

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

STEPHEN P. LAMB
VICE CHANCELLOR

New Castle County Court House
500 N. King Street, Suite 11400
Wilmington, Delaware 19801

Submitted: April 21, 2005

Decided: April 29, 2005

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***RE: Examen, Inc. v. VantagePoint Venture Partners 1996
C.A. No. 1142-N***

Dear Counsel:

In a complaint filed on March 3, 2005, Examen, Inc., a Delaware corporation, petitioned this court for a declaratory judgment that a pending stockholder vote to approve a pending merger was governed by Delaware law. In response, the defendant, VantagePoint Venture Partners 1996, filed an action in California Superior Court on March 8. In the California action, VantagePoint requested discovery to determine whether Examen was subject to a California statute that would purportedly alter the voting rights of Examen's stockholders. On March 21, the California court stayed that action until this court ruled on Examen's declaratory judgment request.

On March 31, this court issued its Memorandum Opinion and Order, styled *Examen, Inc. v. VantagePoint Venture Partners 1996*, C.A. No. 1142-N. This court concluded that the internal affairs doctrine controlled the stockholder vote at issue and, therefore, Delaware law applied to the vote. The next day, April 1, Examen filed a motion for a temporary restraining order (“TRO”) in an effort to enjoin VantagePoint from attempting to lift the stay and re-litigate the same issues in a California court. This court held a teleconference that day in which it granted Examen’s motion.

In the afternoon of April 1, VantagePoint filed its notice of appeal of this court’s opinion. On April 4, VantagePoint sought an injunction pending appeal from this court and the Supreme Court. Both courts denied the motion. The Supreme Court did, however, grant VantagePoint’s motion for an expedited appeal, with final briefing due on April 13. On April 5, Examen closed the merger.

On April 6, VantagePoint filed with this court a motion for reconsideration and lifting of the TRO. Responses were filed and this court heard argument on the motion on April 19. The parties submitted letters in support of their arguments on April 20 and 21. For the following reasons, the court denies the motion.

The general rule concerning a trial court's jurisdiction over matters on appeal is not disputed. In Delaware, the rule is that "the proper perfection of an appeal to this Court generally divests the trial court of its jurisdiction over the cause of action."¹ "The applicable principle is that all matters relating to the subject matter of the appeal are outside the jurisdiction of the trial court, but that matters which are independent of or collateral to the subject matter of the appeal may be acted upon by the trial court."²

What the parties disagree about is whether the TRO is independent of the appeal currently pending before the Delaware Supreme Court. Examen argues that the TRO is not a separate matter to be considered by this court. It argues that VantagePoint is simply seeking to collaterally attack, through the California action, a judgment that is properly on appeal in Delaware. VantagePoint responds that the TRO is not part of the original cause of action because it was granted after the opinion was issued. It also argues that the TRO is not part of the current appeal. In support of this argument, VantagePoint notes that Examen acknowledged that the TRO is not currently before the Supreme Court.³

¹ *Radulski v. Del. State Hosp.*, 541 A.2d 562, 567 (Del. 1988).

² *Shaw v. Metzger*, 1985 Del. Super. LEXIS 1453, at *1-2 (Del. Super. 1985).

³ Examen Answering Br. at 30 ("VantagePoint has not appealed from the Court of Chancery's grant of Examen's Motion for a Temporary Restraining Order.").

The court finds that Delaware's general rule applies in this case. Once VantagePoint perfected its appeal of the March 31 opinion, this court's jurisdiction to reconsider or lift the TRO was divested. Even though the TRO was granted after the opinion was published, it concerns the exact subject matter that is currently on appeal, i.e. whether Examen's stockholder vote was subject to Delaware law. Although VantagePoint cites several cases for the proposition that a trial court retains jurisdiction to enforce an order from which an appeal is taken, each of the cases is a Family Court case that concerns ongoing payments (alimony, child support, etc.) during a pending appeal.⁴ These cases are inapposite to the facts in this case. Here, no individuals are financially dependent upon enforcement of the opinion. Indeed, the opinion awards no money, so no individual could be dependent.

The proper jurisdiction for this motion lies with the Delaware Supreme Court. The Supreme Court has granted VantagePoint's motion to expedite and apparently received final briefing on April 13, 2005. This court finds that it lacks jurisdiction to lift the TRO and in effect release VantagePoint to re-litigate in the California Superior Court the issues that are currently before the Delaware Supreme Court.

⁴ See, e.g., *Lipson v. Lipson*, 799 A.2d 345 (Del. 2001); *Newman v. DCSE/Durkin*, 672 A.2d 9 (Del. 1995); *Tedesco v. Crowley*, 1996 WL 436260 (Del. Fam. Ct. June 26, 1996).

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For the above reasons, the motion for reconsideration and lifting of the TRO
is DENIED. IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor