

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

JOHN J. GORMAN, ET AL.,)
)
 PLAINTIFFS)
)
 v.)
)
 H. WILLIAM COOGAN, JR., ET AL.,)
)
 DEFENDANTS)
)
 FIRSTMARK CORPORATION,)
)
 NOMINAL DEFENDANT)

CIVIL No. 03-173-P-H

**ORDER AFFIRMING THE RECOMMENDED DECISION
OF THE MAGISTRATE JUDGE**

The United States Magistrate Judge filed with the court on November 24, 2004, with copies to counsel, his Recommended Decision on Defendants' Motion for Sanctions and Recommended Findings Pursuant to 15 U.S.C. § 78u-4(c) (Docket Item 112). On December 27, 2004, a partial objection was filed by the plaintiffs' lawyers, and an objection was filed by the defendants.

Following oral argument on March 22, 2005, and upon *de novo* review of the record and the law, I now **ADOPT** the Recommended Decision of Magistrate Judge Cohen, including both his Proposed Findings of Fact and Proposed Conclusions of Law.

Since I agree with the substance of what Magistrate Judge Cohen has written, I see nothing to be gained in writing separately. It is apparent that the

Court of Appeals for the First Circuit will be asked to have the last word in any event.

Contrary to the defendants' suggestion, Magistrate Judge Cohen properly evaluated the complaint as a whole and concluded that the federal counts other than Count X did not border on frivolity and that the Complaint as a whole did not substantially violate Rule 11. Consequently, the Private Securities Law Reform Act did not require an award of fees and expenses incurred in the entire action, see 15 U.S.C. § 78u-4(c)(3)(A)(ii).

I also agree with Magistrate Judge Cohen and do not accept the defendants' argument that transaction causation was always a bar to any relief for violations of sections 13(d), 14(d) or 14(e) of the Williams Act such that those claims were frivolous or borderline frivolous.

I do not address arguments that the parties did not raise in their written submissions, but tried to raise for the first time at oral argument (e.g., the claim as to the defendant Ball).¹

The motion to amend judgment is **GRANTED**. In compliance with the Private Securities Law Reform Act, the judgment shall be amended to reflect that Rule 11 sanctions are awarded to the defendants against the plaintiffs' lawyers in an amount equal to reasonable attorney fees and other expenses incurred as a direct result of the plaintiffs' lawyers' violation of Rule 11(b)(2) in

¹ The Recommended Decision reminded the parties that "objections to those *specified* portions of a magistrate judge's report or proposed findings or recommended decisions" (emphasis added) must be filed within ten days of service, and that failure to file an objection "shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order." Recommended Decision at 48.

bringing a frivolous claim in Count X of the Complaint, *i.e.*, the Williams Act § 14(a) claim of proxy fraud, and in pressing successive frivolous arguments in an attempt to save that count, and that otherwise I have found no Rule 11 violations for the reasons stated on the record in this Order and in Magistrate Judge Cohen's Recommended Decision.

Finally, I direct the plaintiffs' lawyers and the defendants to undertake a serious good-faith effort to reach agreement on a fee disposition consistent with this opinion. Although a complete end to the litigation would undoubtedly be best for all concerned, I also point out that they could agree on an amount or amounts and still preserve their respective rights of appeal on the legal issues.

SO ORDERED.

DATED THIS 28TH DAY OF MARCH, 2005

/s/D. Brock Hornby
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

U.S. District Court
District of Maine (Portland)
Civil Docket For Case #: 03cv173

John J Gorman, *Individually
And Derivatively On Behalf Of
Firstmark Corporation*

Represented By Richard A. Goren
Sean T. Carnathan
Rubin, Hay & Gould, P.C.
205 Newbury Street
Framingham, MA 01701
(508) 875-5222
email: rgoren@rhglaw.com

Kurt J Rechner, *Individually
And Derivatively On Behalf Of
Firstmark Corporation*

Joseph H. Groff, III
Brendan P. Rielly
Jensen, Baird, Gardner & Henry
P.O. Box 4510
Portland, ME 04112
(207) 775-7271
email: jgroff@jbgh.com
brielly@jbgh.com

Phil A Whitney, *Individually
And On Behalf Of All Others
Similarly Situated And
Derivatively On Behalf Of
Firstmark Corporation*

Karin Whitney, *Individually And
On Behalf Of All Others Similarly
Situated And Derivatively On
Behalf Of Firstmark Corporation*

Plaintiffs

v.

H. William Coogan, Jr.
Susan C. Coogan
Donald V. Cruikshanks
R. Brian Ball

Represented By Jerrol A. Crouter
Drummond, Woodsum & MacMahon
P.O. Box 9781
Portland, ME 04101
(207) 772-1941
email: jcrouter@dwmlaw.com

Robert R. Kaplan, Sr.
John T. Wyand
John McCown
Firstmark Corporation

Defendants

Represented Dylan Smith
By Jacqueline Rider
James T. Kilbreth
Verrill & Dana
P.O. Box 586
Portland, ME 04112
(207) 774-4000
email: dsmith@verrilldana.com
jrider@verrilldana.com
jkilbreth@verrilldana.com

Richard A. Goren

and

Sean T. Carnathan

Witnesses

Represented Jonathan W. Brogan
By Russell Pierce
Norman, Hanson & DeTroy
P. O. Box 4600
Portland, ME 04112
(207) 774-7000
email: jbrogan@nhdlaw.com
email: rpierce@nhdlaw.com