

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

IN RE: : Chapter 11  
:   
KAISER GROUP INTERNATIONAL, : Bankruptcy Case No. 00-2263-MFW  
INC., :   
:   
Debtor. :   
:   
----- : -----  
JAMES D. PIPPIN, et al., :   
:   
Appellants, :   
v. : Civil Action No. 01-508-JJF  
:   
KAISER GROUP INTERNATIONAL, :   
INC., et al. :   
:   
Appellees. :   
:   
-----

Pamela S. Tikellis, Esquire of CHIMICLES & TIKELLIS, LLP,  
Wilmington, Delaware.  
Of Counsel: J. Dennis Faucher, Esquire and Michael S.  
Tarringer, Esquire of MILLER FAUCHER and CAFFERTY LLP,  
Philadelphia, Pennsylvania.  
Attorneys for Appellants.

Mark Minuti, Esquire of SAUL EWING LLP, Wilmington, Delaware.  
Of Counsel: G. Christopher Meyer, Esquire, Christine Murphy  
Pierpont, Esquire, Patrick J. Brooks, Esquire of SQUIRE,  
SANDERS & DEMPSEY L.L.P., Cleveland, Ohio.  
Attorneys for Appellees.

-----  
**MEMORANDUM OPINION**

November 29, 2001

Wilmington, Delaware

**Farnan, District Judge.**

Presently before the Court is an appeal by Appellants, James D. Pippin, Paul F. Smith, Edgar T. Randol and other former shareholders of ICT Spectrum Construction, Inc. (collectively, "Appellants") from the April 11, 2001 Order (the "Order") of the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") subordinating claims asserted by Appellants under Section 510(b) of the Bankruptcy Code. For the reasons set forth below, the decision of the Bankruptcy Court will be affirmed.

**BACKGROUND**

**I. Procedural Background**

On June 9, 2000, the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors continued to operate their businesses and manage their properties as debtors-in-possession pursuant to Section 1107(a) and 1108 of the Bankruptcy Code. Thereafter, Appellants timely filed several Proofs of Claim, asserting among other things, claims arising from the sale and purchase of the Debtors' stock.

On September 27, 2000, the Debtors' filed their Fifth Omnibus Objection To Duplicate Claims, Litigation Claims, No Amount Owed Claims And Misclassified Claims (the "Objection")

seeking, among other things, to subordinate Appellants' claims under Section 510(b) of the Bankruptcy Code. The parties briefed the issues raised by the Debtors' Objection and the Bankruptcy Court held a hearing on March 16, 2001. On April 11, 2001, the Bankruptcy Court entered an Opinion and Order subordinating Appellants' claims under Section 510(b). This appeal followed.

## **II. Factual Background**

By way of background, Appellants' claims arise in connection with the February 5, 1998 merger of ICT Spectrum Constructors, Inc. ("ICT Spectrum") and a subsidiary of the Debtors, ICF Kaiser Advanced Technology, Inc. ("Kaiser"). To effectuate the transaction, ICT Spectrum, Kaiser, and certain shareholders of ICT Spectrum entered into an Agreement and Plan of Merger (the "Merger Agreement"). Pursuant to the terms of the Merger Agreement, Kaiser distributed a Private Offering Memorandum to the shareholders of ICT Spectrum. Thereafter, a majority of ICT Spectrum's shareholders approved the Merger Agreement, and the contemplated transaction was completed on March 17, 1998 with retroactive effect to January 1, 1998.

The Merger Agreement governing this transaction provided that ICT's shareholders would receive 8.519 shares of Kaiser common stock in exchange for each share of ICT Spectrum stock

held by the shareholder as of the Closing Date, subject to potential post-closing adjustments. On the Closing Date, the outstanding shares of ICT Spectrum stock were converted into approximately 1,500,000 shares of Kaiser common stock.

In addition to the provisions specifying the number of shares available to ICT Spectrum's shareholders, the Merger Agreement also provided for the value of the Kaiser stock distributed in exchange for the ICT Spectrum stock. Under the terms of the Merger Agreement, the Kaiser stock was to have a value of \$5.36 per share (the "Merger Value"). In the event that the Kaiser share price did not meet the Merger Value, Kaiser agreed to pay Contingent Merger Consideration in the form of cash or cash plus a limited amount of additional stock at Kaiser's discretion (the "fill-up provision"). The value of the Contingent Merger Consideration is determined by calculating the difference between the values of shares issued to ICT Spectrum's shareholders and the Merger Value, as adjusted on March 1, 2001.

