SAM GLASSCOCK III
VICE CHANCELLOR

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

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Date Decided: August 31, 2012

David J. Teklits
Kevin M. Coen
Shannon E. German
Morris, Nichols, Arsht & Tunnell LLP
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347

Stephen E. Jenkins
Catherine A. Gaul
Ashby & Geddes
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, Delaware 19899

Re: *Tang Capital Partners, LP v. Norton*,
Civil Action No. 7476-VCG

Dear Counsel:

This is my decision on the Plaintiffs' request that I enter an order providing that my Memorandum Opinion of July 27, 2012 (the "Opinion"), was intended to be issued pursuant to Court of Chancery Rule 54(b), thereby constituting a partial final judgment. For the reasons below, I deny the Plaintiffs' request.

On July 23, 2012, I heard oral argument on dispositive motions and issued a ruling from the bench (i) dismissing Count V of the Verified Second Amended Complaint in Civil Action No. 7476-VCG and (ii) granting summary judgment on Count VII of that complaint and Count I of the Verified Complaint in Civil Action NO. 7611-VCG. I also informed the parties that I planned to issue in short order a written opinion explaining more fully the rationale of my ruling. Plaintiffs' counsel

immediately moved to reargue orally, which motion I heard and denied, though I indicated that Plaintiffs' right to move again for reargument following my written opinion would be retained. Plaintiffs' counsel then requested that my oral ruling be designated as a partial final judgment under Rule 54(b). The basis for this request was that the Plaintiffs sought to avoid the security interests of secured lenders of Savient Pharmaceuticals, Inc. ("Savient"), in a potential bankruptcy proceeding.[1] At the time of oral argument, the potential preference period for those secured interests, in the event of a Savient bankruptcy, was to expire in two weeks, on August 6, 2012. The Plaintiffs thus sought to perfect their appeal rights as soon as possible. I indicated my intent to issue a written decision, which I thought necessary to allow full review by our Supreme Court, within a week. Perhaps the source of the confusion that has brought us here is that I did not explicitly rule on the Plaintiffs' Rule 54(b) request, though my intent, and indeed my expectation, was that the Plaintiffs, if they so chose, would move for a Rule 54(b) designation immediately following my written opinion. It was my preliminary intent (subject to review of any objection by the Defendants) to certify the decision as final under Rule 54(b), based upon the consideration referred to above. I issued the Opinion four days later, on July 27, 2012.

[1] Pretrial Mots. Arg. Tr. 76:1–6 (July 23, 2012).

One month passed, however, with no activity—no notice of appeal, and no motions for reargument or partial final judgment were filed. Ultimately, on August 27, 2012, the Plaintiffs filed a Notice of Appeal with respect to my Opinion. The Notice of Appeal indicated that, in the Plaintiffs' view, certain language in the Opinion, particularly viewed in light of the Plaintiffs request for a Rule 54(b) judgment immediately following oral argument, gave the appearance that it was my intent to have the Opinion serve as a Rule 54(b) order. On August 28th, the Supreme Court directed the Plaintiffs to request from this Court an order "stat[ing] that the opinion was entered under Rule 54(b)."[2] The Plaintiffs have done so, again contending that my Opinion appeared to serve as a Rule 54(b) order.

Rule 54(b) allows this Court, in limited circumstances, to issue final judgments on less than all of the claims in an action such that those claims may be appealed before the resolution of the remainder of the litigation:

> When more than 1 claim for relief is presented in an action . . . the Court may direct the entry of a final judgment upon 1 or more but fewer than all of the claims . . . only upon an *express* determination that there is not just reason for delay and upon an *express* direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims . . . shall not terminate the action as to any of the claims . . . and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims . . . .[3]

[2] Pls.' Aug. 28, 2012, Ltr. to the Court Ex. A.
[3] Ch. Ct. R. 54(b) (emphasis added).

