IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE AMC ENTERTAINMENT HOLDINGS, INC. STOCKHOLDER LITIGATION	)	Consol. C.A. No. 2023-0215-MTZ

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

Objector Rose Izzo ("Ms. Izzo"),[1] through counsel, hereby moves (a) for clarification of the Scheduling Order[2] or, alternatively, (b) for maintenance of the Status Quo Order[3] pending an appeal of any final judgment.

BACKGROUND

1. In contrast to Defendants' predictions of "financial ruin" following rejection of the now-defunct settlement (the "Old Settlement"),[4] the Opinion caused AMC Common stock to surge above $7 per share in after-hours trading, and APE units to tumble.[5] Good news. Even Adam Aron concedes that there is no imminent

[1] Capitalized words not defined herein have the meaning defined in the Court's Opinion dated July 21, 2023 (D.I. 581, the "Opinion").

[2] D.I. 185 (the "Scheduling Order").

[3] D.I. 10 (the "Status Quo Order).

[4] Op. at 61.

[5] *See* Mike Leonard, *AMC Shares Surge as Judge Denies APE Deal in Surprise Ruling*, BLOOMBERG LAW (July 21, 2023),

crisis: his tweet in response to the Opinion admits that if the Company "is unable to raise equity capital, the risk materially increases of AMC conceivably running out of cash ***in 2024 or 2025***. . . ."[6] In a few weeks, AMC will release its second-quarter earnings results, which will shed more light on the Company's financial status. The breakneck pace of litigation is no longer necessary, if it ever was.

2. As the Opinion recognizes, Ms. Izzo "seeks to become lead plaintiff"[7] so that the Class will, going forward, be represented by one of the retail investors that helped save AMC and put its "bankruptcy concerns in the rearview mirror."[8] She intended to file a prompt motion to intervene.

3. This seemed procedurally appropriate. The Court, following 67 pages of analysis, ordered "[t]he parties [to] confer on and submit a schedule for the remainder of the case," and Plaintiffs to "file a consolidated complaint."[9] Thus, the Opinion appeared to lift the Scheduling Order's provision prohibiting Class members, "[p]ending final determination of whether the Settlement should be

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https://news.bloomberglaw.com/esg/amc-ape-deal-rejected-in-surprise-court-win-for-meme-stock-base.

6 *See* Letter to AMC Stockholders from AMC CEO Adam Aron, https://twitter.com/CEOAdam/status/1683215965608189954 (July 23, 2023) (emphasis added).

7 Op. at 31.

8 D.I. 556 at 2 (quoting Op. Compl. ¶ 7).

9 Op. at 68.

approved, . . . from commencing [or] pursuing . . . any action asserting" claims in this matter.[10]

4. Yet at 11:07 p.m. on July 23, 2023, before the Opinion's ink had dried, Plaintiffs filed a letter—not a motion—with an amendment to the Old Settlement (the "New Settlement").[11] (Curiously, the New Settlement's revised final order still names Munoz as a Plaintiff and proposes that he receive an incentive award.[12]) Plaintiffs asked the Court to "approve the settlement on the revised terms" and "stay [the Opinion] pending Your Honor's consideration of the amended stipulation."[13]

5. The New Settlement Letter not only inappropriately seeks substantive relief,[14] it calls into question the finality of the Opinion and, consequently, the effect of the Scheduling Order. Ms. Izzo does not wish to risk contravening this Court's directives and therefore seeks clarification that the Opinion is a final determination which would allow for a motion to intervene to be filed.

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10 Scheduling Order ¶ 24.

11 Trans. ID 70460360 (the "New Settlement Letter").

12 *See id*., Revised [Proposed] Order and Final Judgment at 1 (defining "Plaintiffs" to include Munoz); *id*. ¶ 13 ("Each Plaintiff is hereby awarded an incentive award. . . .").

13 New Settlement Letter at 3.

14 *See* Ct. Ch. R. 171(f)(1)(C) ("Letters should not be used to request substantive relief.").

6. Alternatively, if the Opinion is not a final determination for purposes of the Scheduling Order, Ms. Izzo respectfully moves to maintain the Status Quo Order pending appeal of any final order approving any amended settlement. The New Settlement leaves in place terms that Ms. Izzo contends violate the limitations on the release of future claims.[15] Because the Opinion ruled on this issue,[16] Ms. Izzo would appeal an order approving the New Settlement, raising this argument (and presumably others). Maintaining the Status Quo Order would be necessary to ensure that the Delaware Supreme Court can meaningfully review any revised Settlement.

