



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE AMC ENTERTAINMENT
HOLDINGS, INC. STOCKHOLDER
LITIGATION

CONSOLIDATED
C.A. No. 2023-0215-MTZ

**DEFENDANTS' OPPOSITION TO ROSE IZZO'S
MOTION FOR CLARIFICATION OF THE
SCHEDULING ORDER OR, ALTERNATIVELY, FOR
MAINTAINING OF STATUS QUO ORDER PENDING APPEAL**

Defendants AMC Entertainment Holdings, Inc. ("AMC" or the "Company"), Adam M. Aron, Denise Clark, Howard W. Koch, Jr., Kathleen M. Pawlus, Keri Putnam, Anthony J. Saich, Philip Lader, Gary F. Locke, Lee Wittlinger, and Adam J. Sussman (collectively, "Defendants") hereby oppose Rose Izzo's Motion for Clarification of the Scheduling Order or, Alternatively, for Maintaining of Status Quo Order Pending Appeal (the "Motion").¹

INTRODUCTION

1. The Motion seeks "clarification" that the Court's July 21, 2023 Opinion lifted the stay in the Court's May 1, 2023 Scheduling Order, such that Ms. Izzo may file a "motion to intervene" in the action.² "Alternatively . . . , Ms. Izzo respectfully

¹ Dkt. 583.

² *Id.* at ¶ 5.

moves to maintain the Status Quo Order pending appeal of any final order approving any amended settlement.”³

2. In its July 24, 2023 letter to the parties and Ms. Izzo, the Court addressed Ms. Izzo’s request for clarification regarding the May 1, 2023 Scheduling Order, holding that the “stay imposed by” that Scheduling Order “remains in place.”⁴

3. As the Court recognized in its July 24 letter, Ms. Izzo’s request in the alternative -- that the Court maintain the Status Quo Order that it entered on February 27, 2023,⁵ pending the disposition of an appeal of any Order that this Court may enter approving the revised proposed settlement that the parties submitted to the Court on June 22, 2023⁶ -- is “preemptive” because the Court has yet to issue any such Order.⁷

4. In any event, for the reasons set forth below, Ms. Izzo fails to make the required showing for this Court to stay any Order that it may enter approving the revised proposed settlement and maintain the Status Quo Order pending an appeal.

³ *Id.* at ¶ 6.

⁴ Dkt. 587 at 5.

⁵ Dkt. 10.

⁶ Dkt. 582.

⁷ Dkt. 587 at 6.

ARGUMENT

5. “[T]he party seeking a stay” bears the burden of demonstrating that a stay is warranted.⁸ In considering whether to grant a stay pending appeal, the Court considers the four factors set forth in *Kirpat, Inc. v. Delaware Alcoholic Beverage Control Commission*,⁹ which require the Court:

(1) to make a preliminary assessment of likelihood of success on the merits of the appeal; (2) to assess whether the petitioner will suffer irreparable injury if the stay is not granted; (3) to assess whether any other interested party will suffer substantial harm if the stay is granted; and (4) to determine whether the public interest will be harmed if the stay is granted.¹⁰

6. “A motion for a stay pending appeal is addressed to the discretion of the trial court.”¹¹ “No one factor is dispositive; rather, the Court will carefully weigh all relevant considerations.”¹² But “*Kirpat* factors (ii)-(iv)” must “*strongly favor* interim relief” for the Court to “exercise its discretion” and “grant[] a stay.”¹³

⁸ *Zhou v. Deng*, 2022 WL 1617218, at *2 (Del. Ch. May 23, 2022); *see also Frankino v. Gleason*, 1999 WL 1063071, at *1 (Del. Ch. Nov. 12, 1999) (in denying defendants’ motion for a stay pending appeal, holding that “*defendants [had] failed to meet their burden*”) (emphasis added).

⁹ 741 A.2d 356 (Del. 1998).

¹⁰ *Id.* at 357.

¹¹ *Wynnefield P’rs Small Cap Value L.P. v. Niagara Corp.*, 2006 WL 2521434, at *1 (Del. Ch. Aug. 9, 2006).

¹² *Id.*

¹³ *Zhou*, 2022 WL 1617218, at *4 (emphasis in original).