The Kaiser stock was also subject to a resale restriction under the Merger Agreement. However, if the price of the Kaiser shares reached the Merger Value before March 1, 2001, the resale restriction was removed, and ICT shareholders were permitted to sell or retain their shares of Kaiser stock.

On March 24, 1999, approximately one year after the Closing Date of the merger transaction, Appellant Pippin, one of the ICT shareholders who approved the merger, filed a class action lawsuit against Kaiser, some of its subsidiaries and three of its officers in the United States District Court of the District of Idaho. In that action, Appellant Pippin and other ICT shareholders allege claims of fraud and breach of contract. Specifically, the ICT Shareholders allege that the Debtors made false and misleading statements and omissions in the Private Offering Memorandum and fraudulently induced ICT's shareholders to approve the merger.

### **III. The Bankruptcy Court's Order**

After a hearing on the Debtors' Objection to the Appellants' Proofs of Claim, the Bankruptcy Court entered a Memorandum Opinion and Order dated April 11, 2001 subordinating Appellants' claims under Section 510(b) of the Bankruptcy Code. Concluding that ICT's shareholders did not divest themselves of their rights as shareholders at any time, and that their claims arose in connection with the purchase of the Debtors' stock and not as the result of a debt instrument, the Bankruptcy Court concluded that the claims of ICT's shareholders were subject to mandatory subordination under Section 510(b) of the Bankruptcy Code. With this background in mind, the Court will address the

issues raised by the instant appeal.

## DISCUSSION

### I. Standard of Review

Pursuant to Federal Rule of Bankruptcy Procedure 8013, the Court "may affirm, modify, or reverse a bankruptcy judge's judgment, order or decree or remand with instructions for further proceedings." Fed. R. Bankr. P. 8013. In reviewing a case on appeal, the bankruptcy court's factual determinations are subject to deference and shall not be set aside unless clearly erroneous. *Id.*; see In re Gutpelet, 137 F.3d 748, 750 (3d Cir. 1998). However, a bankruptcy court's conclusions of law are subject to plenary review and are considered de novo by the reviewing court. Meespierson, Inc. v. Strategic Telecom, Inc., 202 B.R. 845, 847 (D. Del. 1996). Mixed questions of law and fact are subject to a "mixed standard of review" under which the appellate court accepts finding of "historical or narrative facts unless clearly erroneous, but exercise[s] plenary review of the trial court's choice and interpretation of legal precepts and its application of those precepts to the historical facts." Mellon Bank, N.A. v. Metro Communications,

Inc., 945 F.2d 635, 641-642 (3d Cir. 1991) (citing Universal Mineral, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 101-02 (3d Cir. 1981)), cert. denied., 112 S. Ct. 1476 (1992).

**II. Whether The Bankruptcy Court Erred In Concluding That Appellants' Claims Are Subordinated Under Section 510(b) Of The Bankruptcy Code**

In pertinent part, Section 510(b) provides:

[A] claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under Section 502 on account of such a claim, shall be subordinated to all claims or interest that are senior to or equal the claims or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

11 U.S.C. § 510(b). In arguing that the Bankruptcy Court's April 11 Order subordinating their claims was erroneous, Appellants contend that Section 510(b) does not apply to their claims, because the alleged wrongful conducting giving rise to their claims occurred subsequent to their purchase of the Debtors' stock. Thus, Appellants contend that their claims are not claims "arising from" the purchase of securities within the meaning of Section 510(b).

Interpreting the meaning of Section 510(b), this Court has previously adopted the analysis set forth in In re Granite Partners, L.P., 208 B.R. 332, 344 (Bankr. S.D.N.Y. 1997) and

concluded that Section 510(b) should be construed broadly to include claim arising from subsequent events if they are causally linked to the initial purchase or sale of securities. In re Phillips Services (Delaware), Inc., Civ. Act. No. 00-502, mem. op. at 19 (D. Del. Nov. 28, 2001) (collecting cases adopting the Granite court's decision).

In this case, Appellants contend that their claims arise from the Debtors' post-purchase breach of the Merger Agreement and therefore, they did not arise from the purchase or sale of the Debtors' securities. Specifically, Appellants contend that the Debtors breached the Merger Agreement well after the purchase or sale of the Debtors' securities by failing to adhere to the fill-up provision.

