COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County Courthouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

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Date Decided: January 23, 2014

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Mr. Robert Zimmerman
225 Millers Way
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Re: *Zimmerman v. Crothall, et al.*
Civil Action No. 6001-VCP

Dear Counsel and Mr. Zimmerman:

Before me is Defendants' Motion for Stay of Judgment Pending Appeal ("Defendants' Motion")[1] seeking to stay the aspect of the October 15, 2013 Final Order that compels Adhezion to pay $300,000 in attorneys' fees and expenses to Plaintiff's counsel, The Williford Firm ("TWF"), now Intervenor (the "Fee

[1] Defendants' Motion was filed on behalf of all the defendants except the nominal defendant, Adhezion Biomedical LLC ("Adhezion"). Adhezion joined the motion formally, however, on November 26, 2013.

Award" or the "Judgment"). In addition, Defendants request that this Court waive the requirement that they post a supersedeas bond, or, alternatively, that the Court reduce the amount of the bond required to an amount less than the amount of the Judgment. For the reasons set forth below, I deny Defendants' Motion in its entirety.

I. ANALYSIS

Court of Chancery Rule 62(d) provides that "[s]tays pending appeal and stay and cost bonds shall be governed by article IV, § 24 of the Constitution of the State of Delaware and by the Rules of the Supreme Court."[2] Article IV, § 24 of the Constitution states, "an appeal or writ shall be no stay of proceedings in the court below unless the appellant or plaintiff in error shall give sufficient security to be approved by the court below."[3] The applicable Delaware Supreme Court Rules are Rule 32(a) and Rule 32(c). Under Rule 32(a), "[a] motion for stay must be filed in the trial court in the first instance. . . . A stay or an injunction pending appeal may be granted or denied in the discretion of the trial court."[4] In addition, Rule 32(a) provides that the trial court may impose "such terms and conditions . . . as may appear appropriate in the circumstances."[5] On

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2 Ct. Ch. R. 62(d).

3 Del. Const. art. IV, § 24.

4 Supr. Ct. R. 32(a).

5 *Id.*

the other hand, Rule 32(c) states that "[a] stay or injunction pending appeal shall be granted *upon filing and approval of sufficient security*."[6] This bonding requirement, known as a supersedeas bond, is triggered where, as here, "an appellant seeks a stay of the trial court's power to enforce or to permit execution on the judgment or decree which has been appealed."[7]

Defendants contend that this Court "has the discretion to waive the requirement of a supersedeas bond in appropriate circumstances" and then enter a stay of execution of the Judgment. I question whether the trial court has such broad discretion, but even if it did, the circumstances of this case do not support waiving the bond requirement.

Historically, as a bright-line rule, courts in this state required appellants seeking to stay the execution of a judgment to post a supersedeas bond in an amount equal to the judgment.[8] At the time of the decision in *Blackwell*, the governing Supreme Court Rule was Rule 22(4)(b), which provided that:

> In civil causes the form of the bond shall bind the principal obligor to prosecute his appeal or writ to effect, according to law and the rules of this Court, and pay the condemnation money and all costs or otherwise abide the decree in appeal or the judgment in error, if he fails to make his plea good. *Such indemnity, where*

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6 Supr. Ct. R. 32(c) (emphasis added).

7 *Wiland v. Wiland*, 549 A.2d 306, 308 (Del. 1988).

8 *See, e.g., Blackwell v. Sidwell*, 126 A.2d 237 (Del. 1956); *Ownbey v. Morgan*, 105 A. 838 (Del. 1917).

> *the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay and costs and interest on appeal*.[9]

In 1987, however, Rule 22(4)(b) was revised substantially and renumbered 32(c).[10] Today, Rule 32(c) provides, in part:

> A stay or injunction pending appeal shall be granted upon filing and approval of sufficient security. Such security shall be presented to and approved or disapproved in the first instance by the trial court. The type, amount, and form of the security shall be determined in the first instance by the trial court, whose actions shall be reviewable by this Court.[11]

Rule 32(c) further specifies that:

> [T]he security shall ordinarily equal such sum of money and all costs and damages, including damages for delay. The trial court shall have the discretion to set the security at a lesser amount, with a party seeking the stay or injunction pending appeal having the burden to show that a lesser amount is sufficient in the circumstances.[12]

These changes reflect the Supreme Court's intent to relax the former rule's "rigidity," but only by providing trial courts discretion to approve a supersedeas

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[9] Supr. Ct. R. 22(4)(b) (1956) (emphasis added).

[10] *Fletcher v. Ratcliffe*, 1995 WL 790992, at *2 (Del. Super. Dec. 7, 1995).

[11] Supr. Ct. R. 32(c).

[12] Supr. Ct. R. 32(c)(ii).

bond in an amount less than the amount of the judgment in issue.[13] Notably, Rule 32(c) does not afford the trial courts discretion to waive the security requirement altogether.[14] On this basis, I conclude, as a threshold matter, that Defendants must post a supersedeas bond for a stay to issue; therefore, I deny Defendants' request to waive the requirement of a bond.

In addition, to the extent Defendants request that the Court require security in an amount less than the amount of the Judgment, I deny that request. "The primary purpose of the security, or supersedeas bond, is to protect the appellee from losing the benefit of the judgment through the delay or ultimate non-performance by the appellant."[15] Here, Defendants have not demonstrated that

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13 *Cf. Fletcher*, 1995 WL 790992, at *2 (discussing the revision of former Rule 22(4)(b)).

14 Delaware courts have held that, pursuant to article IV, § 24 of the Constitution and the applicable Supreme Court Rules, trial courts are without authority to waive the supersedeas bond requirement. *See, e.g.*, *Owens Corning Fiberglass Corp. v. Carter*, 630 A.2d 647, 648–52 (Del. 1993); *Gates v. Texaco, Inc.*, 2008 WL 1952162, at *1 (Del. Super. May 2, 2008).

It has been suggested that in certain, narrow circumstances, however, a trial court conceivably could waive the bond requirement altogether. *See State ex rel. Caulk v. Nichols*, 281 A.2d 24, 28–30 (Del. 1971) (Hermann, J., dissenting) (discussing the constitutionality of imposing an arbitrary bond requirement on an indigent appellant). But, there has been no showing that any such exceptional circumstances exist in this case.

15 *DiSabatino v. Salicete*, 681 A.2d 1062, 1066 (Del. 1996) (citing *Ellis D. Taylor, Inc. v. Craft Builders, Inc.*, 260 A.2d 180, 182 (Del. Ch. 1969)).

posting security in an amount that is less than the amount of the Judgment sufficiently would protect the appellee, TWF. Indeed, they have stated that Adhezion is in dire financial condition (having experienced net losses in 2011 and 2012 of $1.88 million and $1.2 million, respectively) and will expend in the near future more than $1.8 million in cash on taxes and projects. These are the very circumstances that generally require the posting of security at least equal to the full amount of the Judgment to sufficiently protect against the risk of non-performance by the appellant.

II. CONCLUSION

For the reasons stated, I deny Defendants' Motion unless they promptly post a supersedeas bond (or equivalent security) in the amount of $350,000 to cover the Fee Award and all related costs and damages, including damages for delay and interest on appeal.

IT IS SO ORDERED.

Sincerely,

/s/ Donald F. Parsons, Jr.

Donald F. Parsons, Jr.
Vice Chancellor

DFP/ptp