

2011 IL App (2d) 110087  
No. 2-11-0087  
Order filed September 29, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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DANIEL CARAVETTE,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-L-734
	)	
Z TRIM HOLDINGS, INC.,	)	Honorable
	)	Margaret J. Mullen,
Defendant-Appellant.	)	Judge, Presiding.

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PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.  
Justices Schostok and Hudson concurred in the judgment.

**ORDER**

*Held:* The trial court did not err in: (1) finding that defendant breached the parties' settlement agreement; (2) rejecting defendant's affirmative defenses; and (3) calculating damages. The evidence reflected that a delay in defendant's registration was foreseeable due to SEC scrutiny of defendant's pending filings and that the company's priority was to clear the pending filings and not plaintiff's registration. The damages calculation, which was based on the stock price near the time of defendant's breach, was reasonable. Judgment affirmed.

¶ 1 In a prior suit, plaintiff, Daniel Caravette, sued his former employer, defendant Z Trim Holdings, Inc., for breach of contract and violation of a wage payment statute, alleging that Z Trim owed him commissions. The parties entered into a written settlement agreement. Plaintiff subsequently sued Z Trim for breach of the settlement agreement, alleging that Z Trim failed to

timely file with a regulatory body a registration statement necessary to deliver to him unrestricted shares of the company's stock. Following a bench trial, the trial court entered judgment in plaintiff's favor and awarded him \$47,139.81 in damages and \$31,051 in attorney fees and costs. Z Trim appeals, arguing that: (1) plaintiff failed to prove "causation" and damages; (2) Z Trim's affirmative defenses of commercial frustration and impossibility precluded judgment in plaintiff's favor; and (3) the trial court's damages calculation was erroneous. For the following reasons, we affirm.

¶ 2

## I. BACKGROUND

¶ 3 Z Trim<sup>1</sup> is a publicly-traded corporation headquartered in Mundelein. The company produces, markets, and distributes functional food ingredients and formulated foods. Plaintiff worked for Z Trim as a Series 7 (general securities representative) broker and sold the company's stock. In 2006, plaintiff filed his original suit,<sup>2</sup> alleging that the company owed him commissions (specifically, he alleged breach of contract and violation of the Illinois Wage Payment and Collection Act (820 ILCS 115/1 *et seq.* (West 2010))). On April 24, 2008, the parties executed a written settlement agreement (entitled "MUTUAL GENERAL RELEASE OF ALL CLAIMS"), in which Z Trim agreed to: (1) pay plaintiff (within five business days of the execution of the

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<sup>1</sup> The company was formerly known as Circle Group Holdings, Inc. and Circle Group Entertainment Ltd.

<sup>2</sup> Lake County No. 06-L-904.

agreement) \$50,000; (2) tender to him 200,000 stock warrants at a set strike price;<sup>3</sup> and (3) convey to plaintiff 245,000 shares of *unrestricted* stock.<sup>4</sup>

¶ 4 The provision addressing the conveyance of 245,000 shares, which is at issue in this appeal, specifically stated as follows:

“2. Z-Trim, Inc. shall immediately submit (using the fastest means available) a non-recourse request to the American Stock Exchange and whatever other bodies or entities are necessary to cause 245,000 shares of *unrestricted* common stock of Z-Trim, Inc. to be vested as soon as practicable in [plaintiff].” (Emphasis added.)

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<sup>3</sup> The stock-warrant provision stated:

“3. Z-Trim, Inc. shall further provide standard and routine documents to be drafted, lodged and filed with its corporate authorities and any other necessary entities to vest [plaintiff] with warrants good for a period of three (3) years from the date of execution of this agreement for 200,000 shares of stock at a strike price set as of the close of trading on the date of execution of this agreement. Copies of all documents so drafted, lodged and filed shall be delivered to [plaintiff] promptly upon their finalization, together with copies of whatever documents may be necessary to exercise the warrants so granted.”

<sup>4</sup> The copy of the agreement admitted into evidence bears a 11:59 a.m. facsimile transmittal time on that date.

¶ 5 About six weeks later, on June 18, 2008, plaintiff received 245,000 shares of *restricted*<sup>5</sup> stock. In 2009, he filed the present suit, alleging that Z Trim breached the settlement agreement by failing to deliver to him the 245,000 shares of *unrestricted* stock and that, as a result, he had been damaged in an amount in excess of \$75,000.