I. Ms. Izzo Has Not Shown That Her Potential Appeal Has A Likelihood Of Success On The Merits

7. “When considering the appeal’s likelihood of success on the merits, this Court ‘is called upon not to second guess its decision, but to assess, as objectively as possible, whether the case presents a fair ground for litigation and more deliberative investigation.’”¹⁴ This standard is met where a decision involves “issues of first impression or unsettled areas of Delaware law.”¹⁵

8. Ms. Izzo has raised no such issues. To the contrary, according to the Motion, the only issue on which Ms. Izzo currently intends to appeal is “the scope of the release relating to future claims.”¹⁶ In its July 21, 2023 Opinion, the Court correctly rejected Ms. Izzo’s arguments on this score, holding that her “reading misinterprets the Release,” and that “two limitations [in the] Release make clear the

¹⁴ *Wynnefield*, 2006 WL 2521434, at *1.

¹⁵ *See Frankino*, 1999 WL 1063071, at *2 (“Because this case did not involve issues of first impression or unsettled areas of Delaware law, I cannot conclude that the defendants have presented a serious legal question requiring more deliberative investigation.”); *Gans v. MDR Liquidating Corp.*, 1999 WL 669364, at *1 (Del. Ch. Aug. 17, 1999) (“There are no issues of first impression, unsettled areas of Delaware law or any basis for considering that a serious legal question exists raising fair ground for litigation and thus requires more deliberative investigation.”); *Zohar CDO 2003-1, LLC v. Patriarch P’rs, LLC*, 2016 WL 6661932, at *1 (Del. Ch. Nov. 10, 2016) (“Patriarch’s arguments on appeal will not present issues of first impression or pressing issues of Delaware law for resolution by the Supreme Court. . . . Therefore, Patriarch’s appeal does not present ‘a fair ground for litigation and more deliberative investigation.’”).

¹⁶ Mot. at ¶ 18.

Release does not apply to future events.”¹⁷ In response, Ms. Izzo “merely rehashes the same arguments” she already “made to the Court,” which is insufficient to show a “likelihood of success on appeal.”¹⁸

9. Ms. Izzo also states that “[a]ppeal on other issues would be possible”¹⁹ if the Court approves the parties’ revised proposed settlement, but does not identify those issues. Regardless, the Delaware Supreme Court will review the Court’s approval of the Settlement under the deferential abuse of discretion standard.²⁰ Indeed, the Delaware Supreme Court has held several times that for it to “set aside a settlement which has been found by the Court of Chancery to be fair and reasonable, the evidence in the record must be so strongly to the contrary that the

¹⁷ *In re AMC Ent. Hldgs., Inc. S’holder Litig.*, --- A.3d ---, 2023 WL 4677722, at *24, n.186 (Del. Ch. July 21, 2023).

¹⁸ *Loppert v. WindsorTech, Inc.*, 2004 WL 3092338, at *1 (Del. Ch. Sept. 21, 2004); *see also Tafeen v. Homestore, Inc.*, 2005 WL 1314782, at *1 (Del. Ch. May 26, 2005) (holding that a party failed to show a “likelihood of success on the merits of its appeal” where the party “simply restate[d] the arguments that it presented to this Court when these matters were first heard and when these decisions were first made”), *aff’d*, 886 A.2d 502 (Del. 2005).

¹⁹ Mot. at ¶ 6, n.16.

²⁰ *See Griffith v. Stein*, 283 A.3d 1124, 1132 (Del. 2022) (“To the extent the trial court’s decisions implicate questions of law, [the Delaware Supreme Court] review[s] those questions de novo. Otherwise, a settlement ‘found by the Court of Chancery to be fair and reasonable’ is reviewed for an abuse of discretion.”).

approval of the settlement constituted an abuse of discretion.”²¹ Neither Ms. Izzo nor any other objector would have a likelihood of satisfying this stringent standard on appeal.

II. Ms. Izzo Will Not Suffer Irreparable Harm If A Stay Is Not Granted

10. “A harm that can be remedied by money damages is not irreparable,”²² and Ms. Izzo concedes in the Motion that “many forms of post-appeal relief, including monetary damages, are available.”²³ Moreover, as explained above, the only issue that Ms. Izzo has currently raised for appeal concerns the “scope of the release,”²⁴ which can be addressed on appeal regardless of whether the Status Quo Order is lifted and AMC is able to effectuate the transactions that its stockholders approved on March 14, 2023.

11. In any event:

“[A] movant pursuant to Rule 62(c) must point to some injury other than compliance with this Court’s Order and mootness of its appeal in order for this factor to weigh in the movant’s favor.” The Court may deny a motion pursuant to Rule 62(c), and enforce its judgment against

²¹ *In re Philadelphia Stock Exch., Inc.*, 945 A.2d 1123, 1138-39 (Del. 2008) (quoting *Kahn v. Sullivan*, 594 A.2d 48, 59 (Del. 1991)); *see also Nottingham P’rs v. Dana*, 564 A.2d 1089, 1102 (Del. 1989).