An "express" determination under Rule 54(b) requires a finding that (1) the action involves multiple claims or parties, (2) at least one claim or the rights and liabilities of at least one party have been finally decided, and (3) there is "no just reason" for delaying an appeal.[4]

In their initial request following the Supreme Court's directive, the Plaintiffs did not articulate a basis for Rule 54(b) treatment other than pointing to (1) Plaintiffs' oral Rule 54(b) request at trial, which I did not rule on, and (2) footnote 10 of the Opinion, which simply indicated that the timeframe for appeal would run from the date of the Opinion as opposed to the date of my oral ruling.[5] As explained above, my intention at oral argument was to preserve the Plaintiffs' right to seek reargument or an appeal—whether interlocutory or by way of a Rule 54(b) designation—following the issuance of my Opinion.[6] Moreover, no language in the Opinion satisfies the requirements under Rule 54(b) of an "*express* determination that there is not just reason for delay" and an "*express* direction for an entry of judgment." The Opinion does not cite Rule 54(b), nor does it at any point make the particular findings regarding the propriety of a piecemeal appeal. Delaware practice militates against piecemeal appeals and requires this Court to exercise its

[4] *Matthew v. Laudamiel*, 2012 WL 983142, at *2 (Del. Ch. Mar. 20, 2012) (citing *In re Tri-Star Pictures, Inc., Litig.*, 1989 WL 112740, at *1 (Del. Ch. Sept. 26, 1989)).
[5] *See Tang Capital Partners, LP v. Norton*, 2012 WL 3072347, at *4 n.10 ("For purposes of calculating the time for appeal or reargument of this opinion, my oral decision of July 23, 2012, is withdrawn, and this Memorandum Opinion substituted therefor.").
[6] *See* Pretrial Mots. Arg. Tr. 77:8–10 ("[T]he appeal rights and motion for reargument rights are reserved until that [written] opinion issues.").

discretion in granting a Rule 54(b) motion "sparingly."[7] Accordingly, establishing a precedent whereby partial final judgments under Rule 54(b) could be "inferred" or "presumed" absent the explicit and specific findings required by the Rule would be contrary to Delaware policy and unduly burdensome on our Supreme Court.

In response to the Defendants' opposition to the extant Rule 54(b) request, the Plaintiffs argue that, regardless of my intentions with respect to the Opinion, partial final judgment is appropriate at the present time due to what they perceive to be the continued wasting of assets or "cash burn." When the Plaintiffs made their initial, oral Rule 54(b) motion, we sat two weeks out from the end of a potential bankruptcy preference period. This was the very reason I issued a written opinion in a matter of days. Indeed, I fully expected to receive a motion for reargument, interlocutory appeal, or Rule 54(b) designation immediately after I issued the Opinion, in light of the looming deadline.

The Plaintiffs did not file a notice of appeal until the end of the appeal period. The potential preference period has expired, and the Plaintiffs now argue that a partial final judgment is appropriate on the basis that Savient lies in default of the Indenture and continues to wallow in financial purgatory. In other words, the Plaintiffs merely assert that they are entitled to an immediate appeal because they believe—quite strongly—that my ruling was erroneous and must be corrected with

[7] *See Tri-Star Pictures*, 1989 WL 112740, at *1.

haste. Conviction is not the crux of piecemeal appeal rights, however. This Court must instead determine that the interests of justice outweigh the substantial administrative efficiency concerns associated with partial appeals.[8] Due to the change in circumstances caused by the Plaintiffs' failure to perfect appeal rights shortly after my July 27 Opinion, the Plaintiffs' interest in an immediate appeal, although it remains substantial, no longer constitutes a compelling reason for piecemeal appellate review.

For these reasons, the Plaintiffs' request to have the Opinion designated as a Rule 54(b) judgment is denied. As a result, of course, the Plaintiffs' traditional appeal rights are preserved and may be exercised upon final adjudication of this action.

IT IS SO ORDERED.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III

[8] *See id.* ("[A] Rule 54(b) order should not be entered unless the moving party can show some danger of hardship or injustice through delay which would be alleviated by immediate appeal." (internal quotation marks omitted)).