

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

HAROLD & BETTY WALLACE,	)	
	)	C.A. No. K12A-08-004 (JTV)
Plaintiffs-Below,	)	
Appellees,	)	
	)	
v.	)	
	)	
GECKOSYSTEMS INTERNATIONAL	)	
CORP. and R. MARTIN SPENCER,	)	
	)	
Defendants-Below,	)	
Appellants.	)	

*Submitted: March 19, 2013*

*Decided: June 26, 2013*

Adam C. Gerber, Esq., Hudson, James, Jaywork & Fisher, LLC., Dover, Delaware.  
Attorney for Appellees.

Donald L. Gouge, Esq., Wilmington, Delaware. Attorney for Appellants.

*Upon Consideration of Appellants’  
Appeal from Decision of  
the Court of Common Pleas*

**AFFIRMED**

**VAUGHN, President Judge**

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## OPINION

Appellants Geckosystems International Corp. ("Geckosystems") and R. Martin Spencer ("Spencer") (collectively, "Appellants") appeal from an order of the Court of Common Pleas (the "Order") requiring Geckosystems to comply with a Writ of Attachment *Fieri Facias*. The Order compels Geckosystems to turn over to the sheriff shares of its stock belonging to Spencer in an amount sufficient to satisfy a judgment held by Appellees Harold and Betty Wallace (collectively, "Wallaces").

## FACTS

Geckosystems is a publicly traded company<sup>1</sup> that is incorporated in Delaware. Spencer is the president and CEO of Geckosystems. He and his wife, Elaine G. Spencer, hold sufficient shares to control the corporation. On January 28, 2012, Spencer represented by sworn affidavit that Geckosystems had 349,620,506 common shares issued and outstanding. At the time, he held 44,224,464 (12.65%) of those shares, all of which were restricted from public trading, except for 62,500. Spencer also informed the court below that, in December 2011, he converted 209,463,036 common shares to 2,937 preferred shares. He stated he held 57.59% of all Geckosystems' preferred shares, which are restricted from public trading as well.

In February 2009, the Wallaces initiated litigation in the Court of Common Pleas against Appellants for breach of contract, fraud and promissory estoppel. On August 7, 2009, they obtained default judgments against both Spencer and Geckosystems in the amount of \$17,100, plus court costs and interest. The Wallaces

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<sup>1</sup> Geckosystems' stock is listed for trading on the over-the-counter market (the "pink sheets").

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then caused a Writ of Attachment *Fieri Facias* to be issued for the attachment of Spencer's stock, which was served on Geckosystems. Appellants unsuccessfully moved to quash the writ on the grounds that the proposed sale of Spencer's stock by the sheriff would violate federal securities law. On August 7, 2009, the court below issued the Order that is the subject of this appeal. The Order first orders Geckosystems to deliver to the Sheriff of New Castle County sufficient shares of stock belonging to Spencer to satisfy the judgment. It next provides that if the amount of shares needed to satisfy the judgment cannot be ascertained with reasonable certainty, all shares shall be delivered. It further provides that if Geckosystems is unable to comply with the order, it shall provide reasons to the court supported by an expert attorney's opinion letter supporting such reasons. Finally, so far as is pertinent to this appeal, it orders the parties to confer by telephone to consider language regarding a proposed sale of the shares by the Sheriff. The appellants did not respond to the order, but instead filed this appeal.<sup>2</sup>

**STANDARD OF REVIEW**

The standard of review by this Court for an appeal from the Court of Common Pleas is the same standard applied by the Supreme Court to appeals from this Court.<sup>3</sup>

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<sup>2</sup> The appellees have not raised an argument that the order is not a final, appealable order. Nor did the court make any express ruling on the issue of federal law. However, the appellants did raise the issue in their motion to quash in the court below, and the issue has been argued by both parties in their appellate briefs. Under the circumstances, I am satisfied to proceed to decide the issue on the merits.

<sup>3</sup> *Furniture and More, Inc. v. Hollinger*, 2007 WL 2318126, at \*1 (Del. Super. July 31, 2007).

