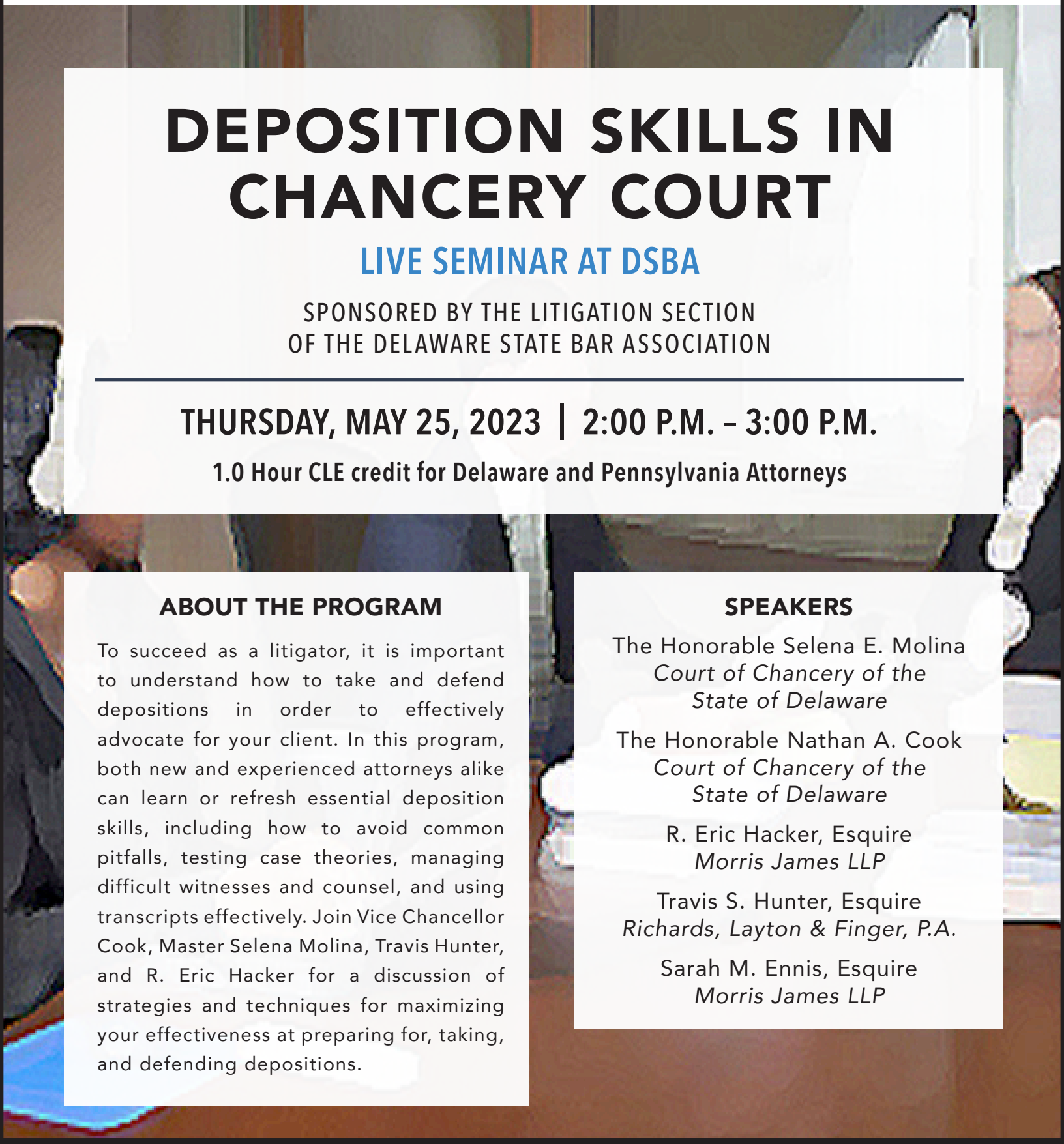
DELAWARE STATE BAR ASSOCIATION

CONTINUING LEGAL EDUCATION



DEPOSITION SKILLS IN CHANCERY COURT

LIVE SEMINAR AT DSBA

SPONSORED BY THE LITIGATION SECTION
OF THE DELAWARE STATE BAR ASSOCIATION

THURSDAY, MAY 25, 2023 | 2:00 P.M. – 3:00 P.M.

