

**Highland Crusander Offshore Partners, L.P. v
Terrestar Corp.**

2008 NY Slip Op 32843(U)

October 14, 2008

Supreme Court, New York County

Docket Number: 600320/08

Judge: Eileen Bransten

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

PART 3

Index Number : 600320/2008

HIGHLAND CRUSADER OFFSHORE

vs.

TERRESTAR CORP.

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. 600320-08

MOTION DATE 6/28/08

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 17 were read on this motion to/for motion to dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2, 3

4, 4, 5, 6

7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM**

FILED
OCT 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10-14-08

Eileen Bransten
HON. EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X

HIGHLAND CRUSADER OFFSHORE PARTNERS,
L.P.; HIGHLAND EQUITY FOCUS FUND, L.P.;
HIGHLAND CAPITAL MANAGEMENT, L.P.;
HIGHLAND CAPITAL MANAGEMENT SERVICES,
L.P.,

Plaintiffs,

Index No.: 600320/08
Motion Date: 6/28/08
Motion Sequence No.: 001

-against-

TERRESTAR CORPORATION f/k/a MOTIENT
CORPORATION,

Defendant.

FILED
OCT 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X

PRESENT: EILEEN BRANSTEN, J:

Defendant Terrestar Corporation f/k/a Motient Corporation (“Motient”) moves pursuant to CPLR 3211(a)(5) to dismiss the complaint based on *res judicata*. Plaintiffs Highland Crusader Offshore Partners, L.P.; Highland Equity Focus Fund, L.P.; Highland Capital Management, L.P.(“Highland Capital”); and Highland Capital Management Services (collectively the “Highland Plaintiffs”) oppose the motion and cross-move to amend their complaint.

BACKGROUND

Motient is a publically held Delaware corporation with its principal place of business in Virginia. In November 2004, the Federal Communications Commission granted one of

its then-subsiidiaries, MSV, a license to develop a hybrid satellite/terrestrial communications network. To raise the capital for this project, Motient's Board of Directors authorized approximately \$400 million in equity financing through the issuance of preferred stock.

In April 2005, Motient sold \$408.5 million worth of its Series A Preferred Stock ("Series A") to over thirty investors. Highland Capital, a registered investment advisor based in Texas that makes the investment decisions for all of the Highland Plaintiffs, purchased \$90 million worth of it pursuant to a Securities Purchase Agreement. Significantly, the purchase agreement sets forth that Motient "intends to invest up to \$350 million of the proceeds of this offering to increase its ownership interest in TerreStar Networks, Inc. ["Networks"]," an entity that includes MSV as one of its investors (*see* Montgomery Aff'd, Appendix ["App.,"] Ex. 14, at 3; Affidavit of Jeffrey Epstein ["Epstein Aff.,"], at ¶ 2).

Along with the Series A stock and the Securities Purchase Agreement, Motient issued a Certificate of Designations, which provides stockholders with a right of redemption if "the Corporation"--defined as Motient--issues securities after April 15, 2005 that exceed \$250 million in gross proceeds. Motient is required to give the stockholders written notice within five days after the initial issuance date and stockholders may then redeem all or some of their Series A stock within 10 trading days.

Shortly before the Series A stock was issued, the Highland Plaintiffs expressed concern that the associated voting rights would require notification and approval under the

Hart-Scott-Rodino Antitrust Improvement Act of 1976. In response, Motient's Board of Directors amended the Certificate of Designations to limit the Series A stockholders' voting rights to only allow them to approve proposed adverse changes to their rights as stockholders.

Motient subsequently discovered a potential conflict between its Certificate of Incorporation, which prohibits the issuance of non-voting stock, and the restricted voting rights associated with the Series A stock. On August 16, 2005, the Highland Plaintiffs commenced an action in the 101st District Court in Dallas, Texas to rescind their purchase of the Series A stock and to recover damages (the "Rescission Action"). They alleged that Motient violated its own Certificate of Incorporation by issuing non-voting stock (*see* *Montgomery Aff'd*, Appendix ["App.,"] Ex. 38). *

Motient's Board decided to exchange the Series A stock for Series B Convertible Preferred Stock ("Series B") in order to avoid a possible conflict with its Certificate of Incorporation. All of the stockholders except the Highland Plaintiffs accepted the exchange offer, which was completed on October 26, 2005. After Motient made the exchange offer, the Highland Plaintiffs supplemented their pleadings in the Rescission Action to include the allegation that "Motient has breached explicit terms of the [Securities Purchase Agreement]" citing several specific sections (*id.*, App. Ex. 37).

* There are several other related actions that are irrelevant to this motion.

In November 2006, Motient issued \$200 million in notes (“TerreStar Issuance”) in order to fund projects for Networks.

During trial preparation in the Rescission Action, the Highland Plaintiffs produced Lawrence Hamermesh (“Hamermesh”) for a deposition. Hamermesh testified that “. . .it is my opinion that. . .a senior security trigger date. . .occurred, and that as a result the holder of Series A. . .became entitled. . .to require Motient to redeem their shares. . .” (*id.*, App. Ex. 44).

Motient moved for summary judgment in the Rescission Action, which was granted on November 30, 2007 (*id.*, App. Ex. 47), two years after the Series A to Series B stock exchange offer and one year after the TerreStar Issuance. All of the Highland Plaintiffs’ claims were “dismissed with prejudice in their entirety” (*id.*).

Several months later, on February 1, 2008, the Highland Plaintiffs commenced this action for breach of contract, alleging that Motient received gross proceeds of over \$250 million from the exchange of Series A to Series B stock and that this income triggered the notice provision in the Certificate of Designations. Motient purportedly did not send out any notification thereby denying the Highland Plaintiffs their right to redeem their stock.

Motient now moves to dismiss this action on *res judicata* grounds, arguing that it is barred based on the dismissal of the Rescission Action.

The Highland Plaintiffs oppose the motion, urging that they are seeking different remedies from those requested in the Rescission Action. They further assert that in February 2008, after this action was commenced, Motient announced that it entered into transactions with Harbinger Capital Partners Master Fund I, Ltd. and Harbinger Capital Partners Special Situations Fund LP, resulting in the Harbinger entities investing \$100 million of debt. Motient also allegedly disclosed that it entered into transactions with EchoStar Corporation, which invested \$150 million of debt. The Highland Plaintiffs maintain that as “a cumulative result of the September 2005, [November] 2006, and February 2008 transactions, [their] right of redemption was triggered” and Motient was required to give them redemption notice so that they could exercise their rights (Plaintiffs’ Memorandum of Law in Opposition to Motion to Dismiss [“Opp. Mem.”], at 4-5). The Highland Plaintiffs cross-move to amend their complaint in this case to include the 2008 transaction postdating commencement of the action and maintain that because these facts took place after the Rescission Action was dismissed, they had no opportunity to seek relief on that basis and their claims therefore cannot be precluded (*id.*; *see also* Affidavit of Michael Colvin at ¶ 8 and Ex. A ¶¶ 17-18).

On reply and in opposition to the Highland Plaintiffs’ motion to amend, Motient points out that on February 5, 2008 Motient and Networks entered into investment agreements with EchoStar and Harbinger (Epstein Aff., at ¶ 5). Motient’s President, General Counsel and Secretary avers, under oath, that Motient, the only entity that could implicate

a right of redemption, “issued no securities to affiliates of Harbinger Capital Partners or EchoStar Corporation in February 2008.” Motient asserts that only Networks issued notes to the entities; thus, no redemption right could possibly have arisen (Epstein Aff., at ¶¶ 7-8). SEC forms and purchase agreements reveal that EchoStar and the Harbinger entities purchased notes from Networks (*see e.g.*, Supplemental Appendix, at Exs. 4, 6, 11); yet, the proposed amended complaint does not address Networks’ involvement. Nor does the proposed amended complaint actually state that Motient issued any securities in 2008 (*see*, Affidavit of Michael Colvin, Ex. A, Proposed Complaint, at ¶ 18 [setting forth that “Motient announced it entered into a series of transactions” and that Harbinger as well as EchoStar invested debt, without indicating in which entity the debt was invested]).

DISCUSSION

“Once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based on different theories or if seeking a different remedy” (*O’Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *Schwartzreich v E.P.C. Carting Co.*, 246 AD2d 439, 441 [1st Dept 1998]). Not only does the doctrine preclude relitigation of matters that were actually litigated in a prior action, it also bars revisiting any issues that *could* have been litigated (*see Schuykill Fuel Corp. v. B*

& C Nieberg Realty Corp., 250 NY 304 [1929]; *see also Boorman v. Deutsch*, 152 AD2d 48, 52 [1st Dept 1989], *lv dismissed* 76 NY2d 889 [1990]).

Here, the Highland Plaintiffs' original complaint in the Rescission Action and its subsequent amendments, which set forth a general breach of contract claim, did not specifically allege that Motient breached the notice requirement. This non-specific claim was later clarified, however, during the discovery process when Hamermesh testified that the Series A-Series B stock exchange triggered the notice provision, and that Motient's failure to inform the Highland Plaintiffs constituted a breach. Both this alleged breach and the Highland Plaintiffs' demand to rescind the contract were brought to conclusion when the Texas District Court awarded summary judgment to Motient.

Even assuming that the Highland Plaintiffs did not actually assert this claim in the Rescission Action, they certainly could have done. Indeed, both the contract they sought to rescind and the Certificate of Designations that was allegedly breached pertain to the Series A stock. The Highland Plaintiffs were put on notice in October 2005, during the pendency of the Rescission Action, that Motient sought to exchange Series A stock for Series B and that the alleged \$250 million it received purportedly triggered the notice provision. They were also aware in November 2006, while litigation of the Rescission Action was ongoing (and approximately a year before summary judgment dismissal was granted), that Motient issued \$200 million in debt to finance Network's projects.

Additionally, the 2008 transactions, upon which the Highland Plaintiffs heavily rely in attempting to defeat dismissal, are not helpful. Accepting the allegations in the proposed amended complaint to be true, the Highland Plaintiffs fail to allege facts that would trigger a redemption notice. Specifically, they fail to plead that in 2008 Motient issued the securities.

Res judicata thus bars the Highland Plaintiffs from commencing this action now, which is based on allegations that were either raised or could have been raised in the Rescission Action. The complaint is therefore dismissed pursuant to CPLR 3211(a)(5) and the Highland Plaintiffs' cross-motion to amend the complaint is denied as moot.

Accordingly, it is

ORDERED that the motion to dismiss the complaint is GRANTED; and it is further

ORDERED that the cross-motion to amend the complaint is DENIED as moot.

This constitutes the Decision and Order of the Court.

Dated: New York, New York

October 15, 2008

FILED
OCT 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

ENTER



Hon. Eileen Bransten