1999 WL 993648
United States District Court, S.D. New York.

FEDERATED STRATEGIC INCOME FUND, portfolio of Fixed Income Securities, Inc.; Federated International High Income Fund, portfolio of World Investment Series, Inc.; and Strategic Income Fund, portfolio of First American Investment Funds, Inc., Plaintiffs,
v.
MECHALA GROUP JAMAICA LTD., Defendant.

No. 99 CIV 10517 HB. | Nov. 2, 1999.

OPINION AND ORDER

BAER, J.

***1** Plaintiffs Federated Strategic Income Fund, Federated International High Income Fund, and Strategic Income Fund (collectively "Federated"), have moved for a preliminary injunction, seeking to enjoin Mechala Group Jamaica Ltd. ("Mechala") from closing an expiring tender offer. This offer, issued by Mechala, related to a certain class of notes held by Federated and other noteholders (collectively "holders"). A hearing on Federated's motion for a preliminary injunction was held before this Court on October 26, 1999. For the foregoing reasons, plaintiffs' motion for a preliminary injunction is GRANTED.

BACKGROUND

1. The Parties

Plaintiffs Federated are the beneficial owners of certain notes issued by defendant Mechala pursuant to two indentures, dated December 24, 1996 and February 26, 1997 (the "Indentures"). The 1996 Indenture applies to $75 million of 12¾% Series B Senior Notes due on December 31, 1999; the 1997 Indenture applies to $25 million of 12¾% Series B Senior Notes, due December 31, 2002 (collectively "the Notes"). Plaintiffs hold $5 million, or 6.67%, of the aggregate outstanding principal amount of the 1999 Notes, and $1.3 million, or 5.4%, of the aggregate outstanding principal amount of the 2002 Notes.

Defendant Mechala, a Jamaican company, is a holding company for a variety of operating subsidiaries. These subsidiaries include: insurance providers, investment and financial services, Jamaica's "largest developer" of housing (particularly low-income housing), related social and commercial infrastructure, Jamaica's "second largest" food distributor, and other major distributors of pharmaceutical, personal care products, hardware, and other consumer products. (Matalon Aff. ¶ 3.) According to defendant, Mechala began suffering from financial setbacks as a result of a general decline in the Jamaican economy that began in 1997. Mechala is owned by the Matalon family, which owns $23 million out of the total $100 million in Notes. [1]

By or before March 1999, Mechala realized that it could not repay the full principal amount of the $75 million due on the 1999 Notes. Mechala retained the investment firm of Donaldson, Lufkin & Jenrette Securities ("DLJ") to advise the company on how to restructure its debt. DLJ, working on behalf of Mechala, analyzed Mechala's financial data and its subsidiaries' business plans, met with senior management, and provided a "number of options" to Mechala. (Kennedy Aff. ¶ 11.) (These options are unspecified in the record.) On June 8, 1999, Mechala decided to proceed with a cash tender offer for the 1999 *and* the 2002 Notes.

2. The Tender Offer

On June 24, 1999, Mechala issued an "Offer to Purchase for Cash and Consent Solicitation" (the "initial Offer"). The offer was to expire on July 22, 1999. Under the initial offer, Mechala agreed to purchase the 1999 and 2002 Notes at $351.57 per $1000 in principal and accrued interest (roughly 35¢ on the dollar). This initial offer would be consummated if a majority of holders tendered their Notes, as well as consented to certain proposed amendments to the indentures which were outlined in the offer. The initial offer informed holders that Mechala "[did] not intend to make the next interest payments due on the 1999 Notes and the 2002 Notes ... and will be unable to repay or refinance the 1999 Notes at their scheduled maturity date on December 30, 1999." (Offer at 15, § 7.)

