COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

July 2, 2008

Via LexisNexis File & Serve
and Facsimile

Mr. Charles Michael Binks
3715 San Antonio Drive
Yorba Linda, CA 92886

Kevin F. Brady, Esquire
Connolly Bove Lodge & Hutz LLP
1007 North Orange Street
P.O. Box 2207
Wilmington, DE 19899-2207

Re: Binks v. Megapath, Inc., et al.; C.A. No. 2823-VCN
Binks v. DSL.net, Inc.; C.A. No. 3129-VCN
Date Submitted: June 27, 2008

Dear Mr. Binks and Mr. Brady:

Charles Michael Binks is the Plaintiff in the two above-referenced actions—one an appraisal action (C.A. No. 3129-VCN) and the other a shareholder fiduciary duty action (C.A. No. 2823-VCN).

On June 4, 2008, the Court, following a hearing, granted the motion of Connolly Bove Lodge & Hutz LLP ("Connolly Bove") to withdraw as Mr. Binks' attorneys in both of the actions. On June 16, 2008, Mr. Binks moved under Court of

Chancery Rule 59(f) for reargument of the Court's decision and under Supreme Court Rule 42 for certification of an interlocutory appeal from the implementing order. The motion also asserts that the Court violated Canon 3A(4) of the Delaware Judges' Code of Judicial Conduct by engaging in *ex parte* communications with Connolly Bove when it read a letter efiled by Connolly Bove on June 3, 2008, which had not been served on Mr. Binks.[1]

I. THE MOTION FOR REARGUMENT

Mr. Binks' motion for reargument fails because it is untimely and because substantively it does not satisfy the requirements of Court of Chancery Rule 59(f).[2]

A motion for reargument under Court of Chancery Rule 59(f) must be "served and filed within five days after the filing of the Court's opinion or the receipt of the Court's decision." The Court's decision was given from the bench on June 4, 2008, and the implementing order was entered later that same day. Mr. Binks was in the

[1] Mr. Binks raises the *ex parte* communication issue in both his motion for reargument and his motion for certification of an interlocutory appeal. That issue was not before the Court and, indeed, was unknown to the Court at the time of the challenged decision allowing Connolly Bove to withdraw. Although perhaps technically not properly brought before the Court through either motion, his contention will be treated as separately raised and will be addressed below.

[2] Because Mr. Binks used an incorrect civil action number on his motion for certification of an interlocutory appeal, its efiling was rejected. Nevertheless, the motion will be treated as if it had been properly submitted for filing on June 16, 2008.

courtroom at the time and, thus, he received the Court's decision on June 4, 2008. His motion for reargument, however, was not filed until June 16, 2008, well over the five days allowed by the Rule.[3] Because the motion was not timely filed, it must be denied.[4]

A few observations about the substance of Mr. Binks' motion may also be appropriate. A motion for reargument may be granted only if the "court has overlooked a controlling decision or principle of law that would have controlling effect, or the court has misapprehended the law or the facts so that the outcome of the decision would be different."[5] In his motion, Mr. Binks renews his arguments with respect to the status of his payments to Connolly Bove for its services. Any dispute between Mr. Binks and Connolly Bove with respect to the payment of fees, however, did not impact the Court's decision. Indeed, the Court made clear (or

[3] By force of Court of Chancery Rule 6(a), the five-day period for filing a motion for reargument is at a minimum seven calendar days.
[4] *See, e.g., State v. Brokenbrough*, 2008 WL 1891705, at *1 (Del. Super. Apr. 30, 2008) ("The five-day rule is jurisdictional and the Court does not have discretion to extend the deadline."); *Blank v. Belzberg*, 2003 WL 21788086, at *1 (Del. Ch. July 24, 2003).
[5] *Those Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs., Inc.*, 2008 WL 2133417, at *1 (Del. Ch. May 21, 2008).

attempted to make clear) that any dispute regarding fees was not being considered by the Court.[6]

