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: June 22, 2005
Decided: July 7, 2005

David J. Teklits, Esquire
Morris, Nichols, Arsht & Tunnell
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899

J. Travis Laster, Esquire
Richards, Layton & Finger, P.A.
One Rodney Square
P.O. Box 551
Wilmington, DE 19801

RE: Examen, Inc. v. VantagePoint Venture Partners 1996
C.A. No. 1142-N
Johnson, et al. v. VantagePoint Venture Partners 1996
C.A. No. 1260-N

Dear Counsel:

These matters both arise out of a dispute about the voting rights of VantagePoint Venture Partners 1996 in the now-completed merger of Examen, Inc., a Delaware corporation, and a Delaware subsidiary of Reed Elsevier Inc., a Massachusetts corporation. In C.A. No. 1142-N, VantagePoint, a sophisticated investor that directly negotiated the acquisition of the very shares in question, sought to establish that, under California law, the holders of shares of a series of preferred stock issued by Examen had the right to a class vote in that merger,

although no such class vote is provided in the certificate of designations of that class or is otherwise claimed to exist under Delaware law.[1] Because VantagePoint owned a majority of the class of preferred stock in question, the right to a class vote would have given it a veto power over the merger for which it had never bargained.

On March 31, 2005, this court granted Examen's motion for judgment on the pleadings in C.A. No. 1142-N, concluding that Delaware law governed the stockholder vote at issue to the exclusion of California law and that, as a matter of law, all of Examen's "stockholders [were] permitted to vote on the proposed merger as a single class."[2] That judgment was affirmed on appeal by the Delaware Supreme Court.[3]

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[1] If, when it acquired the shares from Examen, VantagePoint wanted a class vote on mergers, it could have bargained for it. In fact, VantagePoint did bargain for a class right to elect a director. *See* Certificate of Designations of Series A Preferred Stock of Examen, Inc., Section D(3) (stating in relevant part, "The holders of the Series A Preferred Stock will be entitled, *voting as a separate class*, to elect one (1) director, and the holders of the Common Stock, voting as a separate class, will be entitled to elect the balance of the directors") (emphasis added).

[2] *Examen, Inc. v. Vantagepoint Venture Partners 1996*, 873 A.2d 318, 325 (Del. Ch. 2005).

[3] *Vantagepoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108 (Del. 2005).

That judgment would normally have put to rest VantagePoint's claimed right to a class vote in connection with the now-completed merger. However, there remains pending in the Superior Court of California an action in which VantagePoint ultimately seeks a remedy based on its asserted right to a class vote in the merger.[4] VantagePoint filed that action five days after Examen filed C.A. No. 1142-N. On March 21, 2005, the California Superior Court entered an order staying that action pending this court's ruling.

Immediately upon receipt of this court's March 31, 2005 opinion and order granting judgment on the pleadings, VantagePoint announced its intention to seek an order from the California court lifting the stay in order to obtain a temporary injunction against the merger. The predicate for such an injunction would necessarily have been VantagePoint's claimed right to a class vote in connection with the proposed merger under California law–the very issue considered and rejected in this court's March 31, 2005 opinion and order.

On April 1, 2005, to prevent irreparable harm to Examen and its other stockholders stemming from VantagePoint's threat to seek an injunction in

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[4] *VantagePoint Venture Partners v. Examen, Inc.*, C.A. 05AS00982 (Cal. Super. Ct. Mar. 21, 2005).

California, this court entered a temporary restraining order ("TRO"), preventing VantagePoint from proceeding further in the California action. VantagePoint then appealed. On May 5, 2005, the Delaware Supreme Court issued its opinion, affirming the judgment of this court. VantagePoint has moved to dissolve the TRO to permit it to prosecute its claim in California.

While the appeal was pending, the individuals who comprise the Examen board of directors at the time of the merger, together with the resulting corporation and its parent company, filed C.A. No. 1260-N, naming VantagePoint as the defendant seeking a judicial declaration that (i) the directors and officers of Examen did not breach their fiduciary duties in connection with the merger between Examen and the Delaware subsidiary of Reed Elsevier; (ii) there is no basis to unwind the merger; and (iii) they are not liable to VantagePoint in connection with the merger.

Now before the court is VantagePoint's motion to dissolve the TRO in C.A. No. 1142-N and a motion filed by the plaintiffs in C.A. No. 1260-N to permanently enjoin VantagePoint from proceeding in the California action other than to dismiss it. For the reasons briefly discussed hereinafter, the court dissolves the TRO and denies the request for permanent injunctive relief.

