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

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VICE CHANCELLOR

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RE: *DiRienzio v. Lichtenstein*
Civil Action No. 7094-VCP

Dear Counsel:

On January 18, 2013, seventeen of the nineteen Defendants in this action moved to dismiss the derivative counts of Frederick DiRienzo's First Amended Class Action and Derivative Complaint (the "First Amended Complaint"). Defendants Joseph Mullen and Mark Schwarz (collectively, the "Special Committee") joined that effort by filing their

own motion to dismiss on January 22, 2013.[1] In a Memorandum Opinion (the "Opinion") dated September 30, I granted Defendants' motion to dismiss as to Counts IV through VIII (the "Derivative Claims") of the First Amended Complaint—which were not pled in the original complaint—because DiRienzo failed to satisfy Court of Chancery Rule 23.1's demand requirement.[2] In addition, I granted the Special Committee's separate motion to dismiss Counts I through III (the direct claims for breach of fiduciary duties, or the "Direct Claims") for failure to state a claim.[3] On October 10, DiRienzo filed an application for certification of an interlocutory appeal of the Opinion. Defendants oppose the application. For the following reasons, I find that the application does not meet the criteria for certification under Supreme Court Rule 42. Thus, I deny DiRienzo's application.

## I. STANDARD

Supreme Court Rule 42(b) sets forth the standard for certifying an interlocutory appeal to the Delaware Supreme Court. The trial court will not certify, and the Supreme Court will not accept, an interlocutory appeal unless the order of the trial court determines a substantial issue, establishes a legal right, and meets one of the five

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1 All Defendants oppose DiRienzo's application for certification of interlocutory appeal; therefore, unless otherwise indicated, I refer to Defendants collectively.

2 *See DiRienzo v. Lichtenstein*, 2013 WL 5503034, at *26–36 (Del. Ch. Sept. 30, 2013).

3 *Id.* at *1, 36.

additional criteria enumerated in Rule 42(b).[4] Generally, the Supreme Court will accept an application for interlocutory appeal only in extraordinary or exceptional circumstances.[5] To obtain leave to pursue an interlocutory appeal, a party must apply in the first instance to the trial court and then to the Supreme Court.[6] The Supreme Court will decide whether to accept the application in its sole discretion, but may consider as one factor the trial court's decision on whether to certify the appeal.[7] When considering whether to certify an interlocutory appeal, the trial court must balance the interests of advancing potentially case dispositive issues against the additional burden of fragmentation and delay that interlocutory review can create.[8]

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4 Supr. Ct. R. 42(b). The five sub-criteria are: (1) any of the criteria for certification of a question of law under Rule 41; (2) controverted jurisdiction; (3) an order reversing or setting aside a prior decision in circumstances where an interlocutory appeal may terminate or reduce the litigation or otherwise serve considerations of justice; (4) an order vacating or opening a prior judgment; and (5) a case dispositive issue for which an appeal could terminate the litigation, or otherwise serve considerations of justice. Supr. Ct. R. 42(b)(i)–(v).

5 *See Smith v. Guest*, 2006 WL 2380838, at *1 (Del. Aug. 15, 2006) (TABLE); *Wilm. Sav. Fund Soc'y, FSB v. Covell*, 1990 WL 84687, at *1 (Del. May 16, 1990) (TABLE). *See also* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 14.04, at 14-5 to -6 (2012).

6 Supr. Ct. R. 42(c) and (d).

7 Supr. Ct. R. 42(d)(v).

8 *See Castaldo v. Pittsburgh-Des Moines Steel Co.*, 301 A.2d 87, 87 (Del. 1973); *see also In re Pure Res., Inc. S'holders Litig.*, 2002 WL 31357847, at *1 (Del. Ch. Oct. 9, 2002).

## II. ANALYSIS

### A. The Substantial Issue and Legal Right Requirements

The Supreme Court has explained that "the substantive element of the appealability of an interlocutory order must relate to the merits of the case."[9] In addition, an order establishes a legal right when it "create[s] []or diminish[es] any party's rights with respect to the underlying substantive issues."[10] Here, DiRienzo argues that the Opinion determined substantial issues, *i.e.*, it related to the merits of the case, in "barr[ing] on standing grounds [his] challenge, under a direct, derivative or contractual basis, to the Exchange and Unwind in the context of complex, but novel questions at the intersection of corporate and alternative entity law."[11] DiRienzo contends that the Opinion satisfies the legal right requirement because it: (1) eliminated his right to seek relief under certain claims; (2) freed Defendants from such challenges; and (3) presumptively barred similar claims asserted by all other minority holders.[12]

In opposing certification, Defendants argue that DiRienzo has misconstrued the legal and practical consequences of the Opinion. Specifically, Defendants assert that the Opinion did not extinguish his ability to challenge *directly* the transactions in issue, even

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9 *Castaldo*, 301 A.2d at 87.