ARGUMENT

I. The Opinion is Final, Permitting Intervention by Other Common Stockholders.

7. While the Opinion did not reach every issue raised by the objectors or every exception to the Special Master's Report, it fully disposes of the Old

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15 *See* Izzo Obj. at 30-34.

16 *See* Op. at 58 n.186. Appeal on other issues would be possible if a further opinion were to approve a revised settlement. The Opinion, which focuses on the scope of the Release, did not rule on several issues, including class certification. *Id*. at 33-34. Additional findings would be necessary for a New Settlement to be approved. *See, e.g.*, *Griffith v. Stein*, 283 A.3d 1124, 1137 (Del. 2022) ("When the Court of Chancery reviews a settlement of class action litigation, and certifies a class, Rule 23 requires that the court make a finding that the plaintiff is an adequate class representative.").

Settlement.[17] The Opinion instructs the parties to schedule the remainder of the case—which would, presumably, include the ability for other stockholders to intervene. This path differs from recent cases where the Court, having otherwise approved a settlement's terms, explicitly invited revisions to an overbroad release.[18]

8. Ms. Izzo thus intended to file a motion to intervene. She could then litigate the case or settle for a more favorable result, potentially alongside other investors who (unlike Plaintiffs) "saved the Company" during the COVID-19 pandemic.[19] Plaintiffs apparently continue to believe that their settlement "is necessary to save the Company from financial ruin."[20] It makes little sense for

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[17] *Id*. at 68. The finality of the Opinion is confirmed by its statement that "the various exceptions" to the Special Master's Report are "dismissed." *Id*. at 5. The Opinion did not reach many exceptions, including those concerning "the strength of the claims and the value of the claims being released." *Id*. at 65-66. Dismissal is consistent with an interpretation that the Opinion terminates consideration of the Old Settlement and, thus, the litigation bar in the Status Quo order. Otherwise, it would be procedurally curious to dismiss exceptions without ruling on them, rather than preserving them for consideration of a revised settlement.

[18] *See Firefighters' Pension Sys. of the City of Kansas City, Missouri Trust v. Presidio, Inc.*, C.A. No. 2019-0839-JTL, at 12, 49-50 (Nov. 7, 2022) (Trans.) (cited New Settlement Letter at 3) (inviting revision to unopposed settlement after approving settlement consideration); *Schumacher v. Loscalzo*, C.A. No. 2022-0059-LWW, at 63 (Del. Ch. Sept. 21, 2022) (Trans.).

[19] *See* Izzo Exceptions, D.I. 556 at 34 (quoting Op. Compl. ¶¶ 55-56).

[20] Op. at 61. As the Opinion notes, Plaintiffs did not indicate what "document in the discovery record . . . convinced them the Company was facing imminent bankruptcy if the Proposals were not enacted." *Id*. at 61 n. 194.

Defendants to continue litigating against opponents who concede that, even if they were to win a preliminary injunction, would not seek to make that injunction permanent.[21]

9. Permitting intervention is particularly appropriate because the recent amendments to Section 242, and AMC's required annual meeting, render it unnecessary to continue the breakneck pace of this litigation. The thesis underlying Defendants' entire scheme is that (a) the APE's mirrored voting is necessary to counter "rational apathy" among AMC stockholders and (b) AMC needs additional equity capital to stave off bankruptcy.[22]

10. The amendments to Section 242 change this analysis. Even assuming the Company were to need additional equity capital to avoid disaster, Section 242 permits AMC to seek a share increase on a "shares voted" basis.[23] Yet the parties have not explained why Section 242 does not permit Company to renew its plans to

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21 *See* Izzo Obj. at 39.