¶ 6 In response, Z Trim asserted two affirmative defenses: commercial frustration and impossibility. As to commercial frustration, Z Trim alleged that plaintiff could obtain unrestricted stock under two different methods. The first method consisted of three steps: (1) Z Trim could submit a Form S-3 registration statement to the Securities and Exchange Commission (SEC), seeking to register plaintiff's shares; (2) upon SEC approval, Z Trim would direct its transfer agent to issue stock to plaintiff; and (3) Z Trim would issue a letter to the American Stock Exchange (AMEX), the exchange upon which it was listed at the time, to list the stock for sale. Under the second method, following a six-month holding period (*i.e.*, from the date plaintiff gave consideration

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<sup>5</sup>Generally, restricted stock is stock of a public company that is exempt from the registration requirements of federal securities law. Transfers of restricted stock are generally; restricted for a certain period. *Davis v. C.I.R.*, 110 T.C. 530 (1998); 17 C.F.R. § 230.144(a)(3)(i); *In re Colonial Realty Co.*, 226 B.R. 513, 519-20 n.6 (1998). In the case of public companies (*i.e.*, those subject to the periodic reporting requirements of the Securities Exchange Act of 1934), the holding period is six months (from the date of giving consideration for the shares). 17 C.F.R. § 230.144(d)(1). Restricted stock may, however, be sold in a private sale. See *U.S. v. Rousch*, 466 F.3d 380, 386 (5th Cir. 2006). In contrast, unrestricted stock is "stock of public companies that is freely tradeable on the open market" (*Davis*, 110 T.C. 530), and it vests immediately (*Parsons v. Jefferson-Pilot Corp.*, 789 F. Supp. 697, 702 (M.D. N.C. 1992)).

for the stock, namely, execution of the settlement agreement, to October 24, 2008), plaintiff could utilize SEC Rule 144 (17 C.F.R. § 230.144 (2010)), which is an exemption from the SEC's registration requirement.<sup>6</sup>

¶ 7 Z Trim further alleged that, when the parties executed the settlement agreement, Z Trim had several registration statements pending with the SEC under which it had sought (pursuant to separate settlement agreements) to have restrictions removed from stock it had issued to several third parties: Farhad Zaghi and related parties (Zaghi) as well as George Foreman Enterprises, Inc. Z Trim asserted that, before execution of the settlement agreement at issue in this case, it had not received notice from the SEC of any problems with the third-parties' registration statements. It anticipated that the SEC would approve its registration statements within one to two months of such being filed (as it had always done in the past). However, "[a]lmost immediately after execution" of plaintiff's settlement agreement, the SEC advised Z Trim (via a facsimile transmitted at 1:16 p.m.) that it had concerns involving both of the third parties' pending registration statements and the company's other filed financial statements; the agency requested additional information. Z Trim alleged that it expeditiously provided the additional information and documentation. The SEC, however, did not

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<sup>6</sup> SEC Rule 144 operates as a safe harbor exemption from the registration requirements of the Securities Act of 1933 and permits resales of restricted or control securities. Thomas Lee Hazen, *Law of Securities Regulation* § 4.29 (2011). Specifically, it "applies to securities whose resale are restricted (restricted) as well as to securities whether or not restricted that are held by affiliates of the issuer (often referred to as control securities)." *Id.* The rule imposes a holding period of six months for securities of public companies "as a precondition to the safe harbor with respect to restricted securities." *Id.*

grant the registration statements, but requested “substantial additional information.” The company provided the additional information “as soon as it was possible” and “usually” within “several days.” The SEC closed their investigation on September 26, 2008, and cleared all comments on the registration statements. However, the agency did not authorize the removal of the restrictions on the underlying common stock; it requested that Z Trim file amended and restated registration statements.

¶ 8 Z Trim further alleged that the SEC’s delay indicated to it that no additional registration statements for removal of restrictions on stock would be granted or approved until the underlying issues were resolved. Further, based on the fact that the company’s accounting structure and reporting was the subject of SEC inquiry/requests, “it would have been utterly fruitless to submit further petitions,” including plaintiffs’. Z Trim asserted that it became clear that the fastest means available to remove the restrictions would be for plaintiff to utilize Rule 144. It issued to plaintiff (on June 18, 2008) the restricted stock “when it became apparent that it would not be able to secure approval for the issuance of unrestricted stock in a timely manner.” Z Trim further alleged that plaintiff could have utilized Rule 144 (at the end of the six-month holding period, on October 24, 2008) to have the restrictions removed, but he did not do so.<sup>7</sup>

¶ 9 Z Trim asserted that, by virtue of the SEC’s actions, it was commercially frustrated in performing further than it did when it provided plaintiff with the restricted stock. It contended that,

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<sup>7</sup> Z Trim asserted that, to use Rule 144, plaintiff had to tender back the restricted stock certificate, along with a certification required under the rule stating that he was not an affiliate of the company. Z Trim’s counsel would then send its stock transfer agent an opinion letter authorizing the agent to remove the restrictive legend on plaintiff’s stock certificate.

had it submitted a registration statement to the agency on plaintiff's behalf (in compliance with the settlement agreement), the filing "would have suffered the same fate" as the third parties' petitions. Plaintiff was aware of the company's issues, but chose not to pursue a Rule 144 application, despite his knowledge and experience as a Series 7 broker.

