not act, nor will it be deemed to have acted, in any managerial or fiduciary capacity whatsoever with

respect to the Company". (Section 8[d]). Finally, the Agreement, by its terms terminated on January 10, 2004, and it specified that only "Sections 4 through 8 hereof, inclusive" survive "the termination or expiration of this Agreement". (Section 8[b]) In addition to this confidentiality provision in the Agreement, the Complaint alleges that "[i]n or around October 2003 Catalyst and CSII agreed that Catalyst would provide information to CSII which CSII would maintain confidential", and that "[c]onsistent with the terms of the confidentiality agreement between CSII and Catalyst, CSII provided Catalyst's confidential information to Rothschild." (Complaint, ¶¶ 42-44). This refers to an agreement, dated October 8, 2003, which however, was never signed. (de Alba Deposition, pp. 54-55).

At the time of Rothschild's retention, Catalyst was not a creditor of CSII. It only became a creditor in August 2003, after CSII's default under the bond indenture. At that time, Catalyst purchased $59.2 million in the 12 3/4% Notes which had been issued pursuant to the indenture; which amounted to "more than one third of the outstanding 12 3/4% Notes. Thereafter, Catalyst extended a loan of $1.8 million to CSII. (Complaint, ¶ 17)

Following retention of Rothschild, the Canadian court, by order dated June 27, 2003, declared CSII subject to Canada's Creditors Arrangement Act and appointed a Monitor to oversee CSII's affairs. Thereafter, Catalyst, with the assistance of Rothschild, assisted CSII in preparing a first, and then Amended Plan of Arrangement

and Reorganization of CSII ("Amended Plan"). This Amended Plan was unanimously approved by the CSII creditors in March 2004 and on March 19, 2004, it was sanctioned by the Canadian court. (Complaint, ¶¶ 24-27).

In November 2003,Catalyst approached GE Capital Structured Finance Group, Ltd. ("GE") with a proposal for a new debt facility for Cabovisão of approximately € 150 million, which was agreed to by GE on January 26, 2004. At the same time Cabovisão agreed to provide information which was necessary to obtain GE financing to implement the Amended Plan. On the same date, Catalyst entered into a commitment letter with GE. (Complaint, ¶¶ 31-34). GE executed a confidentialty agreement with regard to the information received. (Complaint, ¶ 45)

It is alleged that to effectuate this refinancing, Rothschild received "confidential, non-public, commercially sensitive information...concerning intercompany liabilities, as well as other information relating to the relationship between CSII and Cabovisão that was not publicly available and which CSII, Telemax, and Cabovisão intended to keep confidential". Also alleged, is that Catalyst provided confidential information to CSII under a confidentialty agreement, concerning "its investment in CSII, as well as its evaluation of and business plans for both CSII and Cabovisão" , and that Catalyst provided this information to Rothschild, who was aware of "the need to keep it confidential." (Complaint, ¶¶ 40-44).

GE prepared a confidential memorandum, based upon the material it had received, and in the Spring of 2004 gave access to this memorandum to Silver Point Capital L.P. ("Silver Point"), which agreed to maintain its confidentiality. Thereafter, Silver Point acquired a portion of the Cabovisão debt, and notified GE that it would not participate in the planned refinancing. This alleged misappropriation by Silver Point is the subject of a separate Connecticut lawsuit. (Complaint, ¶¶ 44-48). CSII was notified on July 5, 2004, that a group of New Lenders "now owned more than two-thirds of the Cabovisão loan" and Silver Point, which had taken over the Board of Directors, "was now the Facility Agent for the loan". GE was prevented from completing its due diligence[3], its commitment expired, and it "requires updated due diligence before it will provide the contemplated financing". As a result, the Amended Plan was not implemented. Moreover, the New Lenders have rejected Catalyst's efforts "to gain Cabovisão's cooperation with respect to the implementation of the Amended Plan which could benefit all shareholders". (Complaint, ¶¶ 49-50,54-59).

In September 2004, CSII sought the assistance of the Canadian Court "to require Cabovisão to cooperate in the implementation of the Amended Plan...by requiring Cabovisão to provide the [necessary] due diligence". It also "sought assistance of the courts of Portugal." Nonetheless, "the New Lenders have refused to cooperate". (Complaint, ¶¶ 60-62).

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[3]In January 2004, GE was advised by Cabovisão of previously undisclosed liabilities.