22 Op. at 9-10; *id*. at 61 & n.194.

23 *See* Rpt. at 51 (describing amendment to Section 242 as providing "'[a]n amendment to increase . . . the authorized number of shares of a class of capital stock . . . may be made and effected' by 'a vote of the stockholders entitled to vote thereon, voting as a single class, [] taken for and against the proposed amendment, and *the votes cast for the amendment exceed the votes cast against the amendment*,' subject to other conditions not relevant here").

issue new common shares ***in an amount that would not trigger the Conversion***.[24] Were the sole purpose of a share increase to raise capital, this would make sense: as the price spike that followed the Opinion suggests, the Company would likely raise far more by selling additional Common shares without first converting the APEs. The Company's next annual meeting, which one stockholder has sued to compel,[25] provides a vehicle to do so if necessary.

11. As the Court recognized, the Old Settlement had "the practical effect of reallocating the ownership of AMC's equity between its common stockholders and the APE unitholders."[26] So does any equity capital raise, which would likely involve dilution. The Conversion, however, is a massive transfer of wealth from Common to Preferred that, if it was ever justified by "rational apathy," is not today. Ms. Izzo seeks to intervene to benefit Common stockholders—the "unlikely hero[es]"[27]—rather than hedge funds like Antara that bought cheap to give Defendants votes.

12. The first step, however, is clarification that the Opinion has dismissed the Old Settlement and Ms. Izzo may intervene. If the parties still desire to pursue

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24 *See, e.g.*, Op. at 9 (describing proposal to increase total number of authorized common shares by 25,000,000).

25 *See Barnes v. AMC Enter. Holdings, Inc.*, C.A. No. 2023-0718-MTZ.

26 Op. at 27.

27 Compl. ¶ 6.

a new settlement, they should file a motion.[28] A proposed form of order clarifying the case's procedural posture is attached.

II. The Court Should Maintain the Status Quo Order Pending Appeal.

13. The New Settlement, like the Old Settlement, seeks to evade appellate review by consummating the Conversion before the Delaware Supreme Court can hear an appeal. The New Settlement would lift the Status Quo order immediately,[29] even though the Settlement's Effective Date does not occur until after appeals are exhausted.[30]

14. The intent is clear: the parties seek to make many types of post-appeal relief impossible before appellate review is possible. As Ms. Izzo's objection notes, many forms of post-appeal relief, including monetary damages, are available.[31] However, if the Status Quo Order is lifted and Defendants complete the Conversion, the APE Preferred Units will disappear and the settlement consideration will be distributed. Even if an appeal succeeds, it would be difficult, if not impossible, to

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28 Ct. Ch. R. 171(f)(1)(C).

29 New Settlement Letter, Revised [Proposed] Order and Final Judgment ¶ 8.

30 Old Stip. ¶ 4; *id*. ¶¶ 1(h); 17.

31 Izzo Obj. at 23.

claw back the settlement payment, reinstate the APEs, or restore class members to their pre-Conversion status.

15. Were the New Settlement to be approved, Ms. Izzo intends to appeal. As discussed below, that appeal holds a reasonable chance of success. She therefore respectfully asks the Court to maintain the Status Quo Order, pursuant to Court of Chancery Rule 62(c), pending appeal of any final order.[32]

16. "Once a status quo order is in place, the party seeking modification bears the burden of showing why it should be modified."[33] The Court in its discretion "may . . . restore[] or grant an injunction during the pendency of [an] appeal. . . ."[34] In considering a motion for an injunction (or restoration of an injunction) pending appeal, the Court exercises its discretion under the four *Kirpat* factors:

> (1) the likelihood of success on the merits of the appeal; (2) whether Plaintiffs would suffer irreparable harm if the injunction is not granted; (3) whether Defendants would suffer

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[32] The Court could accomplish this in two ways. First, it could simply decline to lift the Status Quo Order, allowing the Parties to abandon the Settlement if they choose to do so. Alternatively, it could lift the Status Quo Order (which, by its terms, applies until a ruling on a preliminary injunction motion that Plaintiffs do not contemplate filing) and immediately grant the order attached hereto.

[33] *Lynch v. Gonzalez*, 2020 WL 5648567, at *2 (Del. Ch. Sept. 22, 2020) (cleaned up) (quoting *R&R Capital LLC v. Merritt*, 2013 WL 1008593, at *8 (Del. Ch. Mar. 13, 2013)).

[34] Ct. Ch. R. 62(c).

> substantial harm if the injunction is granted; and (4) whether the injunction would serve the public interest.[35]

Each of the *Kirpat* factors favor maintaining the Status Quo Order.