¶ 10 Z Trim's second affirmative defense was impossibility. It alleged that it took every possible step to comply with its contractual obligations, but did not have the ability to obtain approval of the registration and removal of the restrictions. Therefore, it was impossible for the company to perform any more fully than it did.

¶ 11 A. Trial - Plaintiff's Case

¶ 12 1. Plaintiff

¶ 13 The bench trial commenced on September 8, 2010. Three witnesses testified. Plaintiff testified that he once held a Series 7 license and has engaged in stock transactions; specifically, while he worked for Z Trim, plaintiff's job was to attract private investors to the company (who would purchase company shares). Plaintiff testified that he received the \$50,000 and 200,000 warrants promised to him in the parties' settlement agreement. However, he never received the 245,000 shares of *unrestricted* stock; rather, he received 245,000 shares of *restricted* stock.

¶ 14 Plaintiff testified he understood that he would not receive the stock on the day the agreement was executed and conceded that there is no language in the agreement specifying the date on which he would receive the unrestricted shares. He was also aware that a regulatory body would have to approve the removal of restrictions on the 245,000 shares. However, according to plaintiff, Brian Chaiken, Z Trim's chief financial officer and general counsel, told him that the process would take one or two weeks after the agreement was executed and it was explained to plaintiff that, in the past, the SEC had never disapproved of the removal of restrictions. Plaintiff stated that he was

represented by counsel when he signed the settlement agreement and that he knew that Z Trim was a publicly-traded company. However, plaintiff conceded that he was not present during the entire settlement conference and was not aware of everything that his attorney discussed with Chaiken or Z Trim's counsel. Plaintiff also conceded that he was aware that Z Trim's securities counsel would have to approve and authorize the transaction before the restrictions could be lifted, but he denied knowing that auditors would also be involved. According to plaintiff, Chaiken never informed him that outside securities counsel or the company's auditors had to approve the application or that there would be any delay in submitting the application.

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## 2. Steven Cohen

¶ 16 Steven Cohen, Z Trim's president, testified that he signed the settlement agreement. He denied having knowledge of the performance of the agreement, as he left that matter in Chaiken's hands. Cohen identified other documents relating to the settlement of litigation involving Zaghi and Foreman, but denied any knowledge as to the company's compliance with the terms of their settlements. He also authenticated a Form 10-Q dated May 14, 2008, and agreed that it was accurate at the time it was filed with the SEC. Specifically, the 10-Q noted the company's settlement agreement with plaintiff and stated that the value of the unrestricted shares to be delivered to plaintiff was \$63,700. Cohen also addressed an exhibit that consisted of a printout from yahoo.com listing the daily price of Z Trim stock from April to October 2008 and testified that the document appeared accurate. Plaintiff rested.

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## B. Z Trim's Case

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### 1. Brian Chaiken

¶ 19 Brian Chaiken testified at length on Z Trim's behalf. He is Z Trim's chief legal officer and chief financial officer. He is also a licensed attorney and a CPA. Chaiken was present at the April



21, 2008, settlement conference in plaintiff's case. Chaiken denied that he told plaintiff that he would receive his stock within one or two weeks of the settlement. He informed plaintiff that third party approval was necessary to remove the restrictions on the stock. Chaiken conceded that there was a discussion with plaintiff about a one-to-two-week period, but explained that the discussion was in reference to two pending S-3 registration statements (for Zaghi and Foreman), approval of which he expected in that period; after approval, the company would file another S-3 with the SEC, seeking to register plaintiff's shares.

¶ 20 Chaiken further testified that Z Trim never filed a registration statement with the SEC to remove the restrictions on plaintiff's stock, nor did it forward a listing application to AMEX (a draft of which it had prepared and that was admitted into evidence). The parties executed the settlement agreement shortly before noon on April 24, 2008. At this point, Chaiken was unaware of any impediment to obtaining the unrestricted shares for plaintiff; the company was under the impression that the SEC was undergoing an ordinary review of the pending S-3 registration statements. When asked if Z Trim had anything to gain if plaintiff did not receive his stock, Chaiken replied in the negative, explaining that the opposite was true: a potential breach-of-contract lawsuit by plaintiff.

¶ 21 According to Chaiken, about one or two hours after the settlement agreement was executed, Z Trim received a communication from the SEC, concerning the company's pending S-3 applications and related to its 2007 annual reports and three quarterly reports it had on file with the agency. Some of the SEC comments related to the Zaghi litigation. These comments were not "going to be quickly or easily responded to." They related to the company's financial information and required consultation with external accountants and auditors and outside securities counsel.

