IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ARCHSTONE PARTNERS, L.P., ARCHSTONE OFFSHORE FUND, LTD., BAYLOR UNIVERSITY, BOWDOIN COLLEGE, CARNEGIE CORP. OF NY, CAXTON SELECT INVESTMENTS LLC, TED DINTERSMITH, EXCELSIOR DISCOVERY, THE J. PAUL GETTY TRUST, DAVID E. MOORE, OXBRIDGE ASSOCIATES, LP, RENESSLAER POLYTECHNIC INSTITUTE, SOUTHERN METHODIST UNIVERSITY, THE PRESIDENT AND TRUSTEES OF WILLIAMS COLLEGE, MICHAEL F. PRICE, and UNIVERSITY OF OKLAHOMA FOUNDATION, Plaintiffs, v. WARREN LICHTENSTEIN, STEEL PARTNERS (ONSHORE) L.P., STEEL PARNTERS (OFFSHORE) LTD., STEEL PARTNERS II MASTER FUND L.P., STEEL PARTNERS II L.P., STEEL PARTNERS II GP LLC, STEEL PARTNERS LLC, WEBFINANCIAL L.P., and WGL CAPITAL CORP., Defendants.	)	Civil Action No. 4465-CC
BANK OF AMERICA, N.A. as Master Trustee of ACF MASTER TRUST, Plaintiff,	)	

v.	)	Civil Action No. 4284-CC
	)	
STEEL PARTNERS II (OFFSHORE) LTD., STEEL PARTNERS II (ONSHORE) LP, STEEL PARTNERS II MASTER FUND L.P., STEEL PARTNERS II, L.P., STEEL PARTNERS II GP LLC, WGL CAPITAL CORP., STEEL PARTNERS LLC, STEEL PARTNERS HOLDINGS L.P., and WARREN G. LICHTENSTEIN,	)	
	)	
Defendants.	)	

OPINION AND ORDER DENYING CERTIFICATION OF AN INTERLOCUTORY APPEAL AND DENYING INJUNCTION PENDING APPEAL

Date Submitted: July 7, 2009
Date Decided: July 10, 2009

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CHANDLER, Chancellor

On June 19, 2009, this Court denied plaintiffs' motions for preliminary injunction because the Court was "unable to conclude that plaintiffs are threatened with imminent and irreparable harm sufficient to warrant the extraordinary remedy of a preliminary injunction."[1] After waiting ten days, the maximum period of time permitted under the Supreme Court Rules, plaintiffs moved for certification of an interlocutory appeal of this Court's June 19 Order. Notwithstanding that this Court had already determined that plaintiffs were not threatened with sufficient irreparable injury if an injunction were not issued, plaintiffs also moved for an injunction pending appeal and waiver of bond. For the reasons set forth below, plaintiffs' motions are denied.

I. BACKGROUND

Although a full recitation of the background of these cases is not necessary, a short explanation of plaintiffs' motions for preliminary injunction, and the Court's reasons for denying those motions, may be helpful in understanding the issues before the Court.[2] Plaintiffs are investors in the Steel Partners II family of funds. Since its inception, Steel Partners II, under the leadership of Warren Lichtenstein, has pursued an active value investment strategy, with its portfolio concentrated in a limited number of investments. This strategy often led the fund

[1] Transcript of Oral Ruling of June 19, 2009 ("June 19 Order" or "Order") 152.
[2] The brief summary of the facts provided herein, which is presented only for purposes of clarity, is drawn substantially from the June 19 Order, which was delivered orally following the conclusion of oral argument on plaintiffs' motions for preliminary injunction.

to make long-term investments and attempt to work with management to obtain a return on its investment.

By early October 2008, a number of investors had submitted requests to redeem all or a substantial portion of their investments in the funds, and by November 30, 2008, these redemption requests amounted to approximately 38% of assets under management. These requests posed a problem for the funds. On December 9, 2008, the investors were informed that redemptions had been temporarily suspended. On December 31, 2008, the investors were presented with a plan whereby the interests in the assets of the funds would be transferred to a publicly traded limited partnership, and the interests in that partnership would be given to investors in exchange for their existing interests in the funds. This new entity was designed to address the problems posed by the redemption requests, while hopefully providing investors with a security that would become tradable in the market. Investors, however, would not have the right to redeem the units of this new entity, and this plan faced significant investor resistance.