***2** On the date of issue, Mechala and DLJ began meeting with certain holders to explain the tender offer. Shortly thereafter, an informal committee of noteholders (the "Creditors Committee") was formed, and retained its own legal advisor, the firm of Weil Gotshal & Manges ("Weil Gotshal"), as well as its own financial advisor, Houlihan

Lokey Howard & Zukin Capital ("Houlihan"). The Creditors Committee decided that the offer was inadequate and sought to negotiate a higher price for the notes, and the initial offer was rejected. (Bornstein Aff. ¶ 2.)

On July 22, 1999, the date the offer expired, Mechala and DLJ met with Houlihan to review Mechala's business plan. Houlihan conducted its own review and analysis of Mechala's publicly filed financial statements, loan documents and indentures, audited financial statements, the value of Mechala's property, financial projections, and publicly available data for comparable companies. (Kramer Aff. ¶ 5.) Houlihan also traveled to Jamaica and met with senior management of Mechala, visited its facilities, and met with the Minister of Finance of Jamaica to discuss Mechala's restructuring. As part of its analysis, Houlihan developed "enterprise valuation ranges with respect to Mechala on both a going-concern and liquidation basis" (the "Houlihan Analysis"), and this analysis was presented to the Committee. (Kramer Aff. ¶ 6.) (The Houlihan Analysis was not part of the record.) Further, in early August 1999, information packages were sent to the noteholders, who then entered into confidentiality agreements with the Company. According to defendant, these packages included information regarding the tender offer and financial information regarding the Company, such as appraisals of Mechala's real estate and projections for each of Mechala's subsidiaries. (Kennedy Aff. ¶ 16.) (These information packages were also not part of the record.)

On August 16, 1999, a meeting was held between Mechala, DLJ, Houlihan, the Creditors Committee, Weil Gotshal, P. Hanworth (Mechala's CFO), and Joseph Matalon. At this meeting, the Committee indicated it would agree to a cash tender offer of 70¢ on the dollar. (Kennedy Aff. ¶ 18.) In response, the Matalon family indicated it might be willing to sacrifice recovery of their notes, to increase the tender offer to 39¢ on the dollar. (*Id.*) The Committee rejected this proposal.

The next day, due to the impasse between the parties, DLJ and Houlihan discussed how to initiate a winding-up of the company. Over the next month and after a series of meetings, a draft agreement was prepared by Weil Gotshal (counsel for the Committee). It included plans for selling the assets of the company and an agreement by the noteholders to forebear pursuing their rights under the notes. (Kennedy Aff. ¶ 19.) However, on September 14, 1999, the Creditors' Committee informed DLJ that it chose not to pursue a winding-up. DLJ responded that the only two options available were either to wind-up the company or to negotiate a tender price, and the Committee indicated it preferred to negotiate a tender price. (Kennedy Aff. ¶ 20.)

***3** On September 17, 1999, the Committee informed Mechala that it would agree to a tender offer price of 55¢ on the dollar, but DLJ informed it that the company did not have the ability to pay that price and suggested that the only alternative was to pursue winding-up. (Kennedy Aff. ¶ 21.) Mechala, after some indication from the Committee that such a proposal would be acceptable, countered with an offer of 45¢ per dollar, with an additional $2 million offered as a consent payment to be divided pro rata among those holders who tendered their notes and consented to the proposed amendments to the indentures. (Kennedy Aff. ¶ 22.) The parties agreed to this proposal, and the amended tender offer that brings the parties here was prepared.

On October 1, 1999, Mechala issued the "Amendment to Offer to Purchase for Cash and Consent Solicitation." This amended offer incorporated by reference most of the material provisions and the proposed amendments as outlined in the initial offer, but also contained two significant additional terms: (1) it increased the offer consideration to $450 per $1000 of principal (45¢ on the dollar), and (2) offered a Consent Payment in the aggregate amount of $2 million, which was to be paid on a *pro rata* basis to holders who tendered their notes and consented to the amendments on or before October 15, 1999. (Amended Offer at 1–2.) The amended offer was to expire on October 29, 1999, and the proposed amendments would take effect on that same date. As of midnight on October 15, approximately 77% of holders of both the 1999 Notes and the 2002 Notes had tendered and provided their consent to the amendments.[2] (Kennedy Aff. ¶ 23.) Notes held by Mechala or its affiliates were excluded from this offer. For those holders who tendered, their pro rata share of the $2 million consent payment was therefore 3.456¢ on the dollar, increasing the total consideration for those holders to 48.456¢ on the dollar.

3. The Amendments and the Reorganization

Under the terms of the offer, the proposed amendments provide, *inter alia,* that a substantial number of restrictive covenants of the indentures would be deleted, or "stripped", from the indentures. (*See* Offer at 2, 6.) These covenants include: maintaining an agent for service in New York; consenting to jurisdiction in New York; a waiver of immunities available to the company; maintaining a corporate

existence; and limitations on the company's ability to enter into certain transactions with its affiliates. *Id.* Further, the proposed amendments would eliminate certain events of default that had been designated in the indentures. *Id.* (covenant default, cross-default, judgment default, bankruptcy default, bankruptcy proceedings, and subsidiary guarantee).

Moreover, the offer expressly discloses that the amendments would eliminate the guarantee of the Notes by defendant's subsidiaries. (Offer at 2.) The offer would amend the guarantee provisions of the indentures to provide as follows: "A Guaranteeing Subsidiary will also be released and unconditionally discharged from its obligations under this Guarantee...." (Offer at 16, § 8.) Under the terms of the offer, once this amendment obtained the "requisite consent," the release and unconditional discharge of all of the guaranteeing subsidiaries would occur without further action by Mechala. *Id.*

***4** As the offer clearly states, the tender offer and consent solicitation were "part of a corporate and financial restructuring of the Company and its subsidiaries to reduce its indebtedness and to provide for operating and financial flexibility" through a proposed reorganization." (Offer at 3.) Once consent to the amendments was obtained, Mechala would enter into a series of transactions with its subsidiaries to achieve the planned reorganization ("Reorganization"). First, it would cause Industrial Commercial Developments Ltd. ("ICDL"), one of its wholly owned subsidiaries, to issue 99.9% of its common shares to a company known as Mediterranean St. Lucia, Ltd., in exchange for $14.883 million. Mediterranean St. Lucia Ltd. would be controlled by Joseph Matalon. Further, Mechala was to reorganize the capital structure of ICDL, West Indies Home Contractors Ltd., and Prime Life Assurance Co. Ltd., so that ICDL owned the shares of West Indies Home Contractors Ltd. and Prime Life Assurance Co. Ltd. Mechala was, as well, to extinguish a $70 million debt (outstanding receivable) that ICDL currently owed Mechala. (*See* amended Offer at 2.)

Finally, the offer expressly states that "[i]mmediately following the foregoing transactions and completion of the Offer ... the Company will be a holding company whose only assets will be a nominal amount of cash and other assets and 0.1% of the ordinary shares of ICDL, and ICDL will be the holding company for all of the subsidiaries of the Company currently owned directly or indirectly by the Company." *Id.*

4. Plaintiffs' Action and the Hearing

On October 14, 1999, plaintiffs filed their complaint for preliminary and permanent injunctive relief, and a declaratory judgment, alleging that the tender offer violates the indentures, the Trust Indenture Act of 1939, and the disclosure laws for tender offers. The dispute centers around whether the indentures and the Trust Indenture Act requires the unanimous consent of all holders to the tender offer and the proposed amendments at issue.

Plaintiffs simultaneously brought an order to show cause, seeking a temporary restraining order and a preliminary injunction against defendant to prevent the offer from being consummated on October 29, 1999.[3] The parties agreed to a briefing schedule and a hearing was held before this Court on October 28, 1999. (The parties also agreed that this Court could render its ruling shortly after the offer's expiration date.)

At the hearing, in addition to argument on the motion, plaintiffs called Robert Kowit, Vice President and Senior Portfolio Manager for International Fixed Income of Federated, as their witness. Kowit oversees Federated's international fixed income investments, including the three investment funds that constitute the plaintiffs in this action. The majority of these funds' shares are owned by individual (or "retail") investors. (Tr. at 5.) Kowit was a member of the informal Creditor's Committee. He testified, among other things, that the Committee was composed of institutional holders, without representation by any individual holders, and that the initial offer of 35¢ on the dollar was rejected by the Committee. (Tr. at 6–7.) Negotiations proceeded with defendant, at which time Mr. Matalon threatened liquidation, but such liquidation never occurred; rather, the tender offer was revised. (Tr. at 10.) When the amended offer was made, Kowit argued that the renewed price was not high enough.

***5** Kowit believes that if the current tender offer did not proceed, then further negotiations with Mechala may eventually yield a higher and "more realistic" price for the noteholders. (Tr. at 8, 22.) He disagrees that forced liquidation is a likely result if this offer does not proceed. Kowit bases this conclusion on Federated's analysis of the value of Mechala as a "going concern." (Tr. at 8.) Federated used this methodology because it did not believe there was a threat of immediate forced liquidation and the Mechala operating subsidiaries, while having some difficulties, were still functioning. (Tr. at 11.) This analysis was viewed in terms of selling the company back to the Matalon family, and

also accounted for servicing senior debt. Kowit estimated that Mechala's value on a going concern basis was in the range of 60–75¢ on the dollar. (Tr. at 11.) (This analysis was not part of the record.) Kowit acknowledged that he performed a liquidation analysis of Mechala, but merely noted that it was "a very subjective calculation in a forced situation." (Tr. at 16.)

Kowit further testified that he is not aware of any other creditors of Mechala's that are being asked to take a 55% discount on their debt, other than the holders of the 12¾% Series B Notes involved in this offer. (Tr. at 13.) He believes that Mechala's intent is to repay its other creditors in full. (Tr. at 13 .) Finally, Kowit testified that plaintiffs' concern with this offer stems from their fiduciary responsibility to their retail investors to maximize the recovery for those customers. (Tr. at 20.)

ARGUMENT

A preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997); *see also Buffalo Forge Co. v. Ampco–Pittsburgh Corp.,* 638 F.2d 568, 569 (2d Cir.1981) (preliminary injunctive relief is an extraordinary and drastic remedy which should not be routinely granted.) To justify a preliminary injunction, the moving party must demonstrate: 1) irreparable harm; and 2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits to make them fair ground for litigation and a balance of hardships tipping decidedly in favor of the movant. *Brenntag Int'l Chemicals, Inc. v. Bank of India,* 175 F.3d 245, 249 (2d Cir.1999); *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.,* 596 F.2d 70, 72 (2d Cir.1979).

A. Likelihood of Success on the Merits

Plaintiffs assert that the offer violates both the indentures and the Trust Indenture Act of 1939 because it does not require the unanimous consent of all affected noteholders.[4] The indentures at issue specifically incorporate the protections afforded by the Trust Indenture Act of 1939. According to plaintiffs, the indentures require, by their terms, unanimous consent of all holders when certain rights under the contract are "impaired," namely the right to receive payment of principal and the right to institute suit for the enforcement of payment. *See* Indentures §§ 508 and 902.[5] These same rights are similarly protected under Section 316(b) of the Trust Indenture Act of 1939, as amended, 15 U.S.C. § 77ppp(b), which states:

> ***6** Notwithstanding any other provision of the indenture to be qualified, the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder....
>
> 15 U.S.C. § 77ppp(b). Defendant disputes that unanimous consent was required in this instance, contending there has been no impairment of these rights. Therefore, as their argument goes, the proposed amendments can be made with the consent of only a majority of noteholders.

The question for this Court then is whether the offer and its proposed amendments impair the right to receive payment or impair the right to sue for the enforcement of any such payment. Or, put another way, does a plain reading of the indentures and the application of the Trust Indenture Act require unanimous consent of all the affected holders?