¶ 22 The April 24, 2008, comment from the SEC (concerning the company's pending filings) was the first of its kind that the company had ever received. Chaiken testified that he had no reason to

anticipate such extensive comments at this time. Z Trim communicated with plaintiff's attorney after receiving the comments. The final communication occurred on August 13, 2008, at which time Z Trim informed plaintiff's counsel via email that it would be filing amended statements and would then press the SEC for approval of the pending registration statements: "After we file, we will press the SEC for approval of our pending S-3 registration statements and then be good to go on [plaintiff's statement]." Z Trim did not receive any responsive communication from plaintiff until plaintiff filed the present suit.

¶ 23 Chaiken further testified that the preparation of a Form S-3 for plaintiff's shares would have required consultation with the company's outside securities counsel to draft the document, which would take about two to three weeks; the draft would then have to be submitted to external auditors for their approval, which typically took a few days; and then the company would file the document with the SEC. Only upon SEC approval could the company have removed the restrictive stock legend from the stock certificate. Chaiken testified that, based on his experience, SEC approval of registration statements varies "greatly," noting that the time could range from one week to nine months. He further explained that the fact that the SEC issues comments to an application does not necessarily mean that a company is doing something wrong.

¶ 24 Chaiken testified that *restricted* shares were issued to plaintiff. He explained that, under Rule 144, six months after acquiring the restricted stock, an investor may turn it into unrestricted stock. The investor may attest to the fact that he or she is not an affiliate of the company; tender the stock certificate, along with an attorney opinion letter from the company stating that the investor has satisfied the requirements of Rule 144; and request the transfer agent to remove the restriction on the stock certificate. When asked if the process is automatic, Chaiken responded, "I've never seen a case where a shareholder did not receive unrestricted stock by using that method, by filing the

appropriate documentation.” Plaintiff’s stock was never returned to Z Trim with any such requests. Today, according to Chaiken, plaintiff could still utilize Rule 144, assuming he is not affiliated with the company, which, presumably, he is not.

¶ 25 Chaiken testified that Z Trim made every attempt to resolve the issues with the pending registration statements, including filing amended statements in May 2008. They were not cleared until September 2008 with the comment that the company needed to file an amended and restated registration statement with updated financial information (which would have taken another three to four weeks). Another complication at this time was that the company was in the process of “stepping off” of AMEX and, as a result, could no longer utilize the (short) Form S-3; it has since had to utilize the Form S-1, which is a “much longer and complex form” and involves a “more time[-]consuming preparation process.” Chaiken testified that, assuming a registration statement had been prepared for plaintiff and submitted to the SEC, he would have no reason to believe it would have been treated differently than Zaghi’s registration statement.

¶ 26 Chaiken read into the record a March 19, 2008, email he received from Zaghi’s attorney informing Chaiken that Zaghi and his attorney did:

“ ‘not want any action taken that might delay the effectiveness of the pending registration and the removal of the restriction on [Zaghi’s] three millions shares. Therefore, given the events of last week, concerning which we reserve all of our rights and claims, it appears that a separate registration after the current one becomes effective is the only alternative.’ ”  
(Emphasis added.)

¶ 27 Next, Chaiken addressed a company 10-Q filing in which plaintiff’s 245,000 shares were valued at \$63,700 pursuant to certain accounting rules. Chaiken explained that the value was derived using the stock prices on the date of settlement (the adjusted close on the settlement date).

At the time plaintiff's 245,000 shares were outstanding, there were a total of over 75 million outstanding shares of Z Trim. Thus, plaintiff's shares would not have impacted the company's borrowing ability or any other aspect of its finances.

¶ 28 On cross-examination, Chaiken testified that, at the time of the settlement agreement, several registration statements were pending with the SEC. One—the Zaghi statement—was filed on March 11, 2008. Another was filed on June 5, 2007, (this is presumably the first Zaghi registration statement). Thus, on April 24, 2008, Chaiken was aware that a registration statement had been delayed and was pending for 10 months. He denied knowing the reasons for the delay, explaining that he was not the company's chief financial officer at the time it was filed.

¶ 29 Addressing a draft AMEX additional listing application dated May 12, 2008, for plaintiff's shares, Chaiken testified that this document was prepared but never sent to AMEX. He denied that the reason it was not sent was "it was not practicable" because the company wanted the Zaghi application approved. Chaiken stated that Z Trim prepared the document "in advance[,] hoping that we'd have a chance to use it." The company received the SEC comment letter about one to two hours after the settlement agreement was executed. Chaiken believed that sending in a registration statement for plaintiff's shares would have inflamed the SEC. When the settlement agreement was entered into (and thereafter), it was his hope that the company would receive effective registrations on the pending applications and would then "immediately submit an S-3" on plaintiff's behalf. Chaiken conceded that he stated in a supplemental affidavit that he had never previously seen the SEC ponder on a registration statement involving the company's stock. He was surprised by the SEC's questions about the company's finances and accounting; the SEC had never previously asked questions of this nature.

