

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

WILLIAM B. CHANDLER III
CHANCELLOR

P.O. BOX 581
GEORGETOWN, DE 19947
TELEPHONE (302) 856-5424
FACSIMILE (302) 856-5251

Submitted: September 16, 2004
Decided: September 21, 2004

J. Travis Laster
Richards, Layton & Finger, P.A.
P.O. Box 551
Wilmington, DE 19899

Vernon R. Proctor
P.O. Box 25130
Wilmington, DE 19899

Re: *Loppert v. WindsorTech, Inc.*
Civil Action No. 441-N

Dear Counsel:

Having considered the briefing on defendant's motion to stay my June 25, 2004 decision pending appeal, I conclude that the stay should not be granted for the reasons discussed below.

Preliminarily, defendant's motion fails to comply with Chancery Rule 7(b)(1), which requires that a motion or brief "state with particularity" the grounds supporting it. Defendant's motion and opening brief comprise less than two full pages of text, barely citing the test for a stay set forth by the Delaware Supreme Court in *Kirpat, Inc. v. Del. Alcoholic Beverage Control Comm'n.*¹ The motion contains no analysis of the *Kirpat* factors, let alone why those factors are satisfied in this case.

By ignoring Rule 7(b)(1), defendant effectively forced the plaintiff to address issues raised by defendant's motion in a vacuum, with the defendant then able to make its primary arguments in its reply brief. This strategy resulted in plaintiff filing a sur-reply via letter, which is not consistent with the

¹ 741 A.2d 356 (Del. 1998).

Court's rules, but was necessitated by defendant's failure to comply with Rule 7. Proceeding in this manner is contrary to the explicit direction of the Court's Rules and causes unnecessary expenditures of time and effort by counsel and by the Court.

Turning to the merits of the motion, *Kirpat* set forth the test governing requests for stays pending appeal. It 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.²

With respect to the likelihood of success on appeal, defendant's briefing is devoid of argument that addresses the purported erroneous legal conclusions I made in my June 25, 2004 ruling. Instead, defendant's reply brief merely rehashes the same arguments made to the Court at the summary judgment stage with respect to whether the settlement is specifically enforceable and whether Delaware Rule of Evidence 408 applies—arguments that did not prevail then and do not appear likely to prevail now.

On the issue of irreparable harm to defendant, I am entirely unpersuaded by the allegations of harm to WindsorTech and its shareholders via dilution for two reasons. First, although Loppert possesses 375,000 currently exercisable options, the 1.1 million options that appear to be of greatest concern to defendant are not exercisable until May 2005. Therefore, the greatest alleged harm cannot even occur for another eight months. Second, if defendant is correct that the exercise of those 1.1 million options will cause irreparable harm to WindsorTech's shareholders in May 2005 (or later), then there is an equally serious question as to whether the June 16, 2004 issuance of 950,000 immediately-exercisable, in-the-money options (including 500,000 to Marc Sherman, WindsorTech's CEO, 250,000 to WindsorTech's Vice President and CFO, and 200,000 to two other WindsorTech directors) also harmed WindsorTech's shareholders and WindsorTech's ability to raise capital.

In contrast to the phantom irreparable harm to be suffered by WindsorTech, it is Loppert who stands to be substantially harmed by the imposition of a stay. The third *Kirpat* factor addresses this concern. If a stay

² *Kirpat*, 741 A.2d at 357-58.

were granted, Loppert would be unable to cause WindsorTech to register the shares necessary for him to exercise the options to which he is currently entitled. Given WindsorTech's conduct throughout this litigation, I fully agree with plaintiff that it would be unwise for him to rely on WindsorTech's promise that it will register his shares upon request.

Finally, regarding possible harm to the public interest, this Court found that an enforceable settlement was reached between the parties. Until overturned on appeal, that is the state of affairs between the parties. Filing an appeal does not change the fact that an enforceable agreement exists between Loppert and WindsorTech, an agreement that I concluded should be specifically enforced. Accordingly, the policies favoring the settlement of disputes and the finality of judgments also weigh against a stay.

With all of the *Kirpat* factors indicating that a stay is inappropriate, I conclude that no legally cognizable reason exists that would warrant a stay pending appeal. The Motion to Stay Execution Pending Appeal is DENIED.

IT IS SO ORDERED.

Very truly yours,

/s/ William B. Chandler III

William B. Chandler III

WBCIII:amf