A. Factor One: An Appeal Raises Fair Ground for Litigation.

17. *Kirpat*'s "likelihood of success on appeal" factor "cannot be interpreted literally or in a vacuum when analyzing a motion for stay pending appeal" as "a literal reading . . . would lead most probably to consistent denials of stay motions . . . because the trial court would be required first to confess error . . . before it could issue a stay."[36] Instead, the Court considers whether the appeal raises "a substantial question that is a fair ground for litigation and . . . more deliberative investigation."[37] If the other three factors strongly favor interim relief, then the Court may exercise its discretion to grant a stay.[38]

18. Here, it is impossible to predict every issue that could be raised on appeal. The Opinion, however, explicitly denied objections to the scope of the release relating to future claims.[39] That holding provides a fair ground for litigation:

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35 *Lynch*, 2020 WL 5648567, at *2 (citing *Kirpat, Inc. v. Del. Alcoholic Beverage Control Comm'n*, 741 A.2d 356 (Del. 1998)).

36 *Level 4 Yoga, LLC v. CorePower Yoga, LLC*, 2022 WL 964112, at * 1 (Del. Ch. Mar. 31, 2022) (cleaned up) (quoting *Kirpat*, 751 A.2d at 358).

37 *Id*. (quoting *Kirpat*, 751 A.2d at 358).

38 *Id*.

39 Op. at 58 n. 186 (considering argument made in Izzo Obj. at 30-34).

as the Opinion notes, the Supreme Court has "made plain that the Court's duty to protect absent stockholders carries particular significance when reviewing a release."[40] The Release may extinguish claims arising as of the end of the Class Period, which would not end until ***after*** the Conversion, a date still in the future.[41]

19. Post-hearing events only exacerbate the issues with the Release. As noted, a stockholder has sued to compel AMC to hold an annual meeting. If AMC holds the meeting, or even issues a proxy, in advance of the end of the Class Period, that proxy may include facts in the Complaints. A subsequent disclosure claim may "relate to the ownership" of Common stock during the still-pending class period, yet still be "connected to . . . facts . . . in the Complaints."[42] It is at least a "fair ground for litigation" that the release of such claims contravenes Delaware law.

B. Factor Two: AMC Stockholders Will Suffer Irreparable Injury.

20. Where the consequences of a ruling "cannot be undone," a stay is more likely to be warranted.[43] Here, the same facts that Plaintiffs invoked to secure the

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40 *Id*. at 36 (citing *Griffith*, 283 A.3d at 1133-37).

41 *Id*. at 28-29 n. 90 (noting definition of "Settlement Class Time").

42 *Id*. at 58 n. 186.

43 *Klig v. Deloitte LLP*, 2010 WL 3489735, at *11 (Del. Ch. Sept. 7, 2010) (quoting *Wynnefield Parts. Small Cap Value L.P. v. Niagara Corp.*, 2006 WL 2521434, at *2 (Del. Ch. Aug. 9, 2006)).

Status Quo Order support preserving it on appeal: if the Conversion occurs, the resulting transaction "will be impossible to unwind."[44] Any post-appeal reversion to the status quo would be impossible: not only would an undifferentiated class of common shares need to be somehow converted back to APEs, but the shares created by the Settlement itself would need to be dissolved. Yet those shares could have traded hands multiple times before the Delaware Supreme Court could rule.

C. Factor Three: The Parties Will Suffer No Substantial Harm.

21. Meanwhile, neither Plaintiffs nor Defendants will suffer substantial harm by allowing the Delaware Supreme Court to consider this case. Plaintiffs' Counsel risk a delay in their fee awards. As for AMC, even Adam Aron now downplays the concern: absent the settlement, the "risk materially increases of AMC ***conceivably*** running out of cash ***in 2024 or 2025***. . . ."[45] Discovery in this case has shown that AMC has multiple short-term financing options.[46] And, as explained above, the amendments to Section 242 provide AMC with other means of raising equity capital. There is sufficient time for appellate review.

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[44] *See* D.I. 3 at 17-18 (citing, *inter alia*, 14 Williston on Contracts § 43:15 (4th ed. 2020) (observing restrictions on an injured party's ability to unwind a transaction after closing); 2 Farnsworth on Contracts § 8.20, at 8-166 to 67 (4th ed. Supp. 2019) (same); *Gimbel v. Signal Companies, Inc.*, 316 A.2d 599, 603 (Del.Ch. 1974)).

