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**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
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April 4, 2005

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Re: *Examen, Inc. v. VantagePoint Venture Partners 1996*
Civil Action No. 1142-N

Dear Counsel:

Before the Court is defendant VantagePoint Venture Partners 1996's Motion For Injunction Pending Appeal ("Motion") of Vice Chancellor Lamb's March 31, 2005 ruling (the "Opinion") on the pleadings in favor of plaintiff Examen, Inc. Stays or injunctions pending appeal are governed by the four-part test articulated in *Kirpat, Inc. v. Del. Alcoholic Beverage Comm'n*, 741 A.2d 356 (Del. 1998), and are subject to the discretion of the trial Court. DEL. SUPR. CT. R. 32(a). The Motion is denied.

Kirpat states that the Court should "balance all the equities in the case" and consider four factors: 1) the likelihood of success on the merits of

the appeal; 2) whether the petitioner will suffer irreparable harm if the stay is denied; 3) whether any other interested party will suffer substantial harm if the stay is granted; and 4) whether the public interest will be harmed if the stay is granted. *Id.* at 357-58. Upon balancing these four factors, I conclude that an injunction pending appeal is not warranted.

Although VantagePoint is correct that the proverbial eggs may become scrambled if its application for an injunction pending appeal is denied, *see Gimbel v. Signal Cos. Inc.*, 316 A.2d 599, 603 (Del. Ch. 1974), and that, in the abstract, the loss of voting rights can constitute irreparable harm, *see Aprahamian v. HBO & Co.*, 531 A.2d 1204, 1208 (Del. Ch. 1987), VantagePoint is not at risk of losing voting rights here because it never possessed the rights it is attempting to assert in this action. VantagePoint is a sophisticated investor that elected to purchase stock in a Delaware corporation governed by Delaware law, and indeed negotiated the terms upon which it obtained its preferred holdings in Examen. Opinion at 4 n.6. As such, VantagePoint cannot reasonably argue that it is at risk to lose voting rights it never had.

VantagePoint also correctly argues that if an appeal can be completed on the timetable previously agreed upon by the parties, the harm that Examen would suffer by not being able to consummate the transaction as

scheduled is lessened, and not likely to be substantial. If, however, VantagePoint's appeal forces Examen to delay the closing of the transaction (and there is no guarantee that the appeal could be completed before April 15, 2005), the potential harm to Examen could quickly become quite substantial.

I conclude, however, that VantagePoint's likelihood of success on the merits of its appeal is, at best, very remote. In its application for an injunction pending appeal, VantagePoint has not pointed to any flaws in the Vice Chancellor's analysis that would lead me to conclude that VantagePoint has any quantifiable likelihood of success on the merits of its appeal. The Opinion demonstrates that the Vice Chancellor's decision was both carefully considered and well reasoned. Furthermore, it does not appear that the public interest will be affected by either the granting or denial of the present application, so the final *Kirpat* factor is of no import in the instant analysis.¹

¹ Plaintiff argues that Delaware has a strong interest in governing the affairs of Delaware corporations, *see McDermott, Inc. v. Lewis*, 531 A.2d 206, 214 (Del. 1987), and that "any attempt ... to apply California law to the determination of VantagePoint's voting rights will harm the public interest." Plaintiff's argument misses the mark. Certainly, if the Supreme Court of Delaware were to agree with VantagePoint's contentions, Delaware's interest in governing the internal affairs of its corporations would be drastically altered. The inquiry at this moment, however, is whether the entry of the injunction would harm the public interest, and the answer to that question is no.

Upon balancing these four factors and all of the equities in the case, this Court declines to exercise its discretion to enter an injunction pending appeal. The Motion For Injunction Pending Appeal is DENIED.

IT IS SO ORDERED.

Very truly yours,

/s/ William B. Chandler III

William B. Chandler III

WBCIII:amf