COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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CHANCELLOR

COURT OF CHANCERY COURTHOUSE
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Submitted: April 30, 2009
Decided: May 15, 2009

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Re: *Fisk Ventures, LLC v. Segal, et al.*
Civil Action No. 3017-CC

Dear Counsel:

I have reviewed the parties' submissions concerning respondent Dr. Andrew Segal's motion for injunction or stay pending Segal's appeal of this Court's (1) January 13, 2009 Memorandum Opinion, and (2) March 10, 2009 Order and decree of judicial dissolution of Genitrix, LLC. For reasons briefly stated below, I grant respondent's motion. This letter is the Court's ruling on the motion.

Chancery Court Rule 62(d) provides that "[s]tays pending appeal and stay and cost bonds shall be governed by" Delaware Supreme Court Rule 32(a) and by Article IV, Section 24 of the Constitution of the State of Delaware.[1] Rule 32(a) provides that a motion for stay pending an appeal to the Supreme Court must be made in the Court of Chancery and that this Court has discretion to grant or deny such application. Section 24 provides that there "shall be no stay of proceedings in the court below unless the appellant shall give sufficient security to be approved by

[1] *See Collins v. Am. Int'l Group, Inc.*, 1998 WL 1912279, at *1 (Del. Ch. June 26, 1998).

the court below or by a judge of the Supreme Court."[2] Delaware Courts construe these provisions "liberally."[3] Indeed, in exercising its discretion this Court will consider four factors: (1) "a preliminary assessment of likelihood of success on the merits of the appeal;" (2) "whether the petitioner will suffer irreparable injury if the stay is not granted;" (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."[4]

In *Kirpat*, the Supreme Court noted that this Court must "balance all of the equities involved in the case together" and if the three factors, other than the likelihood of success factor, "strongly favor interim relief, then a court may exercise its discretion to reach an equitable resolution by granting a stay."[5] The Court reasoned that the "likelihood of success on appeal" factor cannot be "interpreted literally or in a vacuum" because a "literal reading" of this factor would "'lead most probably to consistent denial of stay motions, despite the immediate threat of substantial irreparable injury to the movant.'"[6] The Court then observed that granting a stay would be equitable "if the petitioner has presented a serious legal question that raises a fair ground for litigation and thus for more deliberative investigation."[7]

I turn, therefore, to the last three factors of the *Kirpat* test. I conclude that an analysis of these three factors, on balance, favors the granting of Segal's motion to stay pending appeal. Turning to the second factor, Segal must show that without the stay he and Genitrix would suffer irreparable harm. Segal has met this burden. The March 10 Order mandates dissolution of Genitrix and the selling of its assets. Once completed, it is difficult (and costly) to unwind these transactions and as a result Segal and Genitrix will suffer a significant and perhaps unrecoverable loss. This is a clear example of irreparable harm. Next, I look to whether the stay will inflict substantial harm to other interested parties. Since (1) the managing directors of Genitrix are hopelessly deadlocked to the point that Genitrix cannot undertake a significant action, (2) the dissolution and liquidation process will take a substantial

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[2] *Id.*
[3] *Id.* (citing *State of Del. Ins. Dep't v. Remco Ins. Co.*, 1986 WL 3419, at *2 (Del. Ch. Mar. 18, 1986)).
[4] *Kirpat, Inc. v. Del. Alcoholic Beverage Control Comm'n.*, 741 A.2d 356, 357-58 (Del. 1998).
[5] *Id.* at 358.
[6] *Id.* (quoting *Evans v. Buchanan*, 435 F. Supp. 832, 843 (D. Del. 1977).
[7] *Kirpat*, 741 A.2d at 358 (citing *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).

amount of time, and (3) the condition of Genitrix is static and will not further deteriorate with delay, there is little economic harm that will be suffered by petitioner by granting the stay. Thus, I conclude that petitioner will not be substantially harmed by a stay of Genitrix's dissolution and liquidation pending appeal of this Court's previous rulings. Finally, I turn to the fourth factor of the *Kirpat* test. Here, I must look to see if there would be any harm to the public interest if a stay is granted. I find none. The granting of Segal's motion to stay will not impact the dissolution, the winding up and the liquidation of Genitrix, merely the timing of the carrying out of the Court's previous judgment will be effected.[8] Accordingly, the public policy favoring the finality of judgments will not be impacted in this case. Therefore, on balance the weight of the last three factors of the *Kirpat* test tips in favor of granting the stay and the motion "raises a fair ground for litigation" and "more deliberative investigation."[9]

Additionally, Segal seeks interim relief without the requirement of a bond. The primary purpose of a bond is to protect the appellee from losing the benefit of the judgment through the delay or ultimate non-performance by appellant.[10] Since Genitrix's assets and business affairs are currently being managed by a liquidating receiver and since there is little economic harm that could befall petitioner by delay, I conclude that the purpose for requiring the bond in this case does not apply. Thus, I waive the requirement that Segal must post a bond.

Given that the final three factors of the *Kirpat* test weigh heavily in favor of granting Segal's motion to stay pending appeal, I conclude that, on balance, the equities point in favor of providing Segal and Genitrix with "interim relief" pending the outcome of Segal's appeal. Thus, for the foregoing reasons, I grant Segal's motion for a stay pending appeal of my March 10, 2009 Order dissolving Genitrix and liquidating its assets. I also waive the requirement that Segal post a bond to secure petitioner's interests pending the outcome of Segal's appeal.

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[8] *See Loppert v. Windsortech, Inc.*, 2004 WL 3092338, at *2 (Del. Ch. Sept. 21, 2004).
[9] *Kirpat*, 741 A.2d at 358.
[10] *See DiSabatino v. Salicete*, 681 A.2d 1062, 1066 (Del. 1996).

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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