"The standard for granting a permanent injunction requires [the plaintiff] to demonstrate that: (1) it has proven actual success on the merits of the claims; (2) irreparable harm will be suffered if injunctive relief is not granted; and (3) the harm that will result if an injunction is not entered outweighs the harm that would befall the [defendant] if an injunction is granted."[5]

It is, of course, true, as Examen argues, that the court has the inherent power to protect and enforce its judgments by "enjoining parties over whom it has jurisdiction from instituting or prosecuting litigation elsewhere."[6] It is also true that Equity will act to protect a party from repetitious and vexatious litigation that threatens irreparable harm.[7] Indeed, the court relied on these very principles when

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[5] *Christiana Town Ctr. LLC v. New Castle County*, 2003 Del. Ch. LEXIS 60, at *6 (Del. Ch. June 6, 2003), *aff'd*, 841 A.2d 307 (Del. 2004) (TABLE).

[6] Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 5-3, 5-41 n.220 (2005 ed.).

[7] *See, e.g., Scott v. Hunt Oil Co.*, 398 F.2d 810, 811 (5th Cir. 1968) ("There is no longer any doubt that the District Judge, to relieve Appellees of harassing and vexing litigation, had the power to enjoin Appellant from filing suits in the state courts to protect or effectuate its judgments.") (citations omitted); *Tonn v. United States*, 2001 U.S. Dist. LEXIS 21789, at *6 (D. Minn. Nov. 16, 2001) ("A permanent injunction is an appropriate means of preventing a party from pursuing repetitious and vexatious litigation.") (citing *In re Martin-Trigona*, 763 F.2d 140, 142 (2d Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986)); *Rynsburger v. Dairymen's Fertilizer Coop., Inc.*, 266 Cal. App. 2d 269, 279 (Cal. Ct. App. 1968) ("The propriety of injunctive relief to prevent conflicting or vexacious [sic] litigation has long been established in our law."); *E. B. Latham & Co. v. Mayflower Indus.*, 278 A.D. 90, 94 (N.Y. Supr. Ct. App. Div. 1951) (stating that litigation can be enjoined if "it was instituted for the purpose of vexing or harassing the party seeking the injunction").

it issued the TRO on April 1, 2005 to prevent VantagePoint from seeking an injunction in California on the same grounds that had already been decided adversely to it here.

Nevertheless, now that the merger is complete, the only plausible threat to Examen is that it will be forced to respond to the California litigation and seek its dismissal on grounds of *res judicata*. This threat does not constitute irreparable harm. Similarly, VantagePoint's litigation tactics do not rise to the level of being vexatious or harrassing. Although it may appear as if VantagePoint is attempting to get a second bite at the apple by pursuing its later-filed California action, VantagePoint has so far complied with the orders of the Delaware courts. As an example, even though VantagePoint threatened to take action in California immediately after this court's March 31, 2005 ruling, it complied with the TRO entered against it the next day and has not violated that order to this court's knowledge.

Finally, the court refrains from granting an injunction for reasons of comity. As Chancellor Allen said in 1993, "the better practice [is] to rely upon the comity of sister state courts to respect the judgment that has now been made concerning

the feasibility of litigating these claims in the first filed jurisdiction."[8] Although this comment was made in the context of competing motions to stay or dismiss actions pending in two *fora*, similar considerations of comity apply where the first-filed case has proceeded to judgment. To paraphrase Chancellor Allen, the regular issuance of injunctions against the ordinary procession of a second-filed action in a sister state, and after the entry of judgment in this court, risks giving substantial offense to the judicial system of other states, most often for no reason.[9] This court presumes that the California Superior Court will afford Examen all of its due process rights and give it the opportunity fully and fairly to litigate a motion to dismiss the California action on grounds of *res judicata*.

Similarly, despite some concern that VantagePoint will attempt to utilize the California action to collaterally attack a final judgment on the merits of issues that were fully and fairly litigated before the courts of Delaware, this court concludes that the TRO should be dissolved. The TRO was put in place to protect the interests of Examen and its stockholders in effectuating the merger in accordance with Delaware law and also to protect the ability of the Delaware courts to fairly

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[8] *Household Int'l v. Eljer Indus.*, 1993 Del. Ch. LEXIS 67, at *5 (Del. Ch. Apr. 22, 1993).

[9] *Id*. at *7.

adjudicate the issues raised in C.A. No. 1142-N. Now that the merger is accomplished and the Delaware Supreme Court has ruled, those interests are no longer threatened.

For the above reasons, the motion for permanent injunction filed in C.A. No. 1260-N is DENIED. Furthermore, the temporary restraining order entered in C.A. No. 1142-N on April 1, 2005 is DISSOLVED. IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor