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Submitted: November 22, 2004
Decided: November 29, 2004

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

Dear Counsel:

For the reasons discussed below, I deny defendant's motion for reargument of the November 17, 2004 Order ("Enforcement Order") of this Court granting plaintiff's motion to enforce this Court's June 25, 2004 Order ("Summary Judgment Order") granting summary judgment in favor of plaintiff. Furthermore, I hereby issue and enter an order granting plaintiff fees in connection with the *enforcement* of the settlement according to the terms thereof.

Defendant has made two arguments as to why WindsorTech, Inc. ("WindsorTech") has purportedly complied with its obligations under the

parties' settlement and the Summary Judgment Order. First, WindsorTech argues that all of the shares underlying plaintiff's options have been registered. In making this representation to the Court, plaintiff relies on the Affidavit of Edward L. Cummings, filed in connection with defendant's Rule 59(f) motion. Mr. Cummings states under oath that he has personal knowledge that within the shares registered on Form S-8 on October 19, 2004, were all of the shares underlying the nearly two million options held by Mr. Loppert. Mr. Cummings clearly notes in his affidavit that Mr. Loppert's "shares include 250,000 options issued to [him] in 2001, 625,000 issued to him directly under WindsorTech's 2002 Flexible Stock Plan and 1,100,000 issued pursuant to a Settlement Agreement ordered enforced by the Chancery Court [sic] of the State of Delaware."

Mr. Cummings' affidavit further states that he is the Vice-President and Chief Financial Officer of WindsorTech. It does not appear that Mr. Cummings is an attorney. He is not qualified, therefore, to opine from his personal knowledge as to whether the Form S-8 filed on October 19, 2004, registered plaintiff's underlying shares. The Transmittal Affidavit of Mr. Farmer ("Farmer Aff."), an attorney for WindsorTech, does not opine on whether the Form S-8 properly registered plaintiff's shares, but instead relies on Mr. Cummings' opinion.

Counsel for Mr. Loppert clearly identified the deficiencies with the October 19, 2004 S-8 in a letter addressed to counsel for WindsorTech on October 22, 2004. According to Mr. Cummings' affidavit, it is clear that WindsorTech is aware that there are three different sources for Mr. Loppert's options and that their Form S-8 only addressed one of those three. WindsorTech has made no efforts since that date to file an amended S-8, file a new S-8, or provide an opinion of counsel that the S-8 properly registered all of Mr. Loppert's shares.¹

It appears clear to the Court that the October 19, 2004 Form S-8 is deficient for the reasons discussed by Mr. Loppert. It is hereby ORDERED, therefore, that WindsorTech shall file a proper Form S-8 registering all of the shares underlying Mr. Loppert's options, either by amendment to the October 19, 2004 S-8 or by filing a new S-8. After properly registering Mr. Loppert's shares, counsel for WindsorTech shall issue a written opinion to Mr. Loppert and to this Court that Mr. Loppert's shares have been properly registered so that he may reasonably rely on that opinion if and when he desires to sell any or all of those shares.

¹ WindsorTech's counsel wrote to counsel for plaintiff on October 28, 2004, that he had "been advised by WindsorTech that all of the shares underlying the options granted to Mr. Loppert were registered in the Form S-8 recently filed." It is clear from this language that WindsorTech's counsel did not opine on the applicability of the S-8 to plaintiff's shares, but rather merely relayed WindsorTech's position.

Second, WindsorTech argues that Mr. Loppert has not complied with the terms of the settlement with respect to the issuance of a replacement stock certificate for his brother. The settlement provided for the issuance of a replacement certificate for shares held by Mr. Loppert's brother. The settlement further provided that such replacement would be at no charge, subject to the transfer agent's requirements.² According to WindsorTech, it has not yet authorized its transfer agent to issue a replacement certificate because Mr. Loppert has not complied with the transfer agent's requirements, which may include requiring that Mr. Loppert's brother provide an affidavit that the certificate has been lost and a bond in the amount of two percent of the market value of the shares represented by the certificate to be reissued plus \$25. WindsorTech states that it "will promptly authorize replacement when such conditions are satisfied."

Given WindsorTech's course of dealing in connection with this litigation, it is unwise for WindsorTech to retain the discretion to determine whether certain conditions are satisfied before authorizing issuance of a replacement certificate. Therefore, it is hereby ORDERED that WindsorTech shall immediately authorize its transfer agent to issue a replacement certificate to Mr. Loppert's brother upon the *transfer agent's* satisfaction that the requirements for a new certificate are met. According to the settlement, to the

² See Farmer Aff. Exs. C and D.

extent that a bond is required, WindsorTech is hereby ORDERED to pay the costs of that bond and any other costs required by the transfer agent in connection with the issuance of the replacement certificate.

The third matter before the Court is plaintiff's request for fees and costs in accordance with the settlement and this Court's prior Orders. Plaintiff is hereby awarded fees in the amount of \$16,076.50, and \$1,945.42 in costs.³ That amount does not include amounts attributable to the opposition to WindsorTech's motion to stay execution pending appeal, as that portion of the litigation is a discrete issue not directly related to the *enforcement* of the settlement.

Obviously, plaintiff is entitled to an award of fees and costs in connection with this motion for reargument, as the motion is merely an extension of the previous motion to enforce the settlement. Plaintiff shall submit a further affidavit of fees and costs to that end.

IT IS SO ORDERED. The motion for reargument is DENIED.

Very truly yours,

/s/ William B. Chandler III

William B. Chandler III

WBCIII:amf

³ See Aff. of J. Travis Laster in Supp. of Second Fee Award at ¶¶ 6-7.