Mr. Binks also revisits his arguments regarding whether Connolly Bove should be allowed to withdraw under Rules 1.16(b)(4) and 1.16(b)(6) of the *Delaware Lawyers' Rules of Professional Conduct.* Mr. Binks disagrees with the Court's conclusions, but he does not demonstrate that the Court either misapprehended the facts or misapplied the guiding principles of the Rules of Professional Conduct. Indeed, to understand the Court's decision, it is only necessary to return to Mr. Binks' Supplemental Opposition to Motion to Withdraw, dated June 2, 2008, and efiled June 3, 2008, in which, over the course of almost thirteen pages, he excoriates lawyers from Connolly Bove. The tenor of that communication, especially when coupled with the history of frustration between Connolly Bove and Mr. Binks and an apparent disagreement over how to move forward with the above actions, amply demonstrates that this is an attorney-client relationship that can no longer function in any practical fashion. Mr. Binks suggests that there are other lawyers at Connolly Bove with whom he might not have a

[6] Tr. of Oral Arg. (June 4, 2008) at 29.

problem, but the notion that a law firm cannot withdraw because not every lawyer in the firm has had problems with the client (or not every lawyer in a particular practice sector has had problems with the client) cannot be the standard. There are specific lawyers with whom Mr. Binks has worked at Connolly Bove; although he retained the firm, it was obvious that certain lawyers would have primary responsibility for his account; the breakdown of the relationship with those lawyers is palpable.

Thus, Mr. Binks has sponsored no reasons that would suggest to the Court that reargument would be appropriate.[7]

II. THE MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

Mr. Binks' motion for certification of an interlocutory appeal does not seriously attempt to demonstrate how the Court's decision of June 4, 2008, fits within the standards prescribed by Supreme Court Rule 42. To a large extent, it is simply a rehashing of his motion for reargument and renews his contentions that the Court erred. An interlocutory appeal may not be certified unless the order from

[7] In reaching this decision, the Court does not rely in any way upon Mr. Binks' filings after June 4, 2008. Any independent reading of those filings would not suggest that the Court's conclusion regarding the motion to withdraw was a mistake.

which the appeal is sought (1) determined a substantial issue, (2) established a legal right, and (3) satisfied at least one of the criteria set forth in Supreme Court Rule 42(b)(i)-(v).[8] As a general matter, a trial court's decision to allow counsel to withdraw does not satisfy the requirements for an interlocutory appeal.[9] This is because disputes appropriate for interlocutory appeal involve issues of substance relating to the merits of the dispute between the parties.[10] A motion to withdraw, of course, does not relate to the merits of the parties' disputes.

In short, because the Court's order of June 4, 2008, did not determine a substantial issue, did not establish a legal right, and did not satisfy any of the criteria set forth in Supreme Court Rule 42(b)(i)-(v), the motion for certification of an interlocutory appeal will be denied.

III. THE *EX PARTE* COMMUNICATION

The avoidance of *ex parte* communications between lawyers (or clients, or *pro se* litigants) and the Court is important both because of fairness in fact and

---

[8] *See, e.g.*, *Ryan v. Gifford*, 2008 WL 43699, at *4 (Del. Ch. Jan. 2, 2008).
[9] *See, e.g.*, *Loebe v. Newman*, 790 A.2d 476, 2002 WL 122637 (Del. 2002) (TABLE)
[10] *See, e.g.*, *In re Kent County Adequate Public Facilities Ordinances Litigation*, 2007 WL 2875204, at *2 (Del. Ch. Sept. 26, 2007); DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY §14.04[a], at 14-5 to -6 (2008).

because of the need for the appearance of fairness fostering correlative faith in the justice system. Delaware's Canons of Judicial Conduct, at Canon 3A(4), instruct that a "judge should . . . neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding." Similarly, in accordance with Delaware's Principles of Professionalism for Delaware Lawyers adopted by the Delaware State Bar Association and the Delaware Supreme Court, in Part B(3), a "lawyer should avoid *ex parte* communications with the Court on pending matters, ..."[11]