¶ 30 Chaiken next addressed the Zaghi and Foreman registration statements. He testified that the Zaghi registration statement was filed shortly after execution, but beyond the five days specified in the settlement agreement. As to the Foreman application, Chaiken testified that the application was not filed immediately after execution of the settlement agreement, as specified in that agreement. Ultimately, both Zaghi and Foreman received their unrestricted shares, but not through the formal SEC registration process; rather, they both utilized Rule 144, even though that method was not specified in their settlement agreements.

¶ 31 Addressing the details of the Zaghi registration statement, Chaiken testified that it was an unusual agreement in that it required the company to register an open-ended number of shares to then be sold to achieve a dollar value in the market. Initially (*i.e.*, before April 2008), the company contacted the SEC to inquire if the registration would be approved and the SEC informed Z Trim that it would not. Unlike Zaghi's registration statement, plaintiff's case involved a straightforward registration statement to remove restrictions and register stock. Zaghi's initial petition failed, and the parties abandoned the unique approach.

¶ 32 Chaiken next addressed Z Trim stock trading records from yahoo.com. The printout showed the open, high, low, and closing prices and volume traded and the adjusted closing prices for the company's stock between April 1, and June 30, 2008. The document states that the adjusted closing price on April 24, 2008, was \$0.26 per share. This is the price Z Trim utilized in its 10-Q filing on May 14, 2008. The closing price on May 8, 2008, was \$0.19 per share.

¶ 33 On re-direct, Chaiken testified that the Zaghi settlement agreement was unusual and that Z Trim's initial inquiry to the SEC to ascertain if it would approve the deal was unusual. Ultimately, the deal was re-written from an open-ended one to one for a fixed number of shares, which is identical to the arrangement with plaintiff. The unusual nature of the original Zaghi deal required

SEC input before the parties finally committed to it. Z Trim cannot control how long it takes the SEC to review or comment on an application. Z Trim attempted to respond as quickly as possible to the SEC's April 24, 2008, comments.

¶ 34 On re-cross-examination, Chaiken testified that the low price of Z Trim stock on April 24, 2008, was \$0.26 per share and the high was \$0.29 per share. Addressing the draft AMEX listing letter, Chaiken stated that, if it had been sent to AMEX, it would have resulted in plaintiff receiving restricted, not unrestricted, shares; it would not have caused any restrictions to be lifted.

¶ 35 2. Plaintiff

¶ 36 Plaintiff was re-called as an adverse witness and testified that he worked as a broker for Z Trim and held a Series 7 license at the time. He "had heard" of Rule 144, but did not utilize it and "had no idea how to use 144." He did not inquire about the rule, and, when he asked if there was an alternative means by which to obtain unrestricted stock, he was told by his broker that another method would take one year. Addressing the stock price, plaintiff testified that Z Trim stock had been trading in a range for about eight years and that it was not "uncommon to see it drop and then bounce back." He further stated: "I know this stock like the back of my hand for the past eight years." By September and October 2008, the stock price had dropped to \$0.07 per share.

¶ 37 On cross-examination, plaintiff testified that he did not trust Z Trim after he did not receive the 245,000 unrestricted shares.

¶ 38 C. Judgment and Subsequent Proceedings

¶ 39 On November 3, 2010, the trial court entered judgment in plaintiff's favor and awarded plaintiff \$47,139.81 in damages. The court found that the settlement agreement was binding on the parties and that plaintiff's testimony that Chaiken informed him that it would take one to two weeks for Z Trim to issue plaintiff his unrestricted shares was not incredible, but "more likely inaccurate";

the court noted that the evidence showed that the application alone would have taken two weeks to prepare. The trial court further found that Z Trim offered no credible excuse for its failure to immediately submit a Form S-3 registration statement for plaintiff. However, the court also found that, had the SEC received a registration statement for plaintiff's shares, "it likely would have been subject to the same comments and delays raised relative to Mr. Zaghi's statement." The court found that, on or about the date the settlement agreement was executed, Z Trim's stock sold for about \$0.26 per share (relying on Z Trim's exhibit that showed the daily stock price from yahoo.com) and that, on October 24, 2008, the end of the six-month holding period, the stock was worth significantly less (*i.e.*, about \$0.10 per share).