10 *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1991 WL 215621, at *1 (Del. Ch. Sept. 25, 1991).

11 Appl. for Certification of Interlocutory Appeal ("Pl.'s Appl.") 5.

12 *Id.* at 6.

if it did extinguish the Derivative Claims.[13] Defendants also contend that the practical effect of the Opinion only was to deny a motion to amend a complaint, which generally does not satisfy Rule 42(b).[14]

Having carefully considered the parties' arguments, I disagree with DiRienzo's sweeping characterization of the effects of the Opinion. Nevertheless, I find that this Court's dismissal of DiRienzo's derivative claims satisfies the substantial issue and legal right requirements of Rule 42(b).[15]

### B. The Five Additional Criteria

DiRienzo also argues that his application satisfies one or more of the additional criteria specified in Supreme Court Rule 42(b). The first of these criteria is referenced in

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[13] Opp'n to Appl. for Certification of Interlocutory Appeal ("Defs.' Opp'n") 12–13 (citing *Stein v. Orloff*, 1986 WL 16298, at *1–2 (Del. Jan. 28, 1986) (TABLE) (affirming the Court of Chancery's determination that interlocutory orders "do not meet the threshold requirements for certification under Rule 42(b)" where the orders result in the partial dismissal of a complaint for failure to comply with Court of Chancery Rule 23.1's demand requirement).

[14] *Id.* at 14–15. In addition, Defendants argue persuasively that the proposed interlocutory appeal would be purely advisory because DiRienzo has not challenged this Court's finding that he did not comply with Rule 23.1's demand requirement. *See id.* at 21. I do not reach this issue, however, because I find that the proposed interlocutory appeal does not satisfy the additional criteria discussed *infra*.

[15] *Cf. Zimmerman v. Braddock*, 906 A.2d 776, 778–79 (Del. 2006) (accepting an interlocutory appeal, which the Court of Chancery certified based on its satisfaction of the "substantial issue" and "legal right" requirements, to determine whether the trial court properly permitted plaintiff to amend the complaint to comply with Rule 23.1).

Rule 42(b)(i), which incorporates by reference the criteria for certification of a question of law set forth in Rule 41. Regarding the first set of criteria, DiRienzo asserts that the application presents a question of law that is of the first instance (as under Rule 41(b)(i)) or one that is unsettled (as under Rule 41(b)(iii)).[16] Drawing on Rule 42(b)(v), he also asserts that a review of this Court's Opinion "may otherwise serve considerations of justice."[17] Under Rule 42(b)(i), DiRienzo challenges this Court's rulings as to: (1) "the exclusivity of the appraisal remedy in a context outside of [8 *Del C.*] § 253"; (2) DiRienzo's "purported consent to the [limited partnership agreement (the "Agreement")] solely by virtue of having bought stock in a Delaware corporation"; and (3) the nature of the Special Committee's obligation to protect or preserve the rights of a minority of stockholders in the context of a merger of a corporation into a limited partnership, where the partnership agreement expressly eliminated the general partner's liability to the limited partners "to the greatest extent allowed by law" and the Special Committee relied on a fairness opinion "that looked at the proposed combination from the perspective of the survivor . . . and not the [] minority [stockholders.]"[18] Under Rule 42(b)(v), DiRienzo

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[16] Although DiRienzo briefly mentions the criteria prescribed in Rule 41(b)(iii), he does not seriously argue that his proposed appeal raises a question of law relating to the "constitutionality, construction or application of a statute of this State which has not been, but should be, settled by the [Supreme] Court," as called for in subsection (iii).

[17] Supr. Ct. R. 42(b)(v).

[18] Pl.'s Appl. at 7–8.

argues that an interlocutory appeal will serve considerations of justice by enabling the Supreme Court to address important legal issues, the clarification of which might benefit other matters involving the intersection of the Delaware General Corporation Law[19] and the Delaware Revised Uniform Limited Partnership Act.[20] In the same vein, DiRienzo asserts that allowing an immediate appeal would prevent subjecting him and others to costly further litigation on the Direct Claims, which he asserts have been hobbled improperly by the Opinion.[21]

Regarding DiRienzo's Rule 42(b)(i) arguments, Defendants point out that, by essentially leaving intact the Direct Claims, the Opinion did not equate DiRienzo's failure to perfect his appraisal rights to exhausting his exclusive remedy and that this aspect of the Opinion was but one of multiple bases the Court gave for rejecting DiRienzo's efforts to avoid the Agreement.[22] In addition, Defendants dispute DiRienzo's characterization of this Court's rulings as to his "purported" consent to the Agreement and the Special Committee's obligations to the minority stockholders under the circumstances outlined in the First Amended Complaint as being novel.[23] Finally, as to

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19 8 *Del. C.* §§ 101–398.

20 6 *Del. C.* §§ 17-101 to -1111.

