IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GARY STAFFIERI and ADRIA CHARLES STAFFIERI	:	
Plaintiffs,	:	
v.	:	C.A. No. 7439-VCL
HENRY BLACK and MARY LOU BLACK and RAYMOND BUCHTA and SCOTT BLACK BLACKBALL PROPERTIES LLC, and PAUL MILLER AND CANDY MILLER, and GAKIS PROPERTIES II, LLC	:	
Defendants.	:	

ORDER VACATING FINAL ORDER AND JUDGMENT

1. On October 24, 2012, this Court entered a Post-Trial Order that resolved the merits of this action. The Post-Trial Order was not a final judgment. "A final judgment is generally defined as one that determines the merits of the controversy or defines the rights of the parties *and leaves nothing for future determination or consideration*." *Tyson Foods, Inc. v. Aetos Corp.*, 809 A.2d 575, 579 (Del. 2002) (emphasis added). "The test for whether an order is final and therefore ripe for appeal is whether the trial court has clearly declared its intention that the order be the court's 'final act' in a case." *Id.* An aggrieved party only can appeal as of right after a final judgment is entered by the trial court. Del. Const. Art. IV, § 11(1)(a).

2. The Post-Trial Order was titled "Post-Trial Order," not "Final Order and Judgment." Paragraph 16 of the Post-Trial Order granted the plaintiffs' request for an award of attorneys' fees and expenses, including costs. That award needed to be considered and determined. It therefore should have been clear from the face of the Post-Trial Order that there remained matters "for future determination or consideration" and

that the Court did not intend for the Post-Trial Order to be its "final act" in the case. The Delaware Supreme Court "has consistently held . . . that a judgment on the merits is not final until an outstanding application for an award of attorney's fees has been decided." *Emerald P'rs v. Berlin*, 811 A.2d 788, 790-91 (Del. 2001).

3. Notwithstanding the language of the Post-Trial Order and the teachings of cases such as *Tyson Foods* and *Emerald Partners*, the defendants noticed an appeal, before an award of attorneys' fees and expenses had been quantified and a final judgment entered. That was procedural misstep number one. The Court expected plaintiffs to raise the jurisdictional issue with the Delaware Supreme Court. They did not. That was procedural misstep number two. Instead, on December 21, 2012, plaintiffs made their fee application.

4. As the defendants correctly point out, the Court of Chancery Rules do not establish a default briefing schedule. The Court has eschewed a default schedule because counsel are expected to behave responsibly, to discuss pending motions, to agree on an appropriate schedule, and to move matters along. Contrary to the defendants' assertions, it is not the Court's job to babysit counsel or dictate a briefing schedule in every instance.

5. Although the Court of Chancery Rules do not impose a default briefing schedule, a standard time period for a response is thirty days. Issues not addressed are deemed waived.

6. The defendants never opposed the fee application. The defendants never raised any jurisdictional objection. The defendants never communicated with the Court about the fee application in any way. That was procedural misstep number three.

7. As of January 31, 2013, forty-one days had passed since the fee application was made. At that point, the defendants had been given ample time to respond. In light of the reasonableness of the fee request, it appeared likely that the defendants had chosen not to expend additional resources opposing the application. Because of the extended period of silence from the defendants, it was appropriate to deem any opposition waived. Nevertheless, the Court independently reviewed the fee application and determined that the amounts sought were reasonable.

8. At the time the Court entered the Final Order and Judgment, the Court did not misapprehend the facts or misunderstand the law regarding the defendants' failure to respond to the fee application or the jurisdictional conundrum that the parties had created. The Court cited the defendants' failure to respond and noted that if the appeal from the Post-Trial Order were deemed validly taken, such that this Court was without jurisdiction, then the Court would revisit the issue of fees and expenses.

9. The defendants have now moved for reconsideration of the Final Order and Judgment. Under Rule 60(b), one of the bases for relief is excusable neglect. The defendants' failure to address the fee application was neglect, but given the uncertainty created by the jurisdictional issue, it was excusable neglect.

10. Vacatur is also appropriate so that the propriety of the appeal from the Post-Trial Order and the related jurisdictional issue can be addressed. This Court does not have the authority to determine whether an appeal was validly taken to the Delaware Supreme Court. The Delaware Supreme Court is the senior tribunal. Even under Supreme Court Rule 42, this Court only makes a recommendation to the Delaware

Supreme Court. It is for the Delaware Supreme Court to determine the scope of its jurisdiction and decide whether to accept an appeal.

11. The vacating of the Final Order and Judgment does not mean that the parties should proceed with briefing on the fee application. The jurisdictional issue should be resolved first. Plaintiffs shall advise the Court within ten days as to whether plaintiffs have raised with the Delaware Supreme Court the question of whether an appeal was validly taken from the Post-Trial Order.

12. Accordingly, reconsideration is GRANTED, and the Final Order and Judgment is VACATED.

/s/ J. Travis Laster
The Honorable J. Travis Laster
Dated: February 18, 2013