1.0 Hour CLE credit for Delaware and Pennsylvania Attorneys

ABOUT THE PROGRAM

To succeed as a litigator, it is important to understand how to take and defend depositions in order to effectively advocate for your client. In this program, both new and experienced attorneys alike can learn or refresh essential deposition skills, including how to avoid common pitfalls, testing case theories, managing difficult witnesses and counsel, and using transcripts effectively. Join Vice Chancellor Cook, Master Selena Molina, Travis Hunter, and R. Eric Hacker for a discussion of strategies and techniques for maximizing your effectiveness at preparing for, taking, and defending depositions.

SPEAKERS

The Honorable Selena E. Molina
Court of Chancery of the State of Delaware

The Honorable Nathan A. Cook
Court of Chancery of the State of Delaware

R. Eric Hacker, Esquire
Morris James LLP

Travis S. Hunter, Esquire
Richards, Layton & Finger, P.A.

Sarah M. Ennis, Esquire
Morris James LLP

Visit https://www.dsba.org/event/deposition-skills-in-chancery-court/ for all the DSBA CLE seminar policies.

Please note that the attached materials are supplied by the speakers and presenters and are current as of the date of this posting.

Speakers

The Honorable Selena E. Molina
Court of Chancery of the State of Delaware

The Honorable Nathan A. Cook
Court of Chancery of the State of Delaware

R. Eric Hacker, Esquire
Morris James LLP

Travis S. Hunter, Esquire
Richards, Layton & Finger, P.A.

Sarah M. Ennis, Esquire
Morris James LLP

Vice Chancellor Nathan A. Cook

The Honorable Nathan A. Cook was sworn in as Vice Chancellor of the Court of Chancery on July 21, 2022. Prior to joining the Court, Vice Chancellor Cook was the managing partner of Block & Leviton LLP's Delaware office, where he focused his practice on litigation before the Court of Chancery.

The Vice Chancellor received both his undergraduate degree and law degree from the University of Virginia. After law school, he clerked for Vice Chancellor John W. Noble of this Court.

Selena E. Molina

Master in Chancery

Selena Molina became a Master in Chancery in January 2019. Before joining the Court, she was an associate in the litigation department of Saul Ewing Arnstein & Lehr and previously worked as an associate at Richards, Layton & Finger. Ms. Molina served as a judicial law clerk to the Honorable William C. Carpenter, Jr. of the Delaware Superior Court and a Wolcott Fellow to the Honorable Randy J. Holland of the Delaware Supreme Court. She received her B.A. *summa cum laude* from Widener University and her J.D. *magna cum laude* from Widener University School of Law.

Morris James
DELAWARE

"I help clients identify their immediate and long-term goals so we can work creatively to discover the best solutions for their unique needs." - Eric Hacker

R. Eric Hacker

Partner

Eric Hacker is an experienced attorney who practices primarily within the firm's Business Litigation and Business Law Counseling groups.

Eric's practices include both appeals and trial-level representations. Eric's peers have selected him four times as a top appellate attorney in Delaware Today's annual survey of Delaware attorneys. At the trial level, Eric primarily handles corporate and commercial litigation in the Delaware Court of Chancery and the Complex Commercial Litigation Docket of the Delaware Superior Court.

Eric regularly assists clients with disputes involving corporate governance, fiduciary duties, and alternative entities. Eric has also represented several clients in post-closing disputes involving stock purchase agreements and asset purchase agreements. He counsels clients regarding business structures and agreements, and he advises clients on best corporate practices. Outside of litigation, Eric's goal is to help clients structure and conduct their business relationships to avoid disputes.