After discussions with investors, a Revised Plan was announced, pursuant to which investors would receive a cash distribution and have a choice between (1) receiving units in accordance with the plan as originally proposed ("Option A"), or (2) receiving a pro rata distribution of securities held by the funds, in full satisfaction of their investments ("Option B"). A third option was later added,

which would allow investors to have their share of securities placed in a liquidating trust. The investors were instructed that they could choose either Option A or Option B. If investors chose neither option they would be deemed to have chosen Option B.

Plaintiffs sought to enjoin the Revised Plan, asserting that they would prevail at trial on a least three claims. On June 19, 2009, the Court denied plaintiffs' motions on the ground that plaintiffs had failed to establish a sufficient threat of irreparable injury. As the Court stated:

> After carefully considering both your written submissions and the arguments presented to me today, I'm unable to conclude that plaintiffs have established that they will suffer immediate and irreparable harm if the injunction is not issued. Under the Revised Plan, all investors who do not affirmatively select Option A will be given what they're entitled to under Option B—a pro rata share of the securities held by the funds. Plaintiffs argue that dispersing the funds' assets will cause plaintiffs irreparable harm because those plaintiffs could obtain greater value in an orderly liquidation. Plaintiffs fail to define what such an orderly liquidation would look like, and have not convinced me that such a liquidation would produce an amount greater for plaintiffs than what they will receive under the Revised Plan. More importantly, however, plaintiffs have utterly failed to establish their right to force such a liquidation, or even that such a liquidation is likely. Thus, plaintiffs are left to show that they will be harmed by receiving a pro rata share of securities held by the funds, instead of remaining investors in the funds—with the rights that accompany being such an investor.[3]

[3] June 19 Order 143-44.

The Court then explained how plaintiffs had failed to demonstrate that they were entitled to force a liquidation of the funds, either on contractual or statutory grounds.[4] As the Court further explained:

> [E]ven if the Revised Plan were not implemented, it appears permissible, and indeed likely, that plaintiffs would receive the same result under the relevant agreements that they would be entitled to under Option B. Indeed, many of the plaintiffs have actually submitted requests to be redeemed. Although plaintiffs may wish to take control of the Funds and conduct a liquidation rather than receiving in-kind distributions as provided for in the agreements, . . . they are not entitled to do so. Accordingly, I am not convinced that plaintiffs will suffer immediate and irreparable harm as a direct result of the Revised Plan.[5]

II. ANALYSIS

Supreme Court Rule 42 provides that "[n]o interlocutory appeal will be certified by the trial court or accepted by [the Supreme] Court unless the order of the trial court determines a substantial issue, establishes a legal right and meets 1 or more of the . . . criteria" of subparts (b)(i) through (b)(v) of Rule 42. Moreover, even if the requirements of Rule 42 are met, the decision to allow an interlocutory appeal rests with the discretion of the Supreme Court.[6] On this note, defendants

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[4] *Id.* at 144-48.

[5] *Id.* at 151. The Court also noted that the relevant agreements permit distributions in kind. *Id.* at 149-50.

[6] *See* Supr. Ct. R. 42(b); *Rovner v. Health Chem Corp.*, 682 A.2d 627, 1996 WL 442906, at *1 (Del. July 23, 1996) (TABLE) ("Applications for interlocutory review are addressed to the sound discretion of this Court and are accepted only in exceptional circumstances."); *Wilmington Club v. Maroney*, 568 A.2d 1073, 1989 WL 154708, at *1 (Del. Dec. 1, 1989) (TABLE) ("Interlocutory appeals are addressed to the discretion of this Court and are accepted only in exceptional circumstances.").

contend that plaintiffs have failed to identify a single case in which the Delaware Supreme Court has accepted an interlocutory appeal from the denial of a preliminary injunction that was based, in the first instance, upon the plaintiffs' failure to establish that it would suffer irreparable injury in the absence of an injunction.[7] In any event, the requirements of Rule 42 have not been satisfied; accordingly, plaintiffs' application for certification of an interlocutory appeal is denied.