It is undisputed that in October 2004, Cabovisão retained Rothschild as its financial advisor and investment banker regarding a capital restructuring. In this capacity Rothschild sought to stabilize Cabovisão's financial situation, provided assistance to Cabovisão concerning its business plan, and did preliminary administrative work with regard to investor due diligence. Upon the filing of this lawsuit, pursuant to stipulation, Rothschild was prohibited essentially from establishing a data room, from providing due diligence to any third parties, and from working with any third parties. This stipulation was later modified to permit Rothschild to communicate with lenders of Cabovisão in order to prepare for the restructuring.

CSII and Catalyst argue that the Rothschild's action constitutes a breach of the implied covenant of good faith and fair dealing with regard to its "obligations to CSII and its undertakings to Catalyst". More specifically, that "CSII and Catalyst both reasonably understood, that at a minimum, Rothschild would take no action to deprive them of the economic benefits of the work that they contracted to have Rothschild perform for them." And that this meant Rothschild work would result in "CSII continuing to own Cabovisão", and not that Rothschild would later formulate a plan which "would have cut CSII out of the picture". A second claim is that Rothschild, which "received confidential information from CSII and Catalyst" is misusing this information "by performing services for third parties in connection with the same subject matter as the work that Rothschild performed for CSII and Catalyst." Furthermore, it is the claim of the plaintiffs, that they would suffer irreparable harm if the requested provisional relief,

i.e., a preliminary injunction, does not issue, arguing that they would have lost a corporate opportunity, which cannot be measured in damages.

Rothschild argues that it was not in an fiduciary relation with CSII or Catalyst, pointing to the express language of the Agreement with CSII, which provides that it was not acting in a "fiduciary capacity", and therefore the "implied duty of good faith and fair dealing" may not be used "to subject Rothschild to those very same fiduciary duties". But, even if the Rothschild owed such duty to CSII - the signatory to the Agreement, and not Catalyst - not a party to the Agreement, such duty terminated with the expiration of the Agreement. Regarding the misuse of alleged Catalyst confidential information, Rothschild argues that it had no confidentiality agreement with Catalyst, and that the October 8, 2003 letter agreement between CSII and Catalyst is unsigned; however, even if it had been executed, Rothschild was not a party to the October 8th letter. And by its terms, the confidentiality provisions of the letter terminates no later than October 8, 2004. With regard to confidential materials received from CSII, Rothschild argues that any obligations it had concerning such materials have expired by the terms of the Agreement, which specifically excludes the confidentiality provision in the survival clause. But, even if somehow the confidentiality obligations survive the Agreement, it is argued that the materials have, by now, become stale, and that much of them are either publicly available, intended to be made public, or have already been disclosed to third parties. With regard to the confidentiality claim, Rothschild contends that since the Agreement defines the term Company to include Cabovisão, the materials "provided by

on behalf of the Company to Rothschild" belonged to Cabovisão, there cannot be a breach of the Agreement, inasmuch as Cabovisão has now retained Rothschild. Finally, Rothschild argues that there has been no showing of irreparable harm, contending that motion for a preliminary injunction should be denied because damages are calculable.

It is basic that to obtain a preliminary injunction, the movant must demonstrate (1) a likelihood of success on the merits, (2) irreparable injury if provisional relief is not granted and (3) that the equities are in his favor (e.g., Preston Corp v. Fabrication Enter., 68 N.Y.2d 397, 406 [1986]).

I turn first to the issue of whether denial of a preliminary injunction would cause irreparable injury. To me, this issue is dispositive. An irreparable injury is one that cannot be quantified, or measured in damages, and of course there must also not be an adequate remedy at law (see Siegel, New York Practice, Practitioner Treatise Series [3rd ed.], p. 500). Here, it is persuasively argued by Rothschild that there is an adequate remedy at law. Thus, no irreparable injury would occur on the denial of the requested preliminary injunction.

At its essence, plaintiffs' claim is that Rothschild's involvement in the Cabovisão restructuring, which may result in Cabovisão being sold to a third party, will thwart CSII and Catalyst in their effort to obtain control of Cabovisão, and that this so-called corporate opportunity cannot be quantified. In support of this argument, plaintiffs