Eric's diverse experience allows him to help clients navigate complex legal situations. Before joining Morris James, Eric held positions at a global law firm, state and federal agencies, and state and federal courts. Eric also studied at Bucerius Law School in Hamburg, Germany, and he has published articles on topics ranging from employment regulations to comparative civil procedure.

Along with his regular practice, Eric participates in numerous pro bono and educational activities. Eric routinely publishes pieces regarding developments in Delaware corporate law. He represents pro bono clients through Delaware Volunteer Legal Services and the Office of the Child Advocate. Eric also coached the award-winning Sussex Central High School Mock Trial team at the state and national levels. Each year, Eric serves as an arbitrator and briefing judge for the Willem C. Vis International Commercial Arbitration Moot in Vienna, Austria.

Professional Affiliations

Delaware Community Legal Aid Society, Inc., Board of Directors, 2017 - present; Treasurer, 2018 - present.

2022

- Acted as first-chair trial counsel in an expedited Section 225 action that invalidated an improperly elected board of a biotech start-up
- Argued and won an appeal in the Delaware Supreme court reversing a Superior Court decision on a matter of statutory construction
- Served as litigation and trial counsel in a fraud dispute on behalf of the purchaser of the biotechnology company
- Served as litigation and trial counsel for corporate trustee against claims related to an alleged breach of duties
- Successfully defended against the appeal of the Superior Court verdict in favor of the client in breach of contract action
- Navigated client to successful resolution on eve of trial of long-running breach of fiduciary duty dispute
- Negotiated and obtained buyout of rogue LLC member on behalf of remaining members of start-up business

2021

- Defeated summary judgment motions and prevailed at trial in multi-jurisdictional breach of contract action
- Part of the team that litigated and successfully resolved expedited complex control dispute and breach of contract action in the Court of Chancery
- Litigated and successfully resolved claims against clients for alleged breach of fiduciary duty in the connection management of interrelated series of Delaware LLCs

- Served as primary litigation and trial counsel in the successful defeat of a former LLC member's attempt to be reinstated as a member

Articles & Publications

Court of Chancery Denies Bid to Make Records of Arbitration Materials Presumptively Confidential Under Rule 5.1
March 15, 2023
Delaware Business Court Insider

Language and Context Lead Chancery to Conclude That Irrevocable Proxy Does Not Bind Subsequent Transferee
April 27, 2022
Delaware Business Court Insider

Manichaean Capital, LLC: For the First Time, the Court of Chancery Recognizes the Viability of Reverse Veil-Piercing in Rare Circumstances
June 9, 2021
Delaware Business Court Insider

Court of Chancery Permits Section 220 Inspection, Notwithstanding Attorneys' Heavy Involvement in Crafting Demand
April 29, 2021
Delaware Business Court Insider

Latest Blog Posts

Delaware Business Litigation Report

Chancery Resolves Dispute About Competing Forum Selection and Arbitration Provisions

Chancery Concludes Section 18-110 of the LLC Act Does Not Permit Standalone Books and Records Claims When Company Management Is Undisputed

Citing MFW, Court of Chancery Dismisses Merger Challenge

Chancery Sides With Board in Dispute Over Stockholder's Compliance With Advanced Notice Bylaws to Nominate Directors

Chancery Trims Contract Claims in Post-Merger Dispute

Equitable Fraud Claim Sufficient to Support Court of Chancery Jurisdiction

Chancery Finds Personal Jurisdiction Over Individual Who Formed Delaware Entities in Connection with a Challenged Merger Transaction

Board Lacks Standing to Bring Motion to Dismiss Because It Delegated That Authority to Special Litigation Committee

Delaware Healthcare Industry Blog

Chancery Denies Preliminary Injunction Against Nurse Practitioner Based Upon Overbroad Restrictive Covenants

Videos & Podcasts

Morris James Elects Eric Hacker and Ross Karsnitz to the Partnership
January 6, 2023