A. The June 19 Order Did Not Determine A Substantial Issue Or Establish A Legal Right

The June 19 Order did not "determine[] a substantial issue" or "establish[] a legal right."[8] Indeed, the June 19 Order only "determined" one issue: that plaintiffs had failed to establish a sufficient threat of irreparable injury if an injunction were not issued. The Court did not rule on the merits of plaintiffs' claims. Rather, the Court applied equitable principles to determine whether the extraordinary remedy of a preliminary injunction was warranted. It was not. The Court's application of these equitable principles, which involve judicial discretion, did not determine a substantial issue.[9] Similarly, the June 19 Order did not

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[7] Defendants also contend that plaintiffs have failed to identify a single case in which the Delaware Supreme Court has reversed a determination of the Court of Chancery that a plaintiff had failed to establish that it would be irreparably injured in the absence of interim injunctive relief—even in the non-interlocutory setting.

[8] Supr. Ct. R. 42(b).

[9] *See In re Hybrilonics, Inc.*, 514 A.2d 413, 1986 WL 17355, at *2 (Del. Aug. 15, 1986) (TABLE) (ruling did not determine a substantial issue where the "[d]enial of injunctive relief

establish a legal right. Again, the Court determined that plaintiffs were not entitled to a preliminary injunction because they had failed to establish a sufficient threat of irreparable injury. As former-Chancellor Allen put it: "the 'establishment' of such a 'non-right' cannot satisfy Rule 42. If it could, all determinations of such applications would be heard on appeal immediately, which, of course, is not the case."[10] Although the June 19 Order has practical consequences for plaintiffs, it did not establish a legal right.[11]

Plaintiffs argue that the June 19 Order determined substantial issues and established legal rights because it "essentially guts Plaintiffs' core claims."[12] Plaintiffs presumably are referring to the Court's discussion of Section 7.3 of the Amended and Restated Limited Partnership Agreement of Steel Partners II

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was not based on a ruling on the merits of the underlying issue but on the application of equitable principles involving judicial discretion") (citing *Consol. Film Indus., Inc. v. Johnson*, 192 A. 603 (Del. 1937)); *Rovner v. Health Chem Corp.*, 682 A.2d 627, 1996 WL 442906, at *1 (Del. July 23, 1996) (TABLE).

[10] *Blommer Chocolate Co. v. Blommer*, 1992 WL 1368949, at *1 (Del. Ch. Oct. 7, 1992).

[11] *See In re RJR Nabisco, Inc. S'holders Litig.*, C.A. No. 10389, Allen, C., Tr. at 6-7 (Del. Ch. Feb. 2, 1988) ("The establishment of a legal right cannot, in my opinion, be equated with a practical consequence. Surely a result of this opinion, unless the opinion is reversed on appeal, will be that there will be no injunction by this Court against the closing of the KKR tender offer and that, as a result, the transaction, while I can't say it will go forward, is rendered more likely to occur. . . . I cannot conclude that the issuance of this opinion is not a matter of practical consequence to the shareholders. But the opinion on preliminary injunction will not establish legal rights, in my opinion. KKR's right and the right of the shareholders with respect to the tender offer have been established by contract law principles and are regulated to some extent by federal securities laws regulations. They have not been established by this opinion in any respect."); *Edelman v. Phillips Petroleum Co.*, C.A. No. 7899, Walsh, V.C., Order at ¶ 3 (Del. Ch. Feb. 15, 1985) ("Given the lack of finality of the Court's denial of preliminary injunctive relief, the Court's Opinion did not determine a substantial issue or establish a legal right.").

[12] Application of Pls. for Certification of an Interlocutory Appeal ("Pls.' Application") ¶ 20.