²² *In re Delphi Fin. Grp. S’holder Litig.*, 2012 WL 729232, at *18 (Del. Ch. Mar. 6, 2012); *see also Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 930 A.2d 104, 131 (Del. Ch. 2007) (“There is no irreparable harm if money damages are adequate to compensate Plaintiffs. . . .”).

²³ Mot. at ¶ 14.

²⁴ *See* Paragraph 8, *supra*.

the party seeking appeal, even if doing so may harm that party by “undermin[ing] its opportunity for Supreme Court review of the judgment.”²⁵

Ms. Izzo has pointed to no such injury, and the fact that the reverse stock split and conversion may not be reversible is insufficient to show irreparable harm that necessitates a stay pending appeal.²⁶

III. AMC And Its Stockholders Will Face Substantial Harm If A Stay Is Granted

12. The fundamental financial hurdles facing AMC remain in place today.

AMC has continuously operated at a net loss since 2020.²⁷ In the first quarter of 2023, AMC’s costs and expenses exceeded its revenues, resulting in a net loss of

²⁵ *Lynch v. Gonzalez*, 2020 WL 5648567, at *4 (Del. Ch. Sept. 22, 2020) (alterations in original) (quoting *Jagodzinski v. Silicon Valley Innovation Co., LLC*, 2011 WL 4823569, at *3 (Del. Ch. Aug. 16, 2011)); see also *Bond Purchase, L.L.C. v. Patriot Tax Credit Props., L.P.*, 1999 WL 669358, at *8 (Del. Ch. Aug. 16, 1999) (argument that “immediate compliance with the Opinion would provide Plaintiff with final relief and moot Defendants’ current appeal” is insufficient to justify a stay pending appeal because, if the Court “were to accept [that] argument, every Order of this Court that contains a form of injunctive relief would justify a stay of that Order pending appeal”; “a movant pursuant to Rule 62(c) must point to some injury other than compliance with this Court’s Order and mootness of its appeal in order for this factor to weigh in the movant’s favor”).

²⁶ See, e.g., *Zohar*, 2016 WL 6661932, at *2 (denying stay pending appeal after providing specific performance of document production obligations); *Loppert*, 2004 WL 3092338, at *2 (denying stay pending appeal of award of specific performance of a settlement agreement).

²⁷ Defendants’ Brief in Support of Proposed Settlement at 20 (Dkt. 200).

over \$235 million.²⁸ AMC's current assets, including \$495.6 million in cash, were and still are dwarfed by the Company's \$11.4 billion in total liabilities.²⁹ As such, the Company's "current cash burn rates are not sustainable long-term," and "there can be no assurances that the Company will be successful in generating the additional liquidity necessary to meet the Company's obligations beyond twelve months."³⁰

13. Accordingly, AMC was left to raise equity capital, including to pay down its significant debt load, using only the significantly discounted and, thus, significantly dilutive APEs. It is for this reason that AMC proposed -- and the holders of its common stock and APEs approved in a March 14, 2023 vote -- the reverse stock split and the conversion of APEs into common stock, which are designed to create a significant amount of authorized and unissued common stock that AMC can use to raise equity capital.

14. If the effectuation of the reverse stock split and conversion are delayed pending an appeal, AMC very well may be forced to go back to using the

²⁸ Defendants' Reply Brief in Further Support of Proposed Settlement at 12 (Dkt. 441); *see also* May 5, 2023 AMC Form 10-Q at 3-4 (Ex. A). References to "Ex. ___" refer to the Exhibits attached to the Transmittal Affidavit of Kevin M. Gallagher, Esq. filed with this Opposition.

²⁹ Defendants' Reply Brief in Further Support of Proposed Settlement at 13 (Dkt. 441); *see also* May 5, 2023 AMC Form 10-Q at 5 (Ex. A).

³⁰ May 5, 2023 AMC Form 10-Q at 8 (Ex. A).

significantly discounted and, thus, significantly dilutive APEs to raise equity capital during the period of any stay. This would very likely cause significant damage to the Company and all of its stockholders, because using APEs instead of common stock to raise equity capital could be 2-3 times more dilutive to all AMC equity holders based on recent market prices. Worse still, if AMC were left without *any* security to raise equity capital, that would put the Company at significant risk of failing to meet its financial obligations, which would likely result in a bankruptcy or financial restructuring and the *total loss* of the investments of holders of both common stock and APEs.³¹

15. This unique and substantial risk of harm to AMC and its stockholders were the Motion to be granted trumps the risk of any harm that Ms. Izzo or any other objector may suffer were the Motion denied.³²

³¹ *Id.* at 33 (Ex. A).