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As such, the standard of review is “whether there is legal error and whether the factual findings made by the trial judge are sufficiently supported by the record and are the product of an orderly and logical deductive process.”<sup>4</sup> Errors of law are reviewed *de novo*.<sup>5</sup>

**CONTENTIONS**

Appellants contend that a sale of Spencer’s restricted shares of Geckosystems by the Sheriff will constitute a violation of Securities and Exchange Commission (“SEC”) Rule 144 ("Rule 144").<sup>6</sup> Specifically, they contend that the Securities Act of 1933 was enacted to protect investors from large shareholders or affiliates (insiders such as officers, *i.e.*, Spencer) selling all of their shares quickly to the detriment of the investors and the company; that the sale of restricted stock in the public marketplace is generally forbidden unless an exemption from the SEC's registration requirements applies; that appellees cannot accomplish the proposed Sheriff's Sale because they do not meet the criteria of the Rule 144 “safe harbor” provision; that the restricted legend must be removed from stock certificates before a transfer agent has the authority to execute a trade in the marketplace; that the removal is solely at the discretion of Geckosystems; that the corporation will not give its consent; that the sale of all 44 million of Spencer's shares is in clear violation of the 1% per 90 days

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<sup>4</sup> *Wright v. Platinum Fin. Servs.*, 930 A.2d 929, 2007 WL 1850904, at \*2 (Del. June 28, 2007) (TABLE).

<sup>5</sup> *Gibson v. N. Del. Realty Co. Stoneybrook Townhomes*, 1996 WL 453414, at \*1 (Del. Super. June 6, 1996).

<sup>6</sup> 17 C.F.R. § 230.144.

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volume restriction of Rule 144;<sup>7</sup> that Delaware law must be read in harmony with federal law; and that the sale of all Spencer's shares at a single Sheriff's Sale would undermine the public policy of protecting investors.

Generally, the Wallaces contend that Rule 144 neither conflicts with nor applies to the Delaware law permitting the attachment and sale of stock.<sup>8</sup> They contend that Delaware law permits the attachment and sale of restricted shares of common and/or preferred stock; that they submitted an expert opinion letter from a former SEC Division Chief stating that Rule 144 did not affect the enforceability of the Delaware attachment law; that Rule 144 only applies to the voluntary sale of restricted stock into the public securities market using a broker; that the ordered attachment and sale by the sheriff is not voluntary, is not an ordinary brokerage transaction and is not a sale into the public securities market; and that the buyer may purchase subject to any restrictions.

**DISCUSSION**

As the issue involved is purely a question of law, review is to be *de novo*.<sup>9</sup>

Spencer holds unregistered, restricted shares of Geckosystems stock that were issued to him by the corporation. The public resale of unregistered securities is generally forbidden under the Securities Act of 1933 absent an applicable exemption

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<sup>7</sup> 17 C.F.R. § 230.144(e)(1)(I).

<sup>8</sup> *See* 8 *Del. C.* § 324.

<sup>9</sup> *Gibson*, 1996 WL 453414, at \*1.

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from registration requirements.<sup>10</sup>

Rule 144 is a “safe harbor” provision that permits public resale of restricted securities if certain conditions are met.<sup>11</sup> “A person satisfying the applicable conditions of Rule 144 is deemed not to be engaged in a distribution of the securities and is therefore not an underwriter of the securities for purposes of [15 U.S.C. § 77b(a)(11)].”<sup>12</sup>

Spencer, as President and CEO of Geckosystems, is considered an “affiliate,” as that term is defined in Rule 144.<sup>13</sup> This means that, to fall within the purview of Rule 144 and be entitled to its protection, he and Geckosystems must comply with certain criteria including: Spencer must have held the restricted shares for one year, Geckosystems must provide adequate current company information to the public, Spencer is limited regarding the volume of stock that he is permitted to sell every ninety days, the sale must be handled as an ordinary brokerage transaction and a “Form 144” notice of the proposed sale must be filed the SEC in advance of the sale.<sup>14</sup>

Appellants here contend that the expected Sheriff’s Sale would be in

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<sup>10</sup> *Wonsover v. Sec. Exch. Comm’n*, 205 F.3d 408, 410 (D.C. Cir. 2000).

<sup>11</sup> *Kolber v. Body Cent. Corp.*, 2012 WL 3095324, at \*1 n.1 (D. Del. July 30, 2012).

<sup>12</sup> 17 C.F.R. § 230.144 (Preliminary Note); 15 U.S.C. § 77b(a)(11) (defining “underwriter”).

<sup>13</sup> 17 C.F.R. § 230.144(a)(1) (“An affiliate of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.”).