Neither the parties nor this Court located any caselaw that has addressed this precise issue or that interpreted the language "right to receive principal" or "right to sue" in an indenture. Indeed, as the parties point out, there is a paucity of cases cited in the annotations to the Trust Indenture Act, despite the fact that the Act itself is over sixty years old. Whether this is so or not, the law seems clear as to the interpretation of contractual provisions and in the application of those principles in determining whether preliminary injunctive relief is appropriate. The analysis begins with a look at the plain language of the indentures and the Trust Indenture Act, and then to juxtapose that language with the terms of the tender offer. The pertinent indenture and Trust Indenture Act language is set out above.

The offer expressly states that certain proposed amendments to the indentures will become effective once consent is obtained. These amendments include stripping certain restrictive covenants in the indentures, such as maintaining an agent for service in New York, jurisdictional provisions, waiver of immunities, and events of default. *(See* Offer at 16.) More importantly, the amendments will cause to be deleted provisions relating to limitations on Mechala's ability

to conduct certain transactions with its affiliates, as well as the obligation to maintain its own corporate existence. *Id.* Once these amendments become effective, Mechala will be able to perfect the reorganization as described in the offer.

The reorganization will cause all of Mechala's assets to be transferred to its subsidiaries; these subsidiaries will then be controlled by ICDL; Mechala will forgive a $70 million debt that ICDL currently owes to Mechala; and in the end Mechala will be left as a holding company with nominal assets. By virtue of the proposed amendments, Mechala will voluntarily divest itself of its assets, leaving no meaningful recourse for plaintiffs or any noteholder who concludes this is a bad deal and chooses not to tender their notes, but rather to wait and sue for payment upon maturity.

***7** Defendant argued at the hearing that the planned reorganization is somehow separate from the proposed amendments. I disagree. By its terms, the offer states that Mechala will retain no meaningful assets and indicates that the proposed amendments will effectuate the reorganization. It seems clear that Mechala cannot proceed with this reorganization unless and until the amendments take effect, because the planned reorganization would violate certain provisions of the current indentures. Even if defendant's argument held water, however, a proposed amendment that impairs or affects, by its effect and not necessarily by its terms, a holder's right to sue and recover payment could in certain circumstances constitute a violation.

Moreover, in addition to the divestiture of defendant's assets, the offer expressly discloses that the notes will no longer be guaranteed: the "Proposed Amendments would eliminate ... the guarantee of the notes by the subsidiaries" by eliminating § 1041(b) of the indentures. (*See* Offer at 2.) This section currently provides that the guaranteeing subsidiaries will guarantee the payment of principal and interest on the notes when payment becomes due. Each of the guaranteeing subsidiaries will be "released and unconditionally discharged from its obligations under the Guarantee...." (Offer at 16.) Kowit testified that the current guarantors are the operating wholly-owned subsidiaries of Mechala, (Tr. at 5), and once released, no guarantor of the notes will remain. *Id.*

By defendant's elimination of the guarantors and the simultaneous disposition of all meaningful assets, defendant will effectively eliminate plaintiffs' ability to recover and will remove a holder's "safety net" of a guarantor, which was obviously an investment consideration from the outset. Taken together, these proposed amendments could materially impair or affect a holder's right to sue. A holder who chooses to sue for payment at the date of maturity will no longer, as a practical matter, be able to seek recourse from either the assetless defendant or from the discharged guarantors. It is beyond peradventure that when a company takes steps to preclude any recovery by noteholders for payment of principal coupled with the elimination of the guarantors for its debt, that such action does not constitute an "impairment" or "affect" the right to sue for payment.

Plaintiffs have made a sufficient showing that the offer and proposed amendments would constitute an impairment of the right to sue for payment. Consequently, plaintiffs have established a likelihood of success on the merits, i.e. that the offer and proposed amendments may violate the indentures and the Trust Indenture Act by not requiring unanimous consent. Despite defendant's assertions that unanimous consent may be a practical impossibility, and that 77% of the holders have consented, [6] it is still the law that there is no inherent right to proceed with an unlawful tender offer if a violation of the indentures has in fact occurred. *See Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co.,* 476 F.2d 687, 698 (2d Cir.1973) (no inherent right to proceed with an unlawful tender).

B. Irreparable Harm

***8** Having established a likelihood of success on the merit, plaintiffs must independently establish the element of irreparable harm. Plaintiffs claim irreparable harm because, as a practical matter, they will not be able to obtain money damages after the offer is consummated since the proposed amendments and reorganization will render defendant insolvent.

Defendant disputes the contention that the proposed offer and reorganization is not the *cause* of their inability to pay the principal amount, but rather the *result* of it. According to defendant, Mechala was aware by June 1994 that it would be unable to pay the 1999 Notes when they came due, and that the offer and proposed reorganization was then structured to maximize the payments to all holders. Moreover, defendant argues that plaintiffs and all holders will be in a *better* position if injunctive relief is denied and the offer is allowed to proceed. [7] It reasons that if this Court grants injunctive relief, Mechala will be forced to liquidate, and plaintiffs and all noteholders will receive even less money than they would under the offer.

As a general matter, monetary injury does not constitute irreparable harm. *Brenntag Int'l Chemicals, Inc. v. Bank of India,* 175 F.3d 245, 249 (2d Cir.1999); *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.,* 596 F.2d 70, 72 (2d Cir.1979)(irreparable harm defined as "injury for which a monetary award cannot be adequate compensation"). However, an exception to this general rule has been recognized where the defendant is insolvent or insolvency is threatened. *Brenntag Int'l,* 175 F.3d at 250. In those situations, preliminary injunctive relief may be necessary because, while monetary damages may be theoretically available, "as a practical matter, the defendant would not or could not respond fully for those damages." *Drobbin v. Nicolet Instrument Corp.,* 631 F.Supp. 860, 912 (S.D.N.Y.1986).

Here, plaintiffs have presented sufficient evidence that any non-tendering holders will not be able to recover the principal due under the notes at the time of maturity, due to defendant's planned insolvency. Defendant does not dispute this fact. As disclosed in the offer, defendant will transfer all of its assets and will be left with "nominal assets"; further, defendant has already acknowledged it will not be able to pay the 1999 Notes upon maturity .[8] Although the offer was the result of many factors and defendant disputes that it can continue as a going concern, defendant effectively guarantees insolvency through the reorganization.

Defendant submitted four affidavits from various individuals involved in the conduct leading up to Mechala's tender offer. These affidavits contain many unsupported assertions and obviously allowed for no cross-examination. Further, neither the Houlihan analysis nor any other financial analysis allegedly relied upon by defendant to support its assertions were presented at the hearing. Finally, while defendant noted that Mechala and its subsidiaries experienced certain business setbacks for a few months prior to issuing the amended offer, the tender offer was subsequently sweetened and renewed despite these alleged setbacks, liquidation did not occur, and severe financial harm did not befall Mechala, or so it would seem from the record before me. While this Court carefully considered the claim that all holders may be better off if injunctive relief were denied and that a forced liquidation could be the result of injunctive relief, the evidence before me in support of these arguments was insufficient to counter plaintiffs' claim of irreparable harm. *Cf. Schmidt v. Enertec Corp.,* 598 F.Supp. 1528, 1547 (S.D.N.Y.1984) (evidence established that potential harm to defendant and all noteholders if injunction issued outweighed alleged harm to plaintiff). Plaintiffs' inability to recover any monetary damages due to defendant's threatened insolvency justifies a finding of irreparable harm. *See Brenntag Int'l,* 175 F.3d at 250. This conclusion is further buttressed by the fact that the guarantors of the notes will be eliminated if the offer is accepted, thus further reducing plaintiffs' options (more aptly, its chances) for recovery of monetary damages.