(Onshore) LP (the "Onshore Partnership Agreement"), which provides, in part, as follows:

> The interest of any Limited Partner in the Partnership may be terminated by the General Partner, in its sole discretion, if continued participation of such Limited Partner would be detrimental to the Partnership or its interests or would interfere with the business of the Partnership, upon not less than 10 days' prior written notice to such Limited Partner . . . .

In determining that plaintiffs had not established a sufficient threat of irreparable injury, the Court stated that:

> This is not a class or representative action, and several of the plaintiffs have sought redemption of their interests in the Funds. The Onshore Partnership Agreement provides that distributions to withdrawing investors can be paid in cash or securities, or a combination of the two. . . . The General Partner of the Onshore Fund is Steel Partners II GP LLC, and Lichtenstein serves as the managing member of the General Partner. Lichtenstein submitted an affidavit that states that he has made a determination that it is in the best interests of the Partnership to redeem those who do not wish to continue with a restructured entity. It is reasonable to infer from this statement that the General Partner could, and likely would, be able to determine, in its sole discretion that the requirements of Section 7.3 were met and that plaintiffs—to the extent they are not redeemed pursuant to their own requests—should be terminated from the partnership.
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> In my opinion, plaintiffs would have a very difficult time challenging the exercise of discretion of the General Partner under Section 7.3. In the aftermath of significant market disruptions, the Steel Partners hedge fund, like many investment funds, faces serious challenges. Steel Partners has investors with widely varying desires. Some desire immediate liquidity. Others wish to remain investors and try to reap long-term gains on the funds' investments. Lichtenstein faced the unenviable prospect of designing a path forward to fairly address

> these divergent interests. The language of Section 7.3 gives the General Partner broad discretion to address investors' wide ranging and sometimes conflicting desires, particularly in the context of severe market disruptions. Accordingly, at this stage, it appears unlikely that plaintiffs would be able to successfully challenge a determination by the General Partner that certain investors remaining in the fund would be detrimental to the partnership or would interfere with the business of the partnership.[13]

The Court then explained that even if the Revised Plan were not implemented, plaintiffs would receive the same result under the relevant agreements that they would be entitled to under Option B. This discussion was part of the Court's determination that plaintiffs' had not established a sufficient threat of irreparable injury.[14]

The Court's determination on the irreparable injury prong of the test, alone, warranted denial of the motions for preliminary injunction. Nevertheless, after this dispositive determination, the Court stated that:

> ***To the extent*** the reasons given above also address the likelihood of plaintiffs' success on the merits of their arguments that the Revised Plan is not authorized by the Onshore Partnership Agreement or that plaintiffs are entitled to an orderly liquidation, then that is an ***independent and completely alternative*** reason to deny plaintiffs' motion.[15]

By this statement the Court made clear that the basis of its holding was the irreparable injury prong of the test. The implications, if any, of the discussion of

[13] June 19 Order 148-51.
[14] *Id.* at 151.
[15] *Id.* at 152 (emphasis added).

that prong of the test to the success on the merits prong of the test provided an alternative basis to deny the requested relief.[16] Thus, any preliminary observations of the merits of plaintiffs' claims were not necessary to the decision to deny plaintiffs' motions.

Moreover, the Court did not, as plaintiffs assert, determine that Section 7.3 "permits Mr. Lichtenstein to expel a majority of Onshore's Limited Partners to eradicate fundamental investor rights where he could not have gained approval of [Onshore Partnership Agreement] amendments accomplishing the same result."[17] As noted above, this is not a class action, and a number of the plaintiffs have sought redemption from the funds. Thus, in the context of determining whether plaintiffs would be injured if the Revised Plan were not enjoined, the Court noted that "***at this stage, it appears unlikely*** that plaintiffs would be able to successfully challenge a determination by the General Partner that ***certain investors*** remaining in the fund would be detrimental to the partnership or would interfere with the

[16] The Court also stated that it was "***not especially impressed*** by plaintiffs' argument that the Revised Plan should be enjoined because Lichtenstein breached his fiduciary duties or provided inadequate disclosure to investors. . . . ***[T]o the extent that*** Lichtenstein's actions were specifically authorized by the terms of the parties' agreements, they do not constitute a breach of fiduciary duty." *Id.* at 153 (emphasis added).

