

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

NTB

WILLIAM B. CHANDLER III
CHANCELLOR

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Date Decided: February 17, 2000

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Re: *Infinity Investors Ltd. v. Takefman, et al.*
Civil Action No. 17347

Dear Counsel:

Pursuant to Court of Chancery Rule 59(f), defendants Earl T. Takefman and Richard Parker have moved for reargument or clarification of this Court's January 28, 2000 Memorandum Opinion' ("Jan. 28 Opinion") on the issue of the validity of plaintiff Infinity Investors Limited's ("Infinity") preferred stock conversion. Through this letter, I endeavor to clarify the Jan. 28 Opinion with respect to the concern raised by defendants'

¹ *Infinity Investors Ltd. v. Takefman*, Del. Ch., C.A. No. 17347, mem. op. (Jan. 28, 2000).

motion. In order to so clarify, I believe a brief recitation of the facts underlying the parties' dispute would be helpful. It is to this I now turn.

Defendants Takefman and Parker were officers and directors of Visual Edge Systems, Inc. ("Visual Edge" or the "Company"). In August 1999, Infinity, a significant investor in Visual Edge, converted its Visual Edge preferred stock into common stock, assumed a near-majority position, and initiated steps to wrest control of the Company from defendants. Upon converting its preferred stock, Infinity executed a stockholder consent purporting to remove defendants and other directors; from the Company's Board of Directors and replace them with its designees. Defendants contested the validity of Infinity's preferred stock conversion and, by extension, their removal from the Visual Edge Board.

Anticipating just this sort of recalcitrance, Infinity filed a § 225 action in this Court seeking declaratory relief with respect to the validity the preferred stock conversion and subsequent stockholder consent removing defendants from the Visual Edge Board. Later, through an amended complaint, Infinity also alleged that defendants had breached fiduciary duties and tortiously interfered with Infinity's preferred stock conversion.

In September 1999, shortly after oral argument was held on Infinity's § 225 claims, defendants renounced all interest in contesting their removal

from the Board or their termination as officers and moved to dismiss the above captioned matter on mootness grounds. While defendants' motion duly demonstrated their disinclination to contest their removal and termination,² defendants were implicitly reluctant to concede the validity of Infinity's preferred stock conversion. Nevertheless, this Court held that because defendants did not and would not contest the legal sufficiency of the currently constituted Visual Edge Board of Directors, they should not be able to, as a matter of logic and fairness, contest the: validity of the action that *put such Board in place (i.e., the preferred stock conversion)*.³

Although the Jan. 28 Opinion granted defendants' motion to dismiss the § 225 action as moot, and also dismissed Infinity's breach of fiduciary duty claims because Infinity improperly brought such claims directly on its own behalf rather than derivatively on behalf of the Company, I did not dismiss Infinity's tortious interference with contract claim. Defendants now complain that the Court's rulings place them in an awkward posture-unable to defend Infinity's tortious interference claim with the affirmative defense that they opposed Infinity's conversion on the good faith belief that such

² Indeed, Takefman and Parker are seeking severance payments in a Florida court. *See Jan. 28 Opinion*, at 7.

³ Jan. 28 Opinion at 11.

conversion was invalid. In reality, it is their own litigation strategy that has left them in what they perceive to be treacherous terrain. Moreover, their fears are unwarranted. Nothing in the Jan. 28 Opinion suggests that Takefman and Parker resisted the preferred stock conversion in bad faith. Indeed, nothing in the current record militates for such a finding.

Takefman and Parker sought to dismiss this entire suit as moot. They predicated their motion on the fact that they would not then, now, or ever seek to regain their offices at Visual Edge. While Infinity was undoubtedly pleased to see Takefman and Parker go, they also sought judicial relief with respect to the propriety of their Visual Edge stock holdings and attendant corporate control, which Takefman and Parker, albeit briefly, once contested. Infinity seeks such relief for the eminently sensible reason that it does not want to operate Visual Edge under a cloud of improper authority. The Legislature enacted § 225 to resolve just such situations.

Takefman and Parker are the only known parties ever to contest Infinity's preferred stock conversion and subsequent control of the Company's Board of Directors. In order to remove the shadow cast by Takefman's and Parker's intransigence, Infinity hailed them into court and sought a judicial declaration as to the propriety of its <actions. Takefman and

Parker decided they wanted no part of such a proceeding and averred to the Court that they would no longer contest Infinity's control of the Board. Nevertheless, they refuse to fully concede the ultimate declaratory relief Infinity requests pursuant to the § 225 action: validity of the preferred stock conversion.

Takefman and Parker have certainly not conceded that they challenged Infinity's conversion for anything short of legitimate, good faith reasons. Nevertheless, by seeking to dismiss the § 225 action as moot, they must concede the underlying validity of the conversion. The Court's Jan. 28 Opinion, however, should not be construed so as to impugn ill motives to defendants for resisting the preferred stock conversion.

If defendants remain dissatisfied with this clarification, I would be pleased to schedule a brief trial to fully consider the merits of the preferred stock conversion issue.

IT IS SO ORDERED

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III".

William B. Chandler III

WBCIII:meg

oc: Register in Chancery

xc: Vice Chancellors

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