After reviewing Appellants' argument in light of the applicable law, the Court disagrees with Appellants' contention. Under the Bankruptcy Code, the term "claim" is defined broadly to include "a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(5). In accordance with this definition, Appellants' right to payment under the fill-up provision existed on the day the Merger Agreement was executed. See e.g. In re NAL Financial



Group, Inc., 237 B.R. 225, 231 (S.D. Fla. 1999) ("The non-breaching party's cause of action for breach of contract nevertheless arises from the execution of the contract."). The Merger Agreement effectuated the sale of the Debtors' stock to Appellants, and the fill-up provision and any damages related to its breach are directly related to the initial purchase and sale of the Debtors' stock. Further, the fill-up provision essentially contemplated another purchase and/or sale of the Debtors' stock, because it permitted the Debtors at their discretion to issue stock and/or make a cash payment to Appellants to raise the market value of their shares of the Debtors' stock. Accordingly, in the Court's view, Appellants' breach of contract claims are claims arising from the purchase or sale of the Debtors' securities within the meaning of Section 510(b).

Appellants also suggest that their claims are not subject to Section 510(b), because their claims are contract claims and not tort claims. However, Section 510(b) contains no restrictions limiting its application to certain types of claims, and the Court declines to read such a restriction into the express language of Section 510(b). See e.g. In re International Wireless, 257 B.R. 739, 746 (Bankr. D. Del. 2001); In re Public Serv. Co. of New Hampshire, 129 B.R. 5-6

(Bankr. D.N.H. 1991).

Lastly, Appellants contend that they should not be treated as "equity-holders," because they divested themselves of the right to sell their shares under the Merger Agreement. To this effect, Appellants contend that they are more like general creditors than the beneficial owners of a security.

The purpose and intent of Section 510(b) is to prevent an equity holder from elevating his or her claim to unsecured creditor status by asserting a claim for rescission of his or her purchase of the debtor's securities or by asserting a tort claim for damages arising out of his purchase of the debtor's securities. See In re NAL Financial Group, Inc., 237 B.R. 225, 232 (Bankr. S.D. Fla. 1999) (discussing purpose of Section 510(b)) (citations omitted). To this effect, Section 510(b) furthers the principle espoused by the absolute priority rule, i.e. that "creditors stand ahead of the investors on the receiving line." Id. at 233, n.6. By their argument, Appellants suggest that because they were restricted from selling their shares for a period of time under the Merger Agreement, they should not be treated as equity-holders. However, the Court is not persuaded that the limited sales restriction contained in the Merger Agreement is sufficient to strip Appellants of their status as equity-holders. As the

Bankruptcy Court aptly observed:

Even during the restricted period, the ICT Shareholders retained the 'upside' in any value of the Debtors' stock. The Merger Agreement provided that if the stock price went about the Merger Value during the restricted period, the ICT Shareholders could require that the Debtors buy the stock from them or arrange its sale.

(D.I. 9, Ex. 1 at 9-10). While the restricted period served to enhance Appellants' investment prospects, it did not eliminate the risks inherent in being a shareholder. Further, the restricted period did not divest Appellants of their right to share in the Debtors' profits or their right to increase the value of their investment, both of which are fundamental aspects of stock ownership. Indeed, the sales restriction and fill-up provisions actually furthered these interests. Because Appellants retained their expectations and rights as shareholders, the Court cannot conclude that these circumstances justify a departure from the absolute priority rule such that Section 510(b) should not apply to Appellants' claims. Accordingly, the Court concludes that the Bankruptcy Court correctly concluded that Appellants' claims are subject to mandatory subordination under Section 510(b), and therefore, the Court will affirm the April 11 Order of the Bankruptcy Court.

#### **CONCLUSION**

For the reasons discussed, the Bankruptcy Court's April 11, 2001 Order subordinating Appellants' claims pursuant to Section 510(b) of the Bankruptcy Code will be affirmed.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

IN RE: : Chapter 11  
: :  
KAISER GROUP INTERNATIONAL, : Bankruptcy Case No. 00-2263-MFW  
INC., : :  
: :  
Debtor. : :  
: :  
----- : -----  
JAMES D. PIPPIN, et al., : :  
: :  
Appellants, : :  
v. : Civil Action No. 01-508-JJF  
: :  
KAISER GROUP INTERNATIONAL, : :  
INC., et al. : :  
: :  
Appellees. : :

O R D E R

At Wilmington, this 29 day of November 2001, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that the Bankruptcy Court's April 11, 2000 Order subordinating Appellants' claims pursuant to Section 510(b) of the Bankruptcy Code is AFFIRMED.

JOSEPH J. FARNAN, JR.  
UNITED STATES DISTRICT JUDGE