¶ 40 The court rejected Z Trim's affirmative defenses. As to commercial frustration, the court found that the SEC's comments were foreseeable and that the company "was well aware that it was not within its power to require the SEC to approve" the registration statement. As to impossibility, the court found that the SEC's comments could reasonably have been anticipated and that Z Trim "did not offer any credible evidence that it did not contribute to the circumstances in the way it conducted its affairs" and did not attempt all practical alternatives available to clear the SEC's comments in a timely fashion and did not submit the required paperwork. Accordingly, the court found that, by failing to file a Form S-3 registration statement within about two weeks of the execution of the settlement agreement, Z Trim breached its contract with plaintiff.

¶ 41 Addressing damages, the court noted case law that utilized either the date of breach or the judgment date as the reference for calculating the value of a plaintiff's shares. After further noting the need to ensure that the defendant not receive a benefit from its breach of contract, the court utilized the average stock price between the date of the breach (April 24, 2008) and the date the

Zaghi comments cleared (September 28, 2008), which was \$0.19 per shares or \$47,139,81 in damages (\$0.19 times 245,000 shares).

¶ 42 Plaintiff petitioned for fees and prejudgment interest, and Z Trim moved for reconsideration. On January 13, 2011, the trial court awarded plaintiff \$31,051 in attorney fees and costs, but denied plaintiff's petition for prejudgment interest. The court also denied Z Trim's motion to reconsider, finding that the company had the burden of showing the value of the restricted stock (Rule 144 stock) and that no evidence was presented as to the value. Z Trim appeals.

¶ 43 II. ANALYSIS

¶ 44 A. Breach and Damages

¶ 45 Z Trim first argues that the evidence was insufficient to establish the "causation" and damages elements of plaintiff's claim. "The elements of a breach of contract claim are: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of contract by the defendant; and (4) resultant injury to the plaintiff." *Henderson-Smith & Associates, Inc. v. Nahamani Family Services Center, Inc.*, 323 Ill. App. 3d 15, 27 (2001). The question whether a plaintiff established the necessary elements of his or her breach of contract claim is reviewed under the manifest-weight-of-the-evidence standard. *Wilmette Partners v. Hamel*, 230 Ill. App. 3d 248, 256 (1992). A decision is against the manifest weight of the evidence where the finding is unreasonable, arbitrary, or not based on the evidence presented. *Bohne v. La Salle National Bank*, 399 Ill. App. 3d 485, 494 (2010).

¶ 46 Z Trim argues that there was no evidence showing that plaintiff's stock could have been registered and deemed unrestricted by the SEC at any time prior to the running of the six-month window for using Rule 144 (*i.e.*, by October 24, 2008). It notes that the trial court found that, had Z Trim submitted a registration statement for plaintiff's shares, it would likely have been subject to



the same comments and delays as Zaghi's statement. As to damages, Z Trim argues that, even if the SEC had approved plaintiff's registration statement, there was no evidence as to when that would have occurred and what the value of the stock would have been on that day.

¶ 47 We reject Z Trim's arguments, as they focus more on its affirmative defenses, which we address below. The evidence was sufficient to establish a breach of contract. In the settlement agreement, Z Trim promised to "immediately submit (using the fastest means available)" the required filings to AMEX, the exchange upon which it was listed, and "whatever other bodies or entities" (here, the SEC) were required to cause the unrestricted shares to be delivered to plaintiff. Chaiken conceded that no registration statement was ever filed with the SEC for plaintiff's shares (because, in his view, it would have inflamed the agency due to its comments on the pending filings) and that, although a draft AMEX additional listing application was prepared, it was never actually forwarded to AMEX (because he believed it would not have been practicable to do so). As to damages, the contract promised plaintiff unrestricted shares and he received only restricted shares. As plaintiff notes, the value of his shares in May 2008, as reflected in a company 10-Q filing, was \$63,700, a figure that Cohen testified was accurate. By October 2008, the value had fallen, according to the company, to about \$17,000 (based on a mid-October 2008 value of \$0.07 per share). The basic theory of damages for breach of contract requires that a claimant "establish an actual loss or measurable damages resulting from the breach in order to recover." *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 149 (2005). Clearly, the trial court's finding that the evidence established a breach of contract was not against the manifest weight of the evidence.

¶ 48 B. Affirmative Defenses

¶ 49 Next, Z Trim argues that the trial court erred in rejecting its affirmative defenses of commercial frustration and impossibility. It contends that the evidence showed that, at all times, it

intended to comply with the settlement agreement, but that unforeseeable events occurred that prevented it from obtaining SEC approval to remove the restrictions sooner than the time frame allowed by Rule 144. Z Trim urges that, even if it had submitted a Form S-3 for plaintiff's shares, the soonest it would have been approved was October 2008, at which time the stock price had already suffered a reduction in value. (This time also happens to coincide, the company notes, with the time when plaintiff could first have utilized Rule 144.) Z Trim contends that, had plaintiff utilized Rule 144 to have the restrictions removed in October 2008 when the stock was worth about \$0.07 per share, he would have received about \$17,000 for his holdings. Instead, plaintiff waited until the next year to file his lawsuit "and attempted to prove damages far in excess of his actual losses."