[17] Pls.' Application ¶ 19.

business of the partnership."[18] Indeed, the Court did not hold that Lichtenstein had properly elected to redeem any investors under Section 7.3 in this case.

B. The Criteria Of Rule 42(b)(i)-(v) Have Not Been Satisfied

The June 19 Order does not satisfy any of the criteria of Supreme Court Rule 42(b)(i)-(v) for all of the same reasons that the Order neither determines a substantial issue nor establishes a legal right—namely, that the Order does no more than deny plaintiffs' motions for preliminary injunction because plaintiffs failed to establish that they were threatened with sufficient irreparable injury if an injunction were not issued. Nevertheless, I will briefly address plaintiffs' arguments regarding the "criteria" of Rule 42.

Plaintiffs suggest that the discussion of Section 7.3 in the June 19 Order determined "a question of law in the first instance" and was "inconsistent" with prior decisions of this Court. Even aside from the inconsistency of these positions, neither is the case here. As noted above, the June 19 Order did not "determine" anything with respect to Section 7.3. Moreover, even if the Court made a determination regarding Section 7.3 in this case, which it did not, an interpretation of such a contractual provision would not necessarily involve a question of law in the first instance in Delaware. This is particularly true where, as here, the Court

[18] June 19 Order 151. Defendants assert that only five of the plaintiffs have not requested to withdraw from the Onshore Fund. Defs.' Opp'n to Application of Pls. for Certification of an Interlocutory Appeal 14.

made a context specific observation of the potential application of the provision to certain plaintiffs in this case.

Plaintiffs submit that the June 19 Order is "inconsistent" with prior decisions of this Court. In support of this argument, plaintiffs contend that the Order "appears to contradict"[19] the holding in *Gelfman v. Weeden Investors, L.P.*[20] Plaintiffs point to the statement in *Gelfman* that "lack of conscious consideration of the relevant standards shows that those standards were not met."[21] As noted above, however, the Court did not determine that any partner had been properly terminated under Section 7.3. Suffice it to say that the alleged "inconsistency" with *Gelfman* is not sufficient for any of the criteria of Rule 42(b)(i)-(v).

Plaintiffs appear to argue that Rule 42(b)(iii) has been satisfied here. Plaintiffs, however, utterly and completely fail to establish that the June 19 Order "reversed or set aside a prior decision of the court, a jury, or an administrative agency."[22] Accordingly, Rule 42(b)(iii) is clearly not met here.

Finally, the June 19 Order does not satisfy Rule 42(b)(v), which provides as follows: "(v) Case dispositive issue. A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice."[23] It is

[19] Pls.' Application ¶ 23.
[20] 859 A.2d 89 (Del. Ch. 2004).
[21] *Id.* at 118.
[22] Supr. Ct. R. 42(b)(iii).
[23] Supr. Ct. R. 42(b)(v). Rule 42(b)(iv) is clearly not satisfied here as the Order has not "vacated or opened a judgment of the trial court."

quite clear that the June 19 Order did not determine a case dispositive issue. There is also not a case dispositive issue that could potentially be brought before the Supreme Court on an appeal of the Order. A review of the June 19 Order will certainly not terminate this litigation. Plaintiffs attempt, however, to use the "otherwise serve considerations of justice" language to introduce various arguments for why they are entitled to an interlocutory appeal. None of these arguments establishes that any of the criteria of Rule 42(b)(i)-(v) have been met, and I will not address each argument individually. The harms that plaintiffs allege are threatened by the Order are not convincing, much less sufficient to satisfy the requirements of Rule 42. The Court's limited holding on the issue of irreparable injury faced by the specific plaintiffs in this case if an injunction were not issued does not threaten "great uncertainty" that would warrant interlocutory review of the denial of a preliminary injunction.