<sup>14</sup> 17 C.F.R. § 230.144; *see also* Revisions to Rules 144 and 145 of the Securities and Exchange Commission, 72 Fed. Reg. 71546, 71550-52 (Dec. 17, 2007).

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contravention of Rule 144(e)(1)'s "1%" volume limitation, which provides, in pertinent part:

(e) Limitation on amount of securities sold. Except as hereinafter provided, the amount of securities sold for the account of an affiliate of the issuer in reliance upon this section shall be determined as follows:

(1) If any securities are sold for the account of an affiliate of the issuer, regardless of whether those securities are restricted, the amount of securities sold, together with all sales of securities of the same class sold for the account of such person within the preceding three months, shall not exceed the greatest of:

(I) One percent of the shares or other units of the class outstanding as shown by the most recent report or statement published by the issuer . . . .<sup>15</sup>

Thus, Appellants argue that the maximum quantity of Spencer's stock that can be sold during any ninety day period is one percent of that stock class, and that the sale of all of Spencer's stock at once would constitute a clear violation of federal law.

The evidence includes an expert opinion letter obtained by the Appellees from William E. Donnelly, an attorney affiliated with the law firm of Murphy & McGonigle. In their brief, the appellees represent that he is a former SEC Divison Chief. He opined that a sale by the Sheriff falls within an exemption, Section 4(1),<sup>16</sup> which excuses compliance with the registration requirements of the Securities Act.

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<sup>15</sup> 17 C.F.R. § 230.144(e)(1).

<sup>16</sup> 15 U.S.C. § 77d(a)(1).

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His opinion states, in pertinent part, that:

[A] sufficient number of shares of the common stock of [Geckosystems] held by Spencer may be lawfully attached and sold at a public sale by the Sheriff of New Castle County, Delaware in accordance with applicable Delaware law in order to satisfy [the] outstanding judgment against Spencer in favor of the Wallaces without compliance with the registration requirements of the Securities Act in reliance upon the exemption set forth in Section 4(1) of the Securities Act, provided that the following conditions are satisfied: (1) [t]he sale will be limited to a single purchaser; (2) [a]ny purchaser will be required to represent in writing that it is purchasing the shares for investment and not with a view to resale or distribution and that the purchaser will not resell the shares or any portion thereof except pursuant to an effective registration statement under the Securities Act or pursuant to an applicable exemption from the registration requirements of the Securities Act; and (3) [t]he certificate representing the shares acquired by the purchaser will bear a restrictive legend stating that the shares or any portion thereof may not be resold except pursuant to an effective registration statement under the Securities Act or pursuant to an applicable exemption from the registration requirements of the Securities Act.

Appellants contend that Donnelly did not consider the volume restriction of Rule 144 in issuing his opinion. However, the contention is not persuasive. In his letter, he explicitly noted that he was using the Rule 144 definitions of “affiliate” and “restricted securities.” Further, he knew that the judgment was for \$17,100 when he opined that “a sufficient number of shares . . . may be lawfully attached.” I find that he was adequately apprised of the facts relevant to his analysis. Moreover,

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Donnelly's requirement that the purchaser take the stock subject to the restrictions currently in place suggests that his conclusion is not premised upon Spencer's qualifying under Rule 144,<sup>17</sup> but upon his conclusion that the exemption in Section 4(1) applies.

The exemption in Section 4(1) applies to a transaction "by any person other than an issuer, underwriter, or dealer."<sup>18</sup> The Sheriff is clearly neither an issuer nor a dealer. An underwriter is defined as:

any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking . . . . As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.<sup>19</sup>

After considering this language, I conclude that the Sheriff is not an underwriter, and I agree with Donnelly's conclusion that the exemption in 4(1) applies. From this I further conclude that a sufficient number of shares can be sold to satisfy the judgment under the terms set forth in his opinion letter.

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<sup>17</sup> See 17 C.F.R. § 230.144 (Preliminary Note) ("If a sale of securities complies with all of the applicable conditions of Rule 144 . . . [t]he purchaser in such transaction will receive securities that are not restricted securities.").

<sup>18</sup> 15 U.S.C. § 77d(a)(1).

<sup>19</sup> 15 U.S.C. § 77b(a)(11).

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**CONCLUSION**

Therefore, the order of the court below is *affirmed*.

**IT IS SO ORDERED.**

/s/ James T. Vaughn, Jr.

President Judge

cc: Prothonotary  
Order Distribution  
File