21 Pl.'s Appl. 8–10.

22 Defs.' Opp'n 18.

23 *Id.* at 19–20. Defendants also argue that the issue regarding the Special Committee is collateral to DiRienzo's current application (*i.e.*, it relates to Counts

DiRienzo's Rule 42(b)(v) argument, Defendants assert that his invitation to consider the phrase "otherwise serve considerations of justice" in isolation threatens to swallow the Rule. They contend that it must be read in the context of the preceding phrase: that "a review of the interlocutory order may *terminate the litigation*."[24] In this respect, Defendants emphasize that a reversal of the challenged aspects of the Opinion would not terminate this litigation; rather, it probably would prolong it.[25]

For the following reasons, I find that DiRienzo has not satisfied any of the additional criteria under Rule 42(b). First, the Opinion did not hold that appraisal was DiRienzo's exclusive remedy. Instead, it preserved, at a minimum, DiRienzo's Direct Claims for breach of fiduciary duties as to all the individual defendants, except the Special Committee.

Second, DiRienzo's challenge to this Court's finding that he consented to the Agreement fails to present a novel question. DiRienzo suggests that the Court bound him to the Agreement merely because he purchased stock in the subject entity's predecessor. This argument, however, ignores the alternative grounds stated for the Court's rulings.

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I through III as asserted against the Special Committee, but the application for certification seeks leave only to pursue an interlocutory appeal of the dismissal of Counts IV through VIII of the First Amended Complaint). *Id.* at 20. Thus, the Direct Claims against the Special Committee in Counts I through III are not before this Court on the pending application.

[24] *Id.* at 22–24; Supr. Ct. R. 42(b)(v) (emphasis added).

[25] Defs.' Opp'n 23–24.

For example, one independent basis for determining that DiRienzo is bound to the Agreement was his failure to perfect his statutory appraisal rights.[26] DiRienzo's Application does not challenge this aspect of the Opinion. Thus, even if this Court accepts the premise that DiRienzo's argument presents a question of law which is of the first instance, the existence of an unchallenged, alternative ground for the Court's decision undermines his argument for an immediate appeal.[27]

Third, DiRienzo's argument regarding the nature of the Special Committee's obligations to the minority stockholders is irrelevant. Defendants point out correctly that this issue relates only to Counts I through III of the First Amended Complaint. None of those counts are the subject of DiRienzo's application. Thus, appellate review of this aspect of the Opinion would be "advisory and academic."[28]

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[26] *DiRienzo v. Lichtenstein*, 2013 WL 5503034, at *19 (Del. Ch. Sept. 30, 2013). In addition, DiRienzo does not dispute the applicability of the general rule that a stockholder is bound by the corporation's charter and bylaws. *See Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010). There is no allegation in this case that either WebFinancial Corporation's charter or bylaws provide any basis for deviating from this rule. *DiRienzo*, 2013 WL 5503034, at *19.

[27] *See Speiser v. Baker*, 2008 WL 43699, at *4 (Del. Ch. Jan. 2, 2008) (declining to certify an interlocutory appeal because even a successful appeal would prove futile where the challenged aspect of the trial court's decision was one of multiple independent bases for its holding); *Ryan v. Gifford*, 1987 WL 37299, at *2 (Del. May 14, 1987) (TABLE) (rejecting interlocutory appeal because "the alternative basis for the holding [rendered] a determination by the Supreme Court of the legal issues sought to be reviewed [] an advisory and academic exercise").

[28] *Ryan*, 2008 WL 43699, at *4.

Finally, an interlocutory appeal would not "serve considerations of justice." DiRienzo filed the original complaint approximately twenty-two months ago, challenging a series of transactions that began nearly five years ago. The focus of the original complaint was a direct challenge to the Exchange and Partial Unwind. The First Amended Complaint included both the Direct and the Derivative Claims. As to all the individual Defendants, except Mullen and Schwarz, the Direct Claims were not at issue in Defendants' motion to dismiss and were not dismissed by the Opinion. Thus, the Direct Claims can go forward. Although I do not agree with Defendants that Rule 42(b)(v) applies only where an interlocutory order may terminate litigation, here the interests of justice are best served by adjudicating DiRienzo's remaining claims, rather than by considering an interlocutory appeal piecemeal. Moreover, the risk of duplication of efforts, although not insignificant, inheres to partial resolutions generally and does not constitute, in this matter, an exceptional circumstance warranting interlocutory review.

## III. CONCLUSION

For the reasons stated in this Letter Opinion, I find that the requirements for certification of an interlocutory appeal are not present in this case and that no extraordinary or exceptional circumstances exist to support an immediate appeal from this Court's September 30, 2013 Opinion. Accordingly, I deny DiRienzo's application for certification of an interlocutory appeal.

**IT IS SO ORDERED.**

Sincerely,

*/s/ Donald F. Parsons, Jr.*

Donald F. Parsons, Jr.
Vice Chancellor

DFP/ptp