News & Events

Morris James Elects Eric Hacker and Ross Karsnitz as Partners
January 6, 2023

47 Morris James Attorneys Earn Recognition in 2023 Best Lawyers and Ones to Watch Rankings
August 18, 2022

Morris James Earns Peer Recognition as 2021 Delaware Today Top Lawyers
October 26, 2021

Delaware Today Recognizes 45 MJ lawyers as 2020 Top Lawyers
October 22, 2020

U.S. News - Best Lawyers Recognizes Morris James Among Best Law Firms
November 1, 2019

Morris James Leads Delaware Today Top Lawyers Rankings
October 22, 2019
Delaware Today Magazine

R. Eric Hacker Participates in Mock Trial Sponsored by DELREC
March 13, 2017
Sussex County Post, March 10, 2017

Community

Delaware Community Legal Aid Society, Inc.

- Board of Directors, 2017 – present
- Executive Board and Treasurer, 2018 - present

Delaware Supreme Court Rules Committee, 2022 - present

Delaware Bar Association, 2015 – present

American Bar Association, 2015 – present

ABA Business Law section, 2019 - present

Honors

Delaware Today Top Lawyers, Appellate Law, 2019 - Present

Emory University School of Law

- Emory Moot Court Society, Special Teams, 2007-2009

LinkedIn Vcard

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Wilmington, DE 19801

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F 302.571.1750

Practice areas

Corporate and Fiduciary Litigation
Contract Litigation
Business Torts
Business Transactions, Strategic Planning and Counseling
Corporate Advice
Corporate Governance Counseling
Land Use
Legal Opinions
LLC, LP, Partnership Litigation

Special Committee Representation

Clerkships

Judicial Law Clerk for the Family Court of the State of Delaware

Litigation Intern for the Federal Trade Commission, Bureau of Consumer Protection

Judicial Intern for the Honorable Magistrate Judge Judith K. Guthrie

Admissions

Delaware, 2015

Texas, 2009

Education

Emory University School of Law, JD, 2009

Bucerlus Law School, Hamburg, Germany, 2008

University of North Texas, BA, cum laude, 2004

RICHARDS LAYTON & FINGER

TRAVIS S. HUNTER
Director

hunter@rlf.com
302.651.7564

OVERVIEW

Travis Hunter is "highly focused, smart, and savvy counsel" (*Chambers USA*).

Travis is an accomplished trial attorney who has successfully handled significant cases in all of Delaware's state and federal courts. He has particular expertise in handling large commercial disputes in the Delaware Superior Court's Complex Commercial Litigation Division (CCLD), serving as trial counsel in some of the largest cases ever filed in that division.

Highly regarded by clients and peers alike, Travis "is a brilliant attorney who has an ability to see right to the core of issues, and he provides intelligent insight on how best to keep the case focused" (*Chambers USA*). He routinely litigates complex disputes involving

- intellectual property and trade secrets,
- cryptocurrency, including Bitcoin and Ethereum,
- business contracts,
- mergers and acquisitions,
- insurance coverage, and
- products liability.

Travis has also acted as trial counsel in large arbitrations filed with the American Arbitration Association.

Travis serves on the Delaware Superior Court's Rules Committee and the CCLD Rules Committee, and is active in the American Bar Association's Section of Commercial and

Business Litigation. He has also completed the Federal Trial Practice Seminar sponsored by the U.S. District Court for the District of Delaware.