¶ 50

#### 1. Commercial Frustration

¶ 51 The doctrine of commercial frustration renders "a contract unenforceable if a party's performance under the contract is rendered meaningless due to an unforeseen change in circumstances." *Illinois-American Water Co. v. City of Peoria*, 332 Ill. App. 3d 1098, 1106 (2002). The doctrine applies where: (1) the frustrating event was not reasonably foreseeable; and (2) the value of the counter-performance was totally or almost totally destroyed by the frustrating cause. *Id.*; *Farm Credit Bank of St. Louis v. Dorr*, 250 Ill. App. 3d 1, 11 (1993). The doctrine should not be liberally applied. *Smith v. Roberts*, 54 Ill. App. 3d 910, 913 (1977).

¶ 52 Z Trim focuses on the foreseeability element and argues that, it fully performed, but that some unforeseeable event occurred that constituted a genuine impediment to its timely completion of its obligations under the contract. The company contends that, although certain company filings had received negative comments or had been held up for lengthy periods, there was no evidence showing that Z Trim had knowledge that the SEC was reviewing the company's *financial*

disclosures, which arose only an hour or so after the settlement agreement was executed and were unprecedented. It contends that requiring it to file a registration statement that could not timely be granted would have accomplished nothing. It contends that nothing it could have done would have registered plaintiff's stock any sooner than he could have done by himself through Rule 144; in other words, there was no evidence that the SEC would have taken action on plaintiff's registration statement in a manner different than it treated the Zaghi and Foreman filings.

¶ 53 We conclude that the trial court's finding that Z Trim did not establish commercial frustration was not against the manifest weight of the evidence. It was not unreasonable for the trial court to find that the SEC's comments on the pending filings were foreseeable. Addressing the period prior to execution of plaintiff's settlement agreement, Chaiken testified that one registration statement had been pending with the SEC since June 5, 2007, and that, as of April 2008, its approval had been delayed. He also noted that Z Trim had approached the SEC before April 2008 to inquire if the SEC would approve the unique approach it desired to incorporate into the Zaghi filing and that the SEC had responded in the negative. This evidence reflects, at a minimum, that the SEC was in the process of examining certain of the company's arrangements. Z Trim argues that the agency's comments relating to its *financial* disclosures were completely unforeseeable and not related to the Zaghi registration statement. We reject the company's attempt to distinguish the comments in this manner. Every filing is necessarily unique, and Z Trim's argument ignores the fact that the company was on notice that SEC approval of at least one filing—the June 5, 2007 filing—had been delayed. The company nevertheless chose to enter into the settlement agreement with plaintiff and promised (without precondition or notification of the pending delays) to “immediately submit (using the fastest means available)” a registration statement for plaintiff's shares, which it did not do. Further, Chaiken testified that, if plaintiff's registration statement had been filed, it would have inflamed the

SEC; this implies that the company's priority was not to comply with plaintiff's settlement agreement, but to ensure that approval of the Zaghi and other pending filings were not further delayed. Indeed, in the emails between Chaiken and Zaghi's counsel, Chaiken promised not to take any action that might delay approval of the pending registration statements. Critically, Chaiken also testified that the company did not expect to act on plaintiff's registration statement *until it first received approval of the pending applications*. This testimony reflects that plaintiff's application was not the company's priority at the time it entered into the settlement agreement with plaintiff. Rather, Z Trim desired to first clear the pending statements with the SEC and then address plaintiff's registration. Finally, as to Z Trim's argument that there was no evidence that the SEC would have acted on plaintiff's registration statement any time before October 2008, we conclude that, although this possibility existed (indeed, the trial court noted this was the "likely" time), the assertion essentially constitutes speculation because no registration statement was ever filed for plaintiff's shares.