Connolly Bove responded to Mr. Binks' thirteen-page pleading of June 2, 2008, with a brief two-page letter on June 3, 2008, the day before the hearing on its motion to withdraw. The letter added little, if anything, of substance. It recited Connolly Bove's disagreement with many of the factual assertions of Mr. Binks' pleading. It clarified a few matters. In terms of practical effect, however, it did not motivate the Court's decision to allow Connolly Bove to withdraw. Nonetheless, for reasons that are not entirely clear, Connolly Bove failed to serve its June 3, 2008,

[11] *See also* Supr. Ct. R. 10; Ct. Ch. R. 5; Super. Ct. Civ. R. 5.

letter on Mr. Binks. Connolly Bove argues that service on Mr. Binks was "simply overlooked."[12]

Connolly Bove's letter of June 3, 2008, was printed the next day from among several efilings in other matters assigned to the Court. The Court did read the letter and relied upon standard practice, the expectation, and the requirement that counsel would serve papers on the proper parties.[13] The Court did not learn that Connolly Bove had failed to serve Mr. Binks until Mr. Binks filed his motion for reargument on June 16, 2008.[14] The question, in the context of Connolly Bove's motion to withdraw, becomes one of whether the *ex parte* communication had any effect on the outcome. The Court has reviewed its decision-making process; the transcript of

[12] Opp'n to Pl.'s Mot. for Reconsideration/Reargument at 4. It points out that Mr. Binks' thirteen-page pleading, dated the day before, was not efiled until 3:00 p.m. on June 3, 2008, and, with the hearing scheduled for the next day, Connolly Bove was under severe time constraints to file a response. That response, the letter that was not transmitted to Mr. Binks, was efiled shortly after 7:00 p.m. on June 3, 2008.

[13] By Court of Chancery Rule 5, the party (or its counsel) filing a "paper" is required to see to its service upon the "parties." The Rules do not explicitly address service on the "client" during the pendency of a motion to withdraw, but no one disputes that a client confronted with such a motion is entitled to the same notice and service as envisioned generally by the Rules for service upon parties (or their counsel) in the more typical setting.

[14] Connolly Bove's letter shows that a copy was sent to the Defendants' counsel; it did not show a copy as having been sent to Mr. Binks. When the letter was filed, Connolly Bove was still counsel of record for Mr. Binks. It is rare for counsel writing to the Court to show a copy to their client on the transmittal to the Court, although one can be reasonably certain that most, if not virtually all, letters sent to the Court will also be transmitted to the clients. Thus, the absence of Mr. Binks' name from the copy list is not as telling as he suggests.

the June 4, 2008, hearing; the parties' submittals, including, especially, Mr. Binks' pleading of June 2, 2008, and concludes that the Connolly Bove letter of June 3, 2008, was cumulative and that the outcome of the motion would have been the same regardless of whether the June 3, 2008, letter had been filed. For that reason, the substantive issue of whether Connolly Bove should be allowed to withdraw need not be further revisited nor should the disposition of those issues be different because of Connolly Bove's failure to comply with its obligations to serve Mr. Binks.

As noted, Mr. Binks has raised the question of *ex parte* communication in both his motion for reargument and his motion for certification of an interlocutory appeal. Neither was the proper platform for raising those concerns, but the concerns are substantial enough that they deserve to be addressed separately. The Court has considered them and has determined that the June 3, 2008, letter does not provide a basis for setting aside its decision to allow Connolly Bove to withdraw. Accordingly, the Court treats the allegations regarding the *ex parte* communication through Connolly Bove's letter of June 3, 2008, as a separate issue for consideration and concludes that Mr. Binks is entitled to no modification of the order allowing withdrawal.

* * *

Orders implementing this letter opinion will be filed.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: David J. Teklits, Esquire
Register in Chancery-K