PRACTICES

Commercial Litigation
Fiduciary Litigation
Intellectual Property
Alternative Dispute Resolution

CLERKSHIPS

- The Honorable Richard R. Cooch, Delaware Superior Court, 2009-2010

SELECT EXPERIENCE

Delaware Superior Court CCLD Representations

- *Incyte v. Flexus Biosciences*, C.A. No. N15C-09-055 MMJ CCLD: Member of successful defense team on one of the largest trade-secrets jury trials in the Delaware Superior Court's Complex Commercial Litigation Division
- *Viking Pump Inc. v. Century Indemnity Co.*, N10C-060141 PRW CCLD: Member of successful trial team in one of the largest insurance coverage cases taken to a jury trial in the Delaware Superior Court's Complex Commercial Litigation Division
- *JCM Innovation Corp., et al. v. FL Acquisition Holdings, Inc., et al.*, N15C-10-255 EMD CCLD: Trial counsel for defendants in dispute over business acquisition
- *Flowshare, LLC v. Georesults, Inc.*, C.A. No. N17C-07-227 EMD CCLD: Trial counsel for defendants in dispute over business acquisition
- *Novipax Holdings LLC v. Sealed Air Corp.*, N17C-03-1682 EMD CCLD: Counsel for plaintiff in large business dispute involving claims of fraud
- *Ladenburg Thalmann Financial Services Inc. v. Ameriprise Financial, Inc.*, N16C-05-086 WCC CCLD: Co-lead counsel in indemnification dispute
- *Alcoa World Alumina LLC v. Glenore Ltd.*, N15C-08-032, N15C-08-032 EMD CCLD: Counsel in business indemnification dispute
- *Larry Fabian v. BGC Holdings, L.P.*, N14C-03-037 MMJ CCLD: Lead counsel in business contract dispute

Delaware Court of Chancery Representations

- *Haart v. Scaglia*, 2022-0145-MTZ: Successful trial counsel in corporate control dispute concerning ownership of various modeling businesses that was recognized by *The American Lawyer*'s "Litigators' of the Week"

- *Blockfusion USA, LLC v. Property Holdings Portfolio, LLC,* 2021-0037-SG: Lead counsel in control dispute over cryptocurrency and Bitcoin mining facility in New York
- *Perryman v. Stimwave*, 2020-0079-SG: Lead trial counsel in successful defense of an advancement claim brought by director.
- *inTEAM Associates, LLC v. Heartland Payment Systems, Inc.*, 11523-VCMR: Trial counsel in business acquisition and noncompete case involving technology development
- *Strata Decision Technology, L.L.C. and Roper Technologies, Inc. v. Scott Kerber and Allscripts Healthcare Solutions, Inc.*, 12378-VCL: Counsel in dispute over noncompete provisions
- *K&G Concord LLC vs. Charcap, LLC*, 12563-VCMR: Trial counsel in dispute over real property
- *Cummings v. Ronald E. Lewis Estate*, 6948-VCP: Counsel in probate dispute

Delaware District Court Representations

- *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, C.A. No. 17-151-LPS: Counsel for plaintiff in one of the largest judgments cases filed in Delaware
- *Hurwitz v. Mullins et al.*, C.A. No. 15-711-MAK: Counsel in dispute involving federal securities law claims
- *HSM Portfolio LLC et al v. Elpida Memory Inc. et al*, C.A. No. 11-770-RGA: Counsel for defendant in patent infringement dispute
- *Cellectis S.A. v. Precision Biosciences Inc.*, 11-173-SLR: Counsel for plaintiff in patent infringement dispute

EDUCATION

- Pennsylvania State University, Dickinson School of Law, J.D., *summa cum laude*, 2009 Woolsack Honor Society
- Davidson College, B.A., History and Classics, 2006

LEADERSHIP

- Delaware Superior Court
  - Rules Committee
  - Complex Commercial Litigation Division Rules Committee
  - Complex Commercial Litigation Division Advisory Committee
- Rodney Inn of Court, Treasurer
- ABA Commercial & Business Litigation, Newsletter Editor

PRO BONO ACTIVITIES

- Child Attorney, Delaware's Office of the Child Advocate

RECOGNITION

- *Chambers USA*, 2022, 2021, 2020
- *The Best Lawyers in America*, 2023
- *Law360* Rising Star – Trials, 2019
- *Benchmark Litigation*, 2021
- American Bar Foundation, Fellow

BAR ADMISSIONS

- Delaware, 2009
- United States District Court, District of Delaware, 2011
- United States Court of Appeals, Third Circuit, 2013

Morris James
DELAWARE

"Zealous advocacy, efficiency, and creativity define my approach to the practice of law."- Sarah Ennis

Sarah Ennis

Counsel

Sarah focuses her practice within the firm's Corporate and Commercial Litigation, and Bankruptcy and Restructuring groups.