[45] See note 6, *supra* (emphasis added).

[46] *See* Izzo Obj. at 12-13; D.I. 556 at 23-24 (describing Antara offer to provide additional debt financing to AMC).

D. Factor Four: The Public Interest Favors Appellate Review.

22. The public interest favors a stay pending appellate review. As discussed above, an appeal will raise at least one, and likely several, important questions which the Delaware Supreme Court should have the opportunity to consider. Plaintiffs and Defendants should not be permitted to render much of their Settlement *a fait accompli* before this can happen.

23. In sum, the *Kirpat* factors weigh in favor of maintaining the Status Quo Order pending an appeal. Unless the Status Quo Order is maintained, Defendants can be expected to consummate the Conversion, Reverse Split, and settlement payments before the Delaware Supreme Court can respond.

CONCLUSION

24. For the reasons set forth above, the Court should (a) clarify that the Opinion was a final determination, the Scheduling Order's litigation bar is terminated, and any revision to the Settlement should be submitted via motion; and (b) the Status Quo Order should be maintained pending any appeal of any final order approving the New Settlement.

Dated: July 24, 2023

Respectfully submitted,

/s/ Theodore A. Kittila

Theodore A. Kittila (Bar No. 3963)
James G. McMillan, III (Bar No. 3979)
HALLORAN FARKAS + KITTILA LLP
5801 Kennett Pike, Suite C/D
Wilmington, Delaware 19807
Phone: (302) 257-2025
Fax: (302) 257-2019
Email: tk@hfk.law / jm@hfk.law

Words: 2,961

Counsel for Objector Rose Izzo

MARGRAVE LAW LLC
Anthony A. Rickey (Bar No. 5056)
3411 Silverside Road
Baynard Building, Suite 104
Wilmington, Delaware 19810
Phone: (302) 604-5190
Fax: (302) 258-0995
Email: arickey@margravelaw.com

CERTIFICATE OF SERVICE

I, Theodore A. Kittila (No. 3963), certify that copies of the foregoing *ROSE IZZO'S MOTION FOR CLARIFICATION OF THE SCHEDULING ORDER OR, ALTERNATIVELY, FOR MAINTAINING OF STATUS QUO ORDER PENDING APPEAL, [PROPOSED] ORDER GRANTING ROSE IZZO'S MOTION FOR CLARIFICATION OR, ALTERNATIVELY, FOR MAINTAINING STATUS QUO ORDER PENDING APPEAL* and this *CERTIFICATE OF SERVICE* were served on the following on July 24, 2023, by File & Serve*Xpress*:

Special Master Corinne Elise Amato, Esq.
PRICKETT, JONES & ELLIOTT, P.A.
1310 North King Street
Wilmington, DE 19801

Special Master for AMC Entertainment Holdings, Inc. Stockholder Litigation

Gregory V. Varallo, Esq.
Daniel E. Meyer, Esq.
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
500 Delaware Avenue, Suite 901
Wilmington, DE 19801

Michael J. Barry, Esq.
Kelly L. Tucker, Esq.
Jason M. Avellino, Esq.
GRANT & EISENHOFER P.A.
123 Justison Street, 7th Floor
Wilmington, DE 19801

Thomas Curry, Esq.
SAXENA WHITE P.A.
824 N. Market St., Suite 1003
Wilmington, DE 19801

Attorneys for Lead Plaintiffs

Raymond J. DiCamillo, Esq.
Kevin M. Gallagher, Esq.
Matthew W. Murphy, Esq.
Edmond S. Kim, Esq.
Adriane M. Kappauf, Esq.
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 N. King Street
Wilmington, DE 19801

Attorneys for AMC Entertainment Holdings, Inc., Adam M. Aron, Denise Clark, Howard W. Koch, Kathleen M. Pawlus, Keri Putnam, Anthony J. Saich, Philip Lader, Gary F. Locke, Lee Wittlinger, and Adam J. Sussman

Brian Tuttle

Pro Se

Dated: July 24, 2023

/s/ *Theodore A. Kittila*
Theodore A. Kittila (No. 3963)