quote language from Beerly v. Dep't of Treasury, 768 F2d 942, 946-7 (7th Cir., 1985) to the effect that a controlling interest is worth more than the market value of a firm's stock. That case, however, dealt with the appraisal of a dissenting shareholder in a bank merger, who challenged the appraisal as being too low. The Court, as quoted by the plaintiffs stated, that "[s]omeone who thinks he can run a firm better than its present owners--that is, thinks he can get more value out of the firm's assets than they can--naturally will be willing to pay more (if he must!) for a controlling interest than the current market value of the firm's stock; that stock is worth more to him", the Court went on to state: "[b]ut the qualification is vital; the stock is worth more to him only if he has control of the firm, so that he can run it" and upheld the appraisal. Thus, Beerly recognizes that the existence of a controlling interest may be important in calculating the stock's value, not that the value of the such ownership interest is incalculable. This reading is reinforced by plaintiffs' other citation: NoDak Bankcorporation v. Clarke, (998 F2d 1416 [8th Cir., 1993]), which concerned minority shareholders in a bank merger, who were forced to accept cash in exchange for their stock. The Court did note, as referred to by plaintiffs, that "there is a big difference between the value of a minority shareholder's interest and the value of a controlling interest...." (quoting from Beerly), however, this statement was in the context of the appraisal process under the National Bank Act. Neither of these cases stand for the proposition that the owner of a corporation cannot be compensated "for the loss of the corporation or a controlling interest in the corporation", as argued by plaintiffs.

Certainly, there may be situations, involving shareholders, where a remedy at law is inadequate, such as Rolinck v. Rolnick, 35 Misc2d 456 (Queens Cty., 1962) cited by the plaintiffs, involving the issue of corporate ownership and stock control. Other cases have found irreparable harm where specific performance would be appropriate (See, e.g., United Acquisition Corp. v. Banque Paribas, 631 F.Supp 797, 805 [S.D.N.Y.] and cases cited [inability of prospective stock purchaser to gain control if shares are sold to a third party]. However, Catalyst is a creditor of CSII, whose wholly owned subsidiary, Telemax owns 100% of the equity in Cabovisão. Neither it nor CSII is a shareholder of Cabovisão or party to an agreement with Cabovisão. Moreover, under the Amended Plan, if it is implemented:

> the 12 3/4% Notes, including the $53 million owned by Catalyst, are to be converted into equity. Catalyst will invest new cash into Cabovisão by purchasing up to $55 million of equity (subject to prevailing exchange rates). Cabovisão's outstanding debt will be refinanced, with the existing lenders on that debt receiving full payment of all amounts outstanding on the loan, including principal, accrued interest, and fees and expenses. The Amended Plan will result (depending on certain variables) in Catalyst owning approximately 70% of the equity of a reorganized CSII; other creditors who invest new cash into Cabovisão will receive approximately 10% of the equity; the remaining creditors will receive approximately 20% of the equity. CSII will retain, directly or indirectly, 100% of the Cabovisão equity. (Complaint, ¶ 30).

This will not make either CSII or Catalyst, if the plan is implemented, shareholders of Cabovisão. On this alone, there has not been a showing of irreparable injury.

Moreover, Gabriel de Alba, the Managing Director of Catalyst, testified that Catalyst is able to calculate the value of Cabovisão, but "does not include the future flows from keeping the equity of the company". (de Alba deposition, p. 115). While there was no testimony from CSII, the appointed Canadian monitor and receiver, Philip Manel, when asked if he is "able to assign a value to what your constituency would be deprived of if Cabovisão does not assist in completing the Catalyst Plan?", replied that he could "guesstimate an amount". Manel further testified that if the Amended Plan was not consummated, there would be "monetary damage. It's whatever it was worth that they're going to lose, so whatever their share interest would have been that's going to be the damages they will suffer, the actual damages." (Manel deposition, pp. 126-8). He continued that "some of them may have envisaged a significant upside to the – one of the reasons why they accepted the plan because it's taking shares instead of cash. So a lot of them would see intrinsic value in those shares. So to them it could well be greater than their percentage of shares that they're getting." However, the expectations of the creditors certainly is not determinative here, anymore than the disappointment of the dissenting shareholder was not determinative in the Beerly case, supra.

Inasmuch as I conclude that there would be no irreparable injury to the plaintiffs from the denial of the requested injunction, because there is an adequate remedy at law, there is no necessity for me to turn to whether there would be a likelihood of success on the merits or to whether the equities are in the plaintiffs' favor.

Accordingly, for the reasons set forth in this decision, it is

ORDERED that plaintiffs' motion for a preliminary injunction is denied on the grounds that CSII and Catalyst have failed to demonstrate irreparable harm; and it is further

ORDERED that the So Ordered Stipulations of January 14, 2005 and March 21, 2005 are vacated.

J.S.C.
BERNARD J. FRIED
J.S.C.

Dated: 5/23/05

FILED
MAY 24 2005
NEW YORK
COUNTY CLERK'S OFFICE