***9** In *Schmidt v. Enertec Corp.,* 598 F.Supp. 1528 (S.D.N.Y.1984), the plaintiffs, a small group of noteholders, sought to preliminarily enjoin a tender offer, claiming it violated the applicable disclosure laws. The *Schmidt* court held that the plaintiffs failed to establish both irreparable harm and a likelihood of success on the merits. *Id.* at 1549. Under the tender offer there, noteholders could tender their notes (issued by Energy Resources Corp.) in exchange for shares of preferred stock in Enertec Corp.; non-tendering holders could convert their notes to common stock. The defendant there argued, as defendant does here, that granting the injunction would create irreparable harm by forcing it into liquidation. The court agreed that if it issued the injunction, the defendant would be forced to liquidate and holders would be unlikely to recover even close to the full value of their notes. *Id.* at 1546. Significantly, the court noted that the exchange offer would not result in the liquidation or the merger of any of the corporate entities involved. *Id.* at 1530, 1544.

The offer presented in *Schmidt* provided that the holders would receive preferred stock in an operating and solvent business, and an opportunity to improve the value of their investment; non-tendering noteholders in the *Schmidt* case would receive common stock. Further, unlike the case here, the *Schmidt* court found that the plaintiffs failed to establish a likelihood that the proposed exchange offer would violate applicable disclosure laws, but rather that the disclosures proposed by the plaintiffs were themselves inaccurate and misleading. *Id.* at 1548.

In contrast, the holders here are given a drastically different choice: they are being asked to tender their notes at less than 50% of their face value, to lose their guarantee provided by the indentures, and to consent to amendments which will allow defendant to divest itself of its assets. Further, plaintiffs here have established a likelihood of success on the merits based on the proposition that the offer violates the indentures and the Trust Indenture Act. As such, this case presents a situation where preliminary injunctive relief can be a "particularly useful remedy" for a tender offer that appears likely to be in violation of an indenture or applicable law. *See Sonesta Int'l*

Hotels Corp. v. Wellington Assocs., 483 F.2d 247, 250 (2d Cir.1973) (preliminary injunctive relief is particularly useful remedy for prevention of probable disclosure violations in a tender offer).

In *Sonesta,* the court found that the proposed tender offer violated federal disclosure requirements and reversed the district court's denial of injunctive relief. 483 F.2d at 249. There, the court reasoned that prior to the consummation of a tender offer, a court still has a variety of methods available to it for correcting a violation, but recognized that once the tender offer is effective, it is difficult if not impossible to undo the situation or "unscramble the eggs." *Id.* at 250. Here, such relief does not even sacrifice the legitimate desires of noteholders to accept the offer; if the defendant is subsequently vindicated after an expedited trial on the merits, the offer may then be renewed. *See id.* [9]

***10** In this case, the parties have already gone back to the drawing board once and the present offer is the result of that effort. Further, the "opportunity for doing equity is ... considerably better [now] than it will be later on." *Electronic Specialty, Co. v. International Controls Corp.,* 409 F.2d 937, 947 (2d Cir.1969). As this Circuit has recognized, circumstances that constitute irreparable harm are those where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties will be unable to return to the positions they previously occupied. *Brenntag Int'l,* 175 F.3d at 250 (citing *American Hosp. Supply Corp. v. Hospital Prods. Ltd.,* 780 F.2d 589, 594 (7th Cir.1986) ("The premise of the preliminary injunction is that the remedy available at the end of trial will not make the plaintiff whole.")). If injunctive relief is denied, such will be plaintiffs' plight in this lawsuit.

CONCLUSION

Accordingly, plaintiffs' motion for preliminary injunction is GRANTED and defendant is hereby enjoined from consummating the tender offer at this time. To minimize any delay in a final resolution of this matter, the parties are directed to complete all discovery within sixty (60) days of the date hereof, provide a Joint Pre–Trial Order in accordance with my rules by January 5, 2000, and be prepared to try this case on or about January 15, 2000.

SO ORDERED.