³² *See, e.g., Patriarch P'rs, LLC v. Zohar CDO 2003-1, LLC*, No. 549, 2016, at 6 (Del. Nov. 22, 2016) (ORDER) (“The Court of Chancery was within its discretion to conclude that the case does not pose matters of first impression or pressing issues of Delaware law to resolve and that the substantial harm the Zohar Funds would suffer in the event of a stay outweighs the potential injury to Patriarch in the absence of a stay.”).

IV. The Public Interest Weighs Against A Stay

16. Finally, granting a stay would undermine Delaware public policy “favoring the settlement of disputes and the finality of judgments.”³³ Granting a stay here would accomplish nothing beyond harming AMC and its stockholders, and would create the damaging precedent that any valuable court-approved settlement can be held up by an opportunistic petitioner with specious grounds for appeal.

V. If A Stay Were To Be Granted, Ms. Izzo Would Be Required To Post A Meaningful Bond

17. A petitioner seeking a stay of an order pending appeal *must* first provide “sufficient security,” in the form of a supersedeas bond, in an amount determined by the Court.³⁴ The Court does not have “discretion to waive the security requirement altogether.”³⁵

18. The “primary purpose” of the bond is to “protect the appellee from losing the benefit of the judgment through” the delay imposed by a stay.³⁶ From AMC’s perspective, the principal benefit of the settlement is terminating the Status

³³ *Loppert*, 2004 WL 3092338, at *2; *see also Marie Raymond Revocable Tr. v. MAT Five LLC*, 980 A.2d 388, 402 (Del. Ch. 2008) (“It is well established that Delaware law favors the voluntary settlement of contested issues.”), *aff’d sub nom. Whitson v. Marie Raymond Revocable Tr.*, 976 A.2d 172 (Del. 2009) (TABLE).

³⁴ *Zimmerman v. Crothall*, 2014 WL 257461, at *1 (Del. Ch. Jan. 23, 2014) (quoting article IV, § 24 of the Constitution of the State of Delaware).

³⁵ *Id.* at *2.

³⁶ *Id.*

Quo Order that is preventing it from consummating the reverse stock split and conversion, which will alleviate financial pressure by allowing it to raise equity capital via non-discounted securities. Accordingly, one way to calculate the value of the supersedeas bond is the damage AMC is likely to incur from having to sell discounted APEs as opposed to common stock should the Company be constrained from effectuating the reverse stock split and conversion pending the disposition of any appeal.

19. It is impossible to predict how many APEs AMC might issue during a stay pending appeal, but the Company's recent APE sales provide some guidance. In 2022, AMC sold approximately 207.8 million APE units.³⁷ During the first quarter of 2023, AMC sold approximately 49.3 million APE units.³⁸ Assuming AMC sells approximately 50 million APEs a quarter, as it has recently done, and assuming a similar trade differential between common stock and APEs continues, the damages AMC would incur if the Court were to stay its judgment pending appeal would be well over \$100 million a quarter.^{39, 40}

³⁷ Ex. 99.1 to February 28, 2023 AMC Form 8-K at 4 (Ex. B).

³⁸ Ex. 99.1 to May 5, 2023 AMC Form 8-K at 3 (Ex. C).

³⁹ As of the close of July 25, 2023, the trade differential between AMC's common stock and APEs was over \$3.00 (Ex. D).

⁴⁰ Delaware courts have required significant bonds to prevent corporate transactions from being consummated. *See, e.g., In re Del Monte Foods Co. S'holders Litig.*, 25

CONCLUSION

20. For all of these reasons, Defendants respectfully request the Court deny the Motion.

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Words: 2,809

A.3d 813, 844 (Del. Ch. 2011) (ordering a \$1.2 million bond to enjoin a merger termination fee, which represented 1% of the enjoined termination fee); *True N. Commc'ns Inc. v. Publicis S.A.*, 1997 WL 33173290, at *4 (Del. Ch. Dec. 16, 1997) (ordering a \$12 million bond to grant a TRO enjoining a company's largest stockholder from soliciting proxies for a competing transaction to the board's proposed merger); *Gimbel v. Signal Cos.*, 316 A.2d 599, 618 (Del. Ch. 1974) (ordering a \$25 million bond to enjoin an asset sale), *aff'd*, 316 A.2d 619 (Del. 1974).