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Re: Wilt v. Kenyon, et al.
C.A. No. 4833-VCN
Date Submitted: December 22, 2009

Dear Counsel:

The pending question is whether counsel reached a settlement agreement, that proverbial "meeting of the minds," that would sustain the entry of a judgment resolving this matter.

Plaintiff David Wilt ("Wilt") and Defendant Stephanie Kenyon ("Kenyon") are the only two members of a Delaware limited liability company known as Sloans & Kenyon, LLC ("S&K"). Their relationship has broken down, and the time has come to disentangle them. Wilt filed this action seeking the appointment of a receiver to

oversee the dissolution and liquidation of S&K. Because the relationship between Wilt and Kenyon is marked by distrust, the process of negotiating a resolution has been difficult.

The parties agree that a receiver should be appointed. They were, by early November 2009, able to approach closure on an agreement for the appointment of a receiver and resolution of this matter. At that point, counsel for Kenyon reported to the Court that the parties had agreed upon the form of an order appointing a liquidating trustee except for "three (3) important issues which separate us." A week later, Kenyon's counsel reported to the Court that his client had acquiesced in two of the three provisions sought by Wilt. The remaining issue was a disagreement over whether the receiver would be able to sell the business as a going concern. During a teleconference with the Court on November 17, 2009, Wilt's counsel confirmed that only this single issue remained for resolution. By mid-December, Kenyon had relented and accepted Wilt's position on the one issue that had separated them. Thus, her counsel informed Wilt's counsel that she would agree to Wilt's requirement that the receiver have the option of selling the business as a going concern. With that, there was full and complete agreement as to the settlement of this matter. Shortly

thereafter, Wilt's counsel informed Kenyon's counsel that his client would insist upon an earlier form of order, one that had been put aside for some time.

During a teleconference a few days later, the Court directed the parties to set forth their views on whether or not an agreement for the settlement of this action had been reached. This letter opinion constitutes the Court's resolution of that issue.

It is axiomatic that Delaware law encourages settlements.[1] Attorneys of record in a pending action, such as Wilt's attorney and Kenyon's attorney, who agree to a compromise of a case are presumed to have lawful authority to make such an agreement.[2] Accordingly, when opposing attorneys orally agree to compromise and settle a law suit, a binding contract may be created.[3]

In this case, the parties agree that a receiver should be appointed to liquidate their business. The only debate is the scope and nature of the receiver's authority. That debate took some time to resolve. However, with the notification by Kenyon's counsel to Wilt's counsel that his client had agreed to allow the receiver to sell the

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[1] *See, e.g.*, *Loppert v. WindsorTech, Inc.*, 865 A.2d 1282, 1290 (Del. 2004) (citing *Clark v. Ryan*, 1992 WL 16343, at *5 (Del. Ch. June 17, 1992)).
[2] *Aiken v. Nat'l Fire Safety Counselors*, 127 A.2d 473, 475 (Del. Ch. 1956).
[3] *See, e.g.*, *Corbesco, Inc. v. Local No. 542, Int'l Union of Operating Eng'rs*, 620 F. Supp. 1239, 1243 (D. Del. 1985).

business as an operating entity, all open issues were resolved. A classic meeting of the minds had occurred.[4] It is, therefore, appropriate that the Court find, and it does so find, that a binding settlement agreement had been reached.

Counsel are directed to confer and submit a form of order implementing this decision that contains the final text of the settlement agreement.[5]

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

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[4] Wilt does not contest the facts used here. The Court has relied upon representations of counsel, and no one has suggested that the facts are in dispute. Wilt argues that his willingness to agree to a particular form of order in early November 2009 was conditioned upon meeting his then-goal of having a receiver appointed within the next several days. Thus, he contends that his willingness to agree to that form was conditioned upon timely entry of an order. The record, however, does not indicate any such time constraints or conditions on his offer. Had Wilt made known his condition as to timing, perhaps the outcome of this application would have been different. On the record before the Court, this appears to be more of an argument based on conditions conjured up after the fact.

[5] It appears that one issue, not subject to current dispute because of its earlier resolution, has not yet been incorporated into the text of the draft previously submitted to the Court. *See* Letter of Edward A. Tarlov, Esq., dated December 22, 2009, at 2 n.1.

The Court notes that trial of this matter had been scheduled for the second week of January 2010. Given Kenyon's reasonable expectation that a settlement had been achieved, it would have been fundamentally unfair to proceed with the trial on the dates set aside. Accordingly, a continuance, perhaps of several months, would have been necessary. The Court notes that Wilt has been insistent upon the absolute necessity that a receiver be appointed as soon as possible; thus, his reservations about entering into an agreement, based, as far as the Court can ascertain, on relatively minor drafting disputes, is peculiar.