C. Plaintiffs Are Not Entitled To An Injunction Pending Appeal

Plaintiffs have moved for an injunction pending appeal. As explained above, plaintiffs have not met the requirements of Rule 42 that are necessary in order for this Court to certify, or the Supreme Court to accept, an interlocutory appeal. Accordingly, it is my opinion that there is no "pending appeal," and that plaintiffs' motion for injunction pending appeal should be denied for this reason

alone. Nevertheless, I will also discuss the reasons why plaintiffs have otherwise failed to establish entitlement to an injunction.

This Court may, in its discretion, grant an injunction pending appeal.[24] Plaintiffs contend that the standard in *Kirpat, Inc. v. Delaware Alcoholic Beverage Control Commission*[25] governs plaintiffs' motion. Defendants contend that a stay pending appeal, which is governed by *Kirpat*, is different than an injunction pending appeal, which is governed by the same standard that governs a motion for a preliminary injunction. While defendants' argument has some appeal, I need not decide the issue because plaintiffs fail to show entitlement to an injunction even under the *Kirpat* standard. Under *Kirpat*, the reviewing court is required:

> (1) to make a preliminary assessment of likelihood of success on the merits of the appeal; (2) to assess whether the petitioner will suffer irreparable injury if the stay is not granted; (3) to assess whether any other interested party will suffer substantial harm if the stay is granted; and (4) to determine whether the public interest will be harmed if the stay is granted.[26]

Plaintiffs correctly cite *Kirpat* for the proposition that "the 'likelihood of success on appeal' prong cannot be interpreted literally or in a vacuum when analyzing a motion for stay pending appeal."[27] Even taking this approach,

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[24] Supr. Ct. R. 32(a).
[25] 741 A.2d 356 (Del. 1998).
[26] *Id.* at 357.
[27] *Id.* at 358 ("A motion for stay, unlike a petition for preliminary injunction, requires the trial court to analyze the likelihood of success on appeal *after* the trial court already has considered and issued its final determination on the merits of the case. Requiring a literal reading of the 'likelihood of success on appeal' standard 'would lead most probably to consistent denials of

however, I am not convinced that plaintiffs have a reasonable probability of success on appeal. The Supreme Court "reviews for abuse of discretion the Court of Chancery's decision to deny a motion for a preliminary injunction" and "will not disturb that decision on appeal in the absence of a showing that it constituted an abuse of discretion."[28] In my opinion, it is highly unlikely that plaintiffs will be able to establish that this Court abused its discretion in declining to enter the injunction plaintiffs requested.[29] Thus, the first prong of the *Kirpat* test weighs against granting an injunction pending appeal.

The second prong of the *Kirpat* analysis is whether plaintiffs will suffer irreparable injury if the stay is not granted. The Court explained, in its June 19 Order, its reasons for concluding that plaintiffs are not threatened with sufficient irreparable injury to warrant an injunction, and those reasons need not be repeated here. Thus, the second prong of the *Kirpat* test weighs heavily against granting an injunction pending appeal.

Finally, the third and fourth prongs of the *Kirpat* test weigh against granting an injunction pending appeal. Although these factors did not weigh heavily in my analysis, there will certainly be at least some harm to third parties if an injunction

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stay motions, despite the immediate threat of substantial irreparable injury to the movant' because the trial court would be required first to confess error in its ruling before it could issue a stay.") (footnote omitted).

[28] *Box v. Box*, 697 A.2d 395, 397 (Del. 1997).

[29] As noted above, the limited observations in the June 19 Order on the merits of plaintiffs' claims constituted "an independent and completely alternative reason to deny plaintiffs' motion," to the extent they constituted such a reason at all. June 19 Order 152-53.

delays the Revised Plan. As explained above, there would be no great public benefit to the Supreme Court reviewing the denial of the preliminary injunction; even if there were broad-ranging implications at issue in this case, it would not necessarily serve the public interest for the Supreme Court to review those issues in the context of the denial of a preliminary injunction that was based on the lack of sufficient irreparable injury to plaintiffs. Accordingly, and for all the reasons stated above, plaintiffs are not entitled to an injunction pending appeal.

III. CONCLUSION

For the foregoing reasons, plaintiffs' application for certification of an interlocutory appeal and plaintiffs' motion for injunction pending appeal and waiver of bond are denied.

IT IS SO ORDERED.