

COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE

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June 11, 2001

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**RE: Telxon Corporation v. Robert F. Meyerson, et.al.**  
**C.A. No. 13139**  
**Date Submitted: June 4, 2001**

Gentlemen:

On April 2, 2001, the plaintiff filed an application to certify, under Supreme Court Rule 42, an interlocutory appeal from this Court's Order dated March 23, 2001 (the "March 23rd Order"). That Order granted the defendants' motion for summary judgment in part, entering judgment for the defendants on

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all claims of a breach of the duty of loyalty, but reserving two duty of loyalty claims for trial.

In support of its Rule 42 motion, the plaintiff argued that even though its due care claims survived the summary judgment motion, it could not recover damages on the due care claims, which are barred by the 8 Del. C. § 102(b)(7) exculpation clause contained in the corporation's (Telxon's) charter. Therefore, plaintiff argued, certification should be granted because in effect, the March 23rd Order was tantamount to a final order.

That argument shows that at that stage, the plaintiff could have sought appellate review by moving for the entry of final judgment on its duty of loyalty claims under Court of Chancery Rule 54(b). The plaintiff did not do that, but instead (as noted), sought interlocutory review under Supreme Court Rule 42. Thereafter, both this Court and the Supreme Court declined to certify an interlocutory appeal. In its Order refusing that appeal, the Supreme Court specifically observed that Telxon had not "sought entry of a final judgment on the duty of loyalty claims pursuant to Court of Chancery Rule 54(b)."<sup>1</sup>

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<sup>1</sup> Telxon Corporation v. Meverson, Del.Supr., No. 175, 2001, Paragraph 2 (May 9, 2001(ORDER))

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Because there can be no damages recovery on its due care claims, the plaintiff now disclaims any intention to prosecute its duty of care claims. Nonetheless, the plaintiff refuses to dismiss those due care claims with prejudice. Instead, plaintiff seeks the entry of a final judgment on its duty of loyalty claims under Rule 54(b), based on the identical arguments it previously advanced in support of its Rule 42 interlocutory appeal motion. That is, although the plaintiffs duty of care claims will not be tried, and although their voluntary dismissal would effectively render the March 23rd Order a final order that is appealable as of right, the plaintiff will only dismiss his duty of care claims on a “without prejudice” basis.

For the reasons that follow, the plaintiffs Rule 54(b) motion will be denied.

\* \* \*

First, assuming *arguendo* that the Rule 54(b) motion has merit, the plaintiff could -- and should -- have brought that motion in lieu of (or as an alternative to) its earlier Rule 42 motion. Both motions rest on the same arguments, in particular, the contention that the plaintiffs inability to recover damages on its due care claims renders the March 23rd Order (as a practical matter) final. The

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plaintiff has made no effort to explain its earlier failure to proceed under Rule 54(b) nor can that failure credibly be attributed to oversight or inadequate legal representation, since plaintiffs counsel is highly experienced and sophisticated. On the contrary, the inescapable conclusion is that the plaintiff made a deliberate strategic decision to pursue the interlocutory "Rule 42" procedural route instead of taking the "Rule 54(b)" path. That choice having turned out to be unsuccessful, the plaintiff now seeks a second bite out of the apple in its effort to invoke Rule 54(b). No reason, legal or equitable, has been shown why the plaintiff should be allowed to impose upon this Court's (or the Supreme Court's) resources and processes in that way.

Second, no authority is cited to support the plaintiffs position that it may proceed in this *seriatim* fashion. The case upon which the plaintiff relies-- Kapoor v. Fujisawa Pharm. Co., LTD.<sup>2</sup> -- involved an initially unsuccessful appeal that had been filed because of the appellant's mistaken belief that it could appeal as a matter of right. That incorrect belief explained why the appellant had not filed a Rule 42 motion in the trial court to certify an interlocutory appeal. The

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<sup>2</sup> Del. Supr., 702 A.2d 926 (1997)

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Supreme Court dismissed the appeal because no Rule 42(b) motion was filed in the trial court, but instructed the appellant that he could still obtain appellate jurisdiction by requesting the trial court to enter a Rule 54(b) order. In this case, the plaintiff does not argue that the grant of a Rule 54 motion is needed to relieve the plaintiff of the consequence of a procedural mistake, like that which occurred in Klapac comes as no surprise because here there was no mistake - only a strategic decision that did not pan out.

Third, and finally, no Rule 54(b) relief is needed, because in this case the conditions for an appealable final order are fully within the plaintiffs power to create. All the plaintiff need do is dismiss its due care claims with prejudice. And why shouldn't it? Those claims, even if meritorious, concededly cannot serve as the basis for a damages recovery. Therefore (and as the plaintiff freely admits), there is no point in pursuing them. In these circumstances, the plaintiff has nothing to lose by dismissing his due care claims with prejudice, and, by employing that approach, would establish the basis for a final order that would be appealable without any further relief from this Court.

Yet, the plaintiff insists that it will dismiss the due care claims only without prejudice. The reason the plaintiff contends, is that if on appeal the dismissal of

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the duty of loyalty claims is reversed, the plaintiff will be worse off procedurally at a later trial of the loyalty claims (minus the duty of care claims), than would be the case if the duty of care claims -- which will not be tried -- were allowed to remain in the lawsuit. The plaintiffs argument appears to be that dismissing the duty of care claims could somehow hamper its effort to establish its entitlement to judicial review under the entire fairness standard. The logic advanced to support that view continues to elude the Court. Indeed, the plaintiff has failed to articulate the argument so that this Court can grasp it.

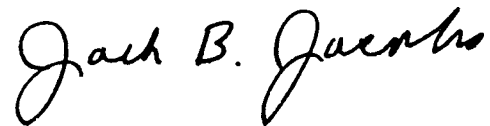
In short, the plaintiffs unwillingness to try its due care claims, coupled with its refusal to dismiss those claims with prejudice, has resulted in a problem of the plaintiffs own making. The plaintiff is not entitled to this Court's assistance in extricating it from that self-made problem. Although the Court cannot force -the plaintiff to dismiss its due care claims with prejudice, neither can the plaintiff, by its obduracy, be permitted to manipulate the Court to grant relief under Rule 54(b).

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The plaintiffs Motion for Entry of a Final Judgment Under Rule 54(b) is denied.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in black ink that reads "Jack B. Jacobs". The signature is written in a cursive style with a large, looping initial "J".

cc: Chancellor William B. Chandler, III  
Vice Chancellor John W. Noble  
Vice Chancellor Stephen P. Lamb  
Vice Chancellor Leo E. Strine, Jr.  
Register in Chancery