EXHIBIT 27

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KIDDER, PEABODY & CO. INCORPORATED,	:	
Plaintiff,	:	87 Civ. 8308 (MP)
-against-	:	
MAXUS ENERGY CORPORATION, MARTIN A. SIEGEL, IVAN F. BOESKY AND JOHN DOES 1-10,	:	
Defendants.	:	

MEMORANDUM OF DEFENDANT MAXUS ENERGY CORPORATION IN OPPOSITION TO THE MOTION OF IVAN F. BOESKY FOR JUDGMENT ON THE PLEADINGS

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STATEMENT OF FACTS

A. The Background of Diamond Shamrock's Claims

The facts supporting Diamond Shamrock's claims in the Texas action have been set out in papers filed by Maxus in connection with its earlier motion before this Court to dismiss or stay these proceedings. They are briefly set forth below.

The sole issue presented by Boesky's present motion is whether, as a matter of law, Diamond Shamrock may assert its claims for injuries arising out of the Natomas acquisition. Since Diamond Shamrock's claims for affirmative relief have been asserted only in the Texas action, for the purposes of this motion, all of the facts there alleged must be taken as true. See, e.g., Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 740 (1976); Bloor v. Carro, Spanbock, Londin, Rodman & Fass, 754 F.2d 57, 61 (2d Cir. 1985).

1. The Retention of Kidder

In 1982 and 1983, Diamond Shamrock Corporation ("Old Diamond Shamrock") was an integrated oil and gas company, having its headquarters in Dallas, Texas (Kelley Aff. ¶ 8).[5] For several years prior to 1983, Kidder actively solicited Old

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5. "Kelley Aff." refers to the Affidavit of James F. Kelley, the former Senior Vice President and General Counsel of Maxus, submitted in support of Maxus' motion to stay this action and filed on February 10, 1988.

Diamond Shamrock's merger and acquisition business by promoting itself -- and particularly its Vice President Siegel -- as having special expertise in those matters (Pet. ¶¶ 9-10).[6] By late 1982, Old Diamond Shamrock was considering several possible companies for acquisition, including Natomas, and Siegel agreed that Natomas was an attractive candidate (Pet. ¶ 11).

On about January 18, 1983, Old Diamond Shamrock formally retained Kidder by letter agreement to act as its investment advisor for the acquisition of Natomas (Pet. ¶ 12). In this agreement, Kidder acknowledged the confidential nature of the information it would receive and provide on the proposed acquisition, and it expressly agreed that such information would not be disclosed to third parties without the prior written consent of Old Diamond Shamrock (Pet. ¶¶ 14-15, Ex. B).

From the outset, Siegel, then a Vice President and Director of Kidder, personally headed and managed all of Kidder's work on the Natomas acquisition (Pet. ¶¶ 17-18). On Siegel's advice, these efforts began with planning for an unsolicited tender offer for the stock of Natomas (Pet. ¶ 23).

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6. "Pet." refers to the Original Petition filed by Diamond Shamrock in the Texas action, a copy of which is attached as Exhibit 1 to the Affidavit of James F. Kelley.

2. The Wrongful Conduct of the Texas Defendants

In the Texas action, Diamond Shamrock alleges that at about the time Old Diamond Shamrock retained Kidder, Siegel and Boesky conspired to share the confidential information on Old Diamond Shamrock's plans to acquire Natomas and to misuse this information to purchase Natomas stock in anticipation of a dramatic increase in its market price (Pet. ¶ 19). Diamond Shamrock also asserts that, pursuant to this scheme, Siegel regularly "tipped" Boesky on Old Diamond Shamrock's confidential plans and that Boesky used this information to purchase Natomas shares before Old Diamond Shamrock publicly announced its plans (Pet. ¶ 20).

Diamond Shamrock alleges that these and related purchases drove up the price of Natomas' stock, thus increasing the price that Old Diamond Shamrock ultimately paid for those securities (Pet. ¶¶ 21-23). It further alleges that Kidder itself is responsible for Siegel's actions since Kidder made him Old Diamond Shamrock's principal financial advisor on the Natomas acquisition (Pet. ¶ 18).[7]

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7. See, e.g., Restatement (Second) of Agency § 261 (1957).

August 31, 1983, D Sub, Inc. merged into Old Diamond Shamrock pursuant to a merger in which (i) D Sub, Inc. disappeared, (ii) New Diamond Shamrock (Maxus) acquired all of the outstanding stock of Old Diamond Shamrock and (iii) the Old Diamond Shamrock stockholders received one share of New Diamond Shamrock (Maxus) stock for each share of Old Diamond Shamrock stock held at the time of the merger. Also on August 31, 1983, N Sub, Inc. merged into Natomas in a merger in which (i) N Sub, Inc. disappeared, (ii) New Diamond Shamrock (Maxus) received all of the stock of Natomas,[14] and (iii) the Natomas stockholders received 1.05 shares of New Diamond Shamrock (Maxus) stock for each share of Natomas stock held at the time of the merger (Notestine Aff. ¶ 9).

Immediately after these mergers, former stockholders of Old Diamond Shamrock owned 54% of the stock of New Diamond Shamrock (Maxus) and former stockholders of Natomas owned the remaining 46%. New Diamond Shamrock's (Maxus') only assets were the stock of two wholly-owned subsidiaries, Old Diamond Shamrock and Natomas. At that same time, Old Diamond Shamrock changed its name to "Diamond Chemicals Company" and thereafter to "Diamond Shamrock Chemicals Company" (Notestine Aff. ¶ 10).

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14. Immediately before the merger, all of the stock of a Natomas subsidiary, American President Lines, was spun off to Natomas' stockholders.

From July 19, 1983, until the consummation of the reorganization plan on August 31, 1983, Old Diamond Shamrock owned and continued to control New Diamond Shamrock. After the consummation of the plan on August 31, the chief executive officer of Old Diamond Shamrock assumed the same position with New Diamond Shamrock, and all of the other officers of Old Diamond Shamrock took their same positions with the new company, all as originally planned (Notestine Aff. ¶ 6, Ex. 2 - Section 1.1). In addition, the entire 12-person board of directors of Old Diamond Shamrock became directors of New Diamond Shamrock, together with four prior directors of Natomas (two of whom were subject to the approval of Old Diamond Shamrock) (id.).

Throughout these transactions, those involved viewed them as constituting the acquisition of Natomas by Old Diamond Shamrock, and they were treated as such for accounting purposes as well. New Diamond Shamrock was simply one of the vehicles through which Old Diamond Shamrock made that acquisition (Notestine Aff. ¶ 7).

2. The Subsequent Transactions

Beginning in late 1983, the Diamond Shamrock companies undertook an internal reorganization pursuant to which Old Diamond Shamrock (then called Diamond Shamrock Chemicals Company) assigned all of its non-chemical assets to four newly-formed subsidiaries:

(a) On November 1, 1983, Old Diamond Shamrock entered into Assignment and Assumption Agreements with three of its four subsidiaries: Diamond Shamrock Exploration Company ("E&P Company"), Diamond Shamrock Refining and Marketing Company ("R&M Company") and Diamond Shamrock Coal Company ("Coal Company"). Each of the Assignment and Assumption Agreements transferred to the respective subsidiary all assets and business operations of Old Diamond Shamrock which related to that respective subsidiary. The claims against Kidder, Siegel and Boesky, however, remained with Old Diamond Shamrock.

(b) On January 1, 1984, Old Diamond Shamrock (Diamond Shamrock Chemicals Company) entered into an additional Assignment and Assumption Agreement with a fourth subsidiary, Diamond Shamrock Corporate Company (Notestine Aff. Ex. 3). In that agreement Old Diamond Shamrock transferred to Diamond Shamrock Corporate Company all of its assets except those associated with the operation of the chemicals business and the capital stock and assets of E&P Company, R&M Company and Coal Company. As appears from that assignment, this transfer included "all claims, unsatisfied judgments and causes of action which [Diamond Shamrock Chemicals Company, i.e., Old Diamond Shamrock] may have against any third party," except those specifically

associated with one of the operating subsidiaries (Notestine Aff. Ex. 3). Old Diamond Shamrock continued to own the assets of the chemical business. Accordingly, the claims against Kidder, Siegel and Boesky previously owned by Old Diamond Shamrock were transferred by assignment to Diamond Shamrock Corporate Company, the plaintiff in the Texas action (Notestine Aff. ¶ 11).

Later, in January 1984, Old Diamond Shamrock (then called Diamond Shamrock Chemicals Company) declared a stock dividend payable to its parent, New Diamond Shamrock (Maxus), consisting of all the issued and outstanding stock of E&P Company, R&M Company, Coal Company and Diamond Shamrock Corporate Company. Following the dividend, these four subsidiaries and Old Diamond Shamrock became sister subsidiaries, with New Diamond Shamrock (Maxus) as their parent (Notestine Aff. ¶ 12).

In September 1986, New Diamond Shamrock (Maxus) sold all of the outstanding stock of Diamond Shamrock Chemicals Company to Oxy-Diamond Alkali Corporation, an indirect wholly-owned subsidiary of Occidental Petroleum Corporation (Notestine Aff. ¶ 13).

On May 1, 1987, New Diamond Shamrock changed its name to Maxus Energy Corporation. Diamond Shamrock Corporate Company continues to be a wholly-owned subsidiary of Maxus (Notestine Aff. ¶ 14).

In summary, all of the claims that Old Diamond Shamrock had against Kidder, Siegel and Boesky arising out of their conduct in connection with the Natomas acquisition were in January 1984 transferred to, and now belong to, Diamond Shamrock Corporate Company, the plaintiff in the Texas action. In addition, and for that same reason, when New Diamond Shamrock thereafter in September 1986 sold the stock of Old Diamond Shamrock (Diamond Shamrock Chemicals Company) to an indirect subsidiary of Occidental Petroleum Corporation, that transaction in no way affected the standing of Diamond Shamrock Corporate Company to assert its claims against Boesky, Siegel and Kidder.

ARGUMENT

As stated at the outset, Boesky misperceives the "standing" issue. The only question before this Court is whether Diamond Shamrock has in the Texas action alleged injury to itself -- not the measure of damages for that injury. Under Delaware law, Diamond Shamrock has alleged such injury and plainly has standing to bring the claims asserted in the Texas action.

Boesky argues that (1) permitting Diamond Shamrock to recover for the wrongs alleged would contravene the Supreme Court's ruling in Bangor Punta and the Delaware Chancery Court decision in Courtland Manor; (2) under some portion of the

the acquisition of Natomas in 1983 was not an "acquisition" but rather an amalgamation of two equals and (2) neither Maxus (the defendant here) nor its wholly-owned subsidiary, Diamond Shamrock, owns or controls the claims asserted against Boesky and Kidder.

Boesky is wrong for several reasons. Old Diamond Shamrock contracted with Kidder and it was to Old Diamond Shamrock that Kidder owed duties, and whose information was misappropriated by Kidder in violation of those duties. As a direct result of that breach of contract and misappropriation, Old Diamond Shamrock pursued the tender offer for and subsequently acquired Natomas. The vehicle chosen to effect that acquisition does not matter.

The oft-repeated statement by Boesky that, once the transaction was accomplished, Maxus' assets were not diminished (Boesky Br. at 10, 22, 23 n.8, 25, 28) is similarly of no moment. Maxus did not even come into existence until July 19, 1983 (Notestine Aff. ¶ 5), several months after (i) Kidder's alleged misappropriation of information, (ii) Old Diamond Shamrock's tender offer to acquire Natomas, and (iii) Old Diamond Shamrock's entry into the May 30 reorganization agreement by which it agreed to acquire Natomas (Pet. ¶¶ 19-24, 28). Thus, the injury complained of was to Old Diamond Shamrock, the bulk of that injury predated Maxus' formation,

and Diamond Shamrock Corporate Company, to which such claims were transferred, has standing to assert the claims formerly belonging to Old Diamond Shamrock.

Focusing on just one facet of the damages claimed in the Texas action, Boesky argues that the merger reorganization agreement was not in substance an acquisition of Natomas by Old Diamond Shamrock; instead, he relies on the technical form of the transaction to argue that it was an acquisition by a third party, Maxus, in which Old Diamond Shamrock's former stockholders were paid too little (Boesky Br. at 25). Such a claim, Boesky asserts, can only be maintained by the former stockholders of Old Diamond Shamrock individually (Boesky Br. at 24-27).

These arguments are incorrect for two reasons. First, Boesky ignores Delaware law which holds claims such as those at issue here are derivative and can only be brought by the corporation. See pp. 23-29, supra. Second, Boesky's hypertechnical arguments concerning the nature of the transaction ignore corporate reality. Old Diamond Shamrock, not Maxus (which was not yet formed), was the signatory to the May 30, 1983 reorganization agreement with Natomas (Notestine Aff. Ex. 2). In fact, (i) Old Diamond Shamrock set out to acquire Natomas, (ii) it commenced a hostile tender offer for control of Natomas, (iii) it agreed to a negotiated, tax-free

acquisition, and (iv) it created New Diamond Shamrock, N Sub, Inc. and D Sub, Inc. in order to effectuate that acquisition (Notestine Aff. ¶ 6).

Moreover, as part of the acquisition, Old Diamond Shamrock's officers became the officers of New Diamond Shamrock, and thus controlled its day-to-day affairs (Notestine Aff. ¶ 6, Ex. 2). Old Diamond Shamrock Directors also constituted a majority of New Diamond Shamrock's board (id.). Consistent with these facts, the transaction was treated for accounting purposes as an acquisition of Natomas by Old Diamond Shamrock (id. ¶ 7).