¶ 54

## 2. Impossibility

¶ 55 The doctrine of impossibility of performance applies where there "is an unanticipated circumstance that has made the performance of the promise vitally different from what should reasonably have been within the contemplation of the parties when the contract was entered." *Illinois-American Water*, 332 Ill. App. 3d at 1106; see also *Farm Credit Bank*, 250 Ill. App. 3d at 9 (doctrine applies "where the continued existence of a particular thing is so necessary to the performance of a contract that, by law, it is implied as a condition of the contract that the destruction of that thing shall excuse performance"). The doctrine requires that: (1) the circumstances creating the impossibility were not and could not have been anticipated by the parties; (2) the party asserting

impossibility did not contribute to the circumstances; and (3) the party asserting impossibility demonstrate that it has tried all available practical alternatives to permit performance. *Id.*

¶ 56 As with its commercial frustration affirmative defense, we conclude that the trial court did not err in finding that Z Trim failed to establish its impossibility defense. As with commercial frustration, foreseeability is an element of this defense. As such and for the same reasons, we conclude that the trial court did not err in finding that the SEC's comments were foreseeable. Although we need not address the remaining elements, we note that the evidence also showed that Z Trim did not try all available practical alternatives to permit performance and actually contributed to the circumstances, where it did not even file a registration statement for plaintiff's shares. Chaiken's self-serving testimony that such action would have inflamed the SEC was properly discounted by the trial court, as the email correspondence between him and Zaghi's attorney reflected that the company's priority was to register Zaghi's shares.

¶ 57 C. Damages Calculation

¶ 58 Next, Z Trim argues that the trial court erred in its damages calculation. It contends that the plaintiff presented no evidence on damages and that the trial court's reliance on the Yahoo listings was erroneous. Z Trim suggests that the correct valuation is the use of a mid- or late-October stock price (about \$0.06 or \$0.11 per share), rather than the trial court's averaging of the stock price for the period from the contract date (April 24, 2008) to the date the Zaghi comments cleared (September 28, 2008), which it calculated as \$0.19 per share. For the following reasons, we reject Z Trim's argument.

¶ 59 The purpose of damages is to place the nonbreaching party in the position he or she would have been had the contract been performed; the nonbreaching party should not be placed in a better position or provided with a windfall recovery. *Feldstein v. Guinan*, 148 Ill. App. 3d 610, 613

(1986); *Golen v. Chamberlain Manufacturing Corp.*, 139 Ill. App. 3d 53, 60 (1985). The amount of damages awarded is generally within the discretion of the trier of fact; nevertheless, a reviewing court can order a new trial if the damages are manifestly inadequate, if proved elements of damages have been ignored, or if the award does not bear a reasonable relationship to the plaintiff's loss. *Netzel v. United Parcel Service, Inc.*, 181 Ill. App. 3d 808, 817 (1989).

¶ 60 “It is well established that the proper measure of damages for corporate stock is its market value at a time reasonably close to the date of breach.” *Alimissis v. Nanos*, 171 Ill. App. 3d 1005, 1010-11 (1988) (further noting that courts use various data, including the price as of date of judgment or the highest market value since date of conversion, for determining stock value to ensure that the defendant does not receive a benefit from its breach of contract and further holding that use of the highest market value of stock near the time of breach was a reasonable damages calculation). Here, the evidence showed that the earliest the registration statement for plaintiff's shares could have been filed was about two weeks after execution of the settlement agreement; thus, the date of breach was about early May 2008. The Yahoo listings, which Cohen testified appeared accurate and to which defense counsel stipulated at the end of trial, showed that Z Trim's stock had an average price of \$0.19 per share at the end of the first week of May 2008. This price would result in a \$46,550 valuation of plaintiff's stock (\$0.19 x 245,000). The trial court here noted that, if it used the price as of the date of breach (about \$0.25 per share), then plaintiff would receive a windfall. The court also noted that, if it used the value on the date of judgment (November 2010), Z Trim would benefit from its breach because the stock price had significantly dropped. Ultimately, the trial court awarded plaintiff \$47,139.81 by using the average of the stock price from April 24, to

September 28, 2008, which it noted was \$0.19 per share.<sup>8</sup> We cannot conclude that the trial court's calculation was erroneous.

¶ 61 Z Trim also argues that the damages award should have: (1) been discounted for the (restricted) stock that plaintiff retained; and (2) taken into consideration the “dumping” factor, *i.e.*, that the sale of a block of shares as large as plaintiff's would have negatively impacted the company's stock price. We reject these arguments because Z Trim did not raise its request for (or offer any evidence concerning) a discount or offset at trial or the *specific* impact a trade of a volume of shares equal to plaintiff's block would have on its stock price.

¶ 62 Finally, because Z Trim has not prevailed on any arguments on appeal, we reject its request for fees and costs. The settlement agreement provides only that a *prevailing* party in any enforcement action shall be entitled to recover its fees.

¶ 63 III. CONCLUSION

¶ 64 For the foregoing reasons, the judgment of circuit court of Lake County is affirmed.

¶ 65 Affirmed.

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<sup>8</sup>By this court's calculation, the trial court's actual figure was slightly over \$0.192 per share.

Z Trim does not contest this aspect of the court's calculation.