Parallel Citations

Fed. Sec. L. Rep. P 90,707

Footnotes

1 While ownership by the Matalon family is never spelled out, defendant identifies Joseph A. Matalon as the Director of Investments for Matalon (Matalon Aff. at ¶ 1; Def. Br. at 6). Yet, Matalon also serves as President and CEO. (Bornstein Aff., Ex. A.). Further, the Indentures disclose Joseph A. Matalon as President and CEO, and Joseph M. Matalon as Executive Vice President and COO. Given the involvement by the Matalon family, including the $23 million of the notes referred to in defendant's brief (Def. Br. at 6), ownership or control seems clear.

2 More precisely, $40.659 million (82.79% of the value) of the 1999 Notes had been tendered, and $17.11 million (66.4% of the value) of the 2002 Notes had been tendered. (Kennedy Aff. ¶ 23.)

3 Plaintiffs' application for a temporary restraining offer sought to immediately enjoin the tender offer, prior to the date of consent on October 15, 1999. This relief was sought so that plaintiffs, in the event the tender offer was held to be valid, would not be harmed in having missed the opportunity to tender and share in the $2 million consent payment. The TRO application became moot, however, after the parties agreed to an expedited briefing schedule on the motion for a preliminary injunction and because the parties reached a stipulation whereby plaintiffs were able to tender their notes by the date of consent without waiving any claims.

4 Plaintiffs also assert that the offer violates disclosure requirements for tender offers. Because the Court finds that a violation may have occurred under the terms of the indentures and the Trust Indenture Act, the Court does not address this argument.

5 Section 508. *Unconditional Right of Holders to Receive Principal, Premium and Interest* Notwithstanding any other provision in this Indenture and the Guarantees, the Holder of any Security shall have the right, which is absolute and unconditional, to receive payment, as provided herein (including, if applicable, Article Twelve) and in such Security of the principal of (and premium if any) and (subject to section 309) interest on such Security on the respective Stated Maturities expressed in such Security (or, in the case of redemption, on the Redemption Date) and to institute suit for the enforcement of any such payment, and such rights shall not be impaired without the consent of such Holder.

Section 902. *Supplemental Indentures with Consent of Holders.*

> With the consent of the Holders of not less than a majority in aggregate principal amount of the Outstanding Securities, by Act of said Holders delivered to the Company, the Guaranteeing Subsidiaries and the Trustee, (but without consent of any Guaranteeing Subsidiaries) the Company when authorized by a Board Resolution, and the Trustee may enter into an indenture or indentures supplemental hereto for the purpose of adding any provisions to or changing in any manner or eliminating any of the provisions of this Indenture or of modifying in any manner the rights of the Holders under this Indenture; provided, however, that no such supplemental indenture shall, without the consent of the Holder of each Outstanding Security affected thereby:
>
> (1) ... reduce the principal amount thereof, ... or impair the right to institute suit for the enforcement of any such payment after the Stated Maturity thereof

6 Moreover, the evidence presented establishes that defendant already had obtained the majority of consents it felt was needed to proceed with the offer prior to the offer in fact being issued, (*see* Bornstein Aff. ¶ 2 (committee comprised a majority of holders)), and had similarly "locked up" the consenting votes of Bornstein's group before the offer was issued. *(See* Bornstein Aff. ¶ 5.)

7 Further, defendant contends that the suit is barred by the "no action" clause, section 507 of the indentures. The Court finds this argument without merit. *See Upic & Co. v. Kinder–Care Learning Centers, Inc.,* 793 F.Supp. 48 (S.D.N.Y.1992). Further, as a matter of equity, the offer in this action was set to expire within thirty days, well before plaintiffs could have even complied with the 60–day requirement set out in section 507.

8 Interestingly, defendant has remained silent as to their ability or willingness to repay the 2002 Notes upon maturity, especially considering the offer requires the tender of all 1999 and 2002 Notes.

9 Defendant here too can advise its subsidiaries and other interested parties that the tender offer may be renewed following a trial on the merits. This is an especially viable alternative in light of the expedited schedule set down by this Court.

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