In view of these facts, to regard the transaction as an acquisition by a third party, Maxus, of Old Diamond Shamrock and Natomas, as Boesky does (Boesky Br. at 25) would elevate form over substance in a manner contrary to Delaware law.[21] The transaction here was an acquisition of Natomas by Old Diamond Shamrock. Whether one views the acquisition as one in which Kidder's advice to Old Diamond Shamrock and its wrongful

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21. See, e.g., E.I. duPont de Nemours and Co., Inc. v. Shell Oil Co., 498 A.2d 1108, 1117 (Del. 1985); Council of South Bethany v. Sandpiper Development Corp., Inc., C.A. No. 935 (Sussex) Jacobs, V.C., slip op. at 13 (Del. Ch. Sept. 4, 1986). Accord Bangor Punta, 417 U.S. at 717 n.14 ("Where one person has wronged another in a matter within equity's jurisdiction, equity . . . will not suffer the wrongdoer to escape restitution to such person through any device or technicality."), quoting Home Fire Insurance Co. v. Barber, 93 N.W. 1024, 1035 (Neb. 1903).

use of confidential information caused Old Diamond Shamrock to enter into a transaction in which it overpaid to acquire Natomas,[22] or one in which Old Diamond Shamrock (through Maxus, the company it created to carry out its acquisition) issued too much stock to buy Natomas,[23] the contention that

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22. If viewed as an over-priced acquisition by Old Diamond Shamrock, it is clear that Old Diamond Shamrock (or its successor, Diamond Shamrock Corporate Company), has standing to sue. It is black letter law that improper dissipation of corporate assets gives rise to corporate or derivative claims, but not individual claims by stockholders. 12B Fletcher Cyclopedia Corporations § 5911 at 421 (1984); see also Cede & Co. v. Technicolor, Inc., 542 A.2d at 1188 n.10. Moreover, in Youngman v. Tahmoush, the only case cited by either party involving an alleged overpayment in a corporate acquisition, the Delaware Chancery Court clearly accepted that a cause of action seeking to enjoin an acquisition at an allegedly excessive price as derivative in nature, as it analyzed the plaintiff's standing to act as a derivative representative.

23. If one views the transaction as involving the wrongful issuance of stock or other changes in the capital structure of the company, which caused the "impairment of certain shareholders' equity positions" as Boesky does (Boesky Br. at 24), the claims still belong to Old Diamond Shamrock and the company it created to carry out the Natomas acquisition, Maxus. As the Delaware Supreme Court recently held in Kramer v. Western Pacific Industries, Inc., No. 328, 1987, slip op. (Del. Aug. 22, 1988) (attached hereto as Exhibit B), allegations that options to purchase stock were wrongfully issued are derivative in nature and do not give rise to individual or class claims, even where plaintiff alleges that the alleged wrongful dilution of equity resulted in a reduction in the price he received in a merger. Slip. op. at 11-12. See also Elster v. American Airlines, Inc., 100 A.2d at 222. Similarly, allegations concerning allegedly improper changes in the capital

(Footnote Continued On Next Page)

the claim asserted belongs to the former stockholders of Old Diamond Shamrock is wrong.

POINT II - BANGOR PUNTA DOES NOT PRECLUDE A RECOVERY BY MAXUS OR DIAMOND SHAMROCK

Boesky also argues that to permit Maxus or Diamond Shamrock to recover for wrongs done to it, would benefit all post-merger shareholders (or their successors in interest), including former Natomas shareholders who supposedly benefited from the alleged illegal price run-up and overpayment in the merger (Boesky Br. at 17). On that basis, Boesky contends that Maxus and Diamond Shamrock lack standing to sue since recovery would result in an unfair benefit to the former Natomas shareholders, citing Bangor Punta Operations, Inc. v. Bangor and Aroostrook R.R. Co., 417 U.S. 703 (1974) (Boesky Br. at 13).

In Bangor Punta, it was not merely "certain" of the shareholders who would receive an unfair benefit as Boesky suggests (Boesky Br. at 13). Rather, it was the holder of over 99% of the stock of Bangor and Aroostrook Railroad, who had

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23. (Footnote Continued From Previous Page)

structure of a corporation have been held to be "clearly derivative." Moran v. Household International, Inc., 490 A.2d at 1070-71; accord Margolies v. Pope & Talbot, Inc., C.A. No. 8244 (New Castle), Hartnett, V.C., (Del. Ch. Dec. 23, 1986) (attached hereto as Exhibit C). Claims that stock was issued "for inadequate consideration" likewise belong to the corporation and thus are derivative in nature. Bennett v. Breuil Petroleum Corp., 99 A.2d at 241.

CONCLUSION

On the basis of the foregoing, the joint motion for judgment on the pleadings of Boesky and Kidder should be denied.

Respectfully submitted,

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