Her practice includes litigating corporate and commercial matters in the Delaware Court of Chancery and the Complex Commercial Litigation Docket of the Delaware Superior Court. Sarah also has extensive experience in the Delaware District Court and the Delaware Bankruptcy Court in matters involving business restructuring and insolvency.

Sarah is experienced with fiduciary duty claims, contract disputes, and summary

proceedings under Delaware's business statutes and has represented Chapter 11 debtors, insurers in all facets of bankruptcy-related issues, creditors committees, liquidating trustees, trade creditors and financial institutions, purchasers of assets, and both plaintiffs and defendants in numerous avoidance actions, including preference and fraudulent transfer actions. She counsels clients on commercial bankruptcy, restructuring, and insolvency matters, as well as matters involving corporate and fiduciary litigation.

Prior to joining Morris James, Sarah worked as an associate for seven years in Wilmington handling corporate and commercial litigation and bankruptcy matters where she gained significant experience in various courts in Delaware.

Experience

- Counseling current and former directors, officers, and advisors of debtors relating to fiduciary duties
- Counseling official committees of unsecured creditors and equity committees
- Advising indenture trustees, agents, and lending groups in complex restructurings
- Advising and representing managers and members of Delaware limited liability companies regarding disputes and dissolution
- Assisting secured creditors seeking to enforce rights against debtors, including through foreclosure, liens, execution, and replevin.
- Advising clients in complex cross border insolvency and asset recovery issues
- Advising matters regarding D & O insurance coverage claims
- Advising and defending restrictive and non-compete covenants

- Inspection of books and records

Professional Affiliations

- American Bar Association
- American Bar Association, Business Law Section, Network Newsletter, Chair, 2018-2023, Women Business and Commercial Advocates Committee of the Business Law Section, Vice Chair, 2018 – 2023
- American Bankruptcy Institute
- Delaware State Bar Association, Litigation Section, Chair, 2022 – Present
- Richard S. Rodney American Inn of Court

CCX, Inc., Counsel to the Debtor

Dohmen v. Goodman, Delaware Counsel to Appellant in certification of question of law before the Delaware Supreme Court regarding a general partner's duty of disclosure to a limited partner in a Delaware limited partnership

Juno USA, LP, Counsel to Settlement Trustee

Punch Bowl Social (PBS BrandCo LLC), Lead Counsel to Debtors

SportCo. Holdings, Inc., Delaware Counsel to the Creditors' Litigation Trustee

Synergy Pharmaceuticals Inc., Counsel to the Litigation Trustee

News & Events

Morris James Earns Peer Recognition as 2021 Delaware Today Top Lawyers
October 26, 2021

Best Lawyers in America Names 33 Morris James Attorneys in 2022 Rankings
August 19, 2021

Community

Delaware State Bar Association, Women and the Law Section, Roxana C. Arsht Fellowship Committee, Chair, 2019 – 2022

Honors

Delaware Today Top Lawyers, Bankruptcy Business, 2021
Delaware Today Top Lawyers, Appellate Law, 2022

Academic Appointments

The Delaware Journal of Corporate Law, Bluebook Editor (Widener University Delaware Law School)

LinkedIn Vcard

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Practice areas

Bankruptcy and Restructuring

Committee Representations

Corporate and Fiduciary Litigation

Distressed Entity, Insolvency Counseling

Energy Industry

Litigation and Liquidation Trustees

Admissions

Delaware

New Jersey

Pennsylvania

U.S. District Court, District of Delaware

U.S. District Court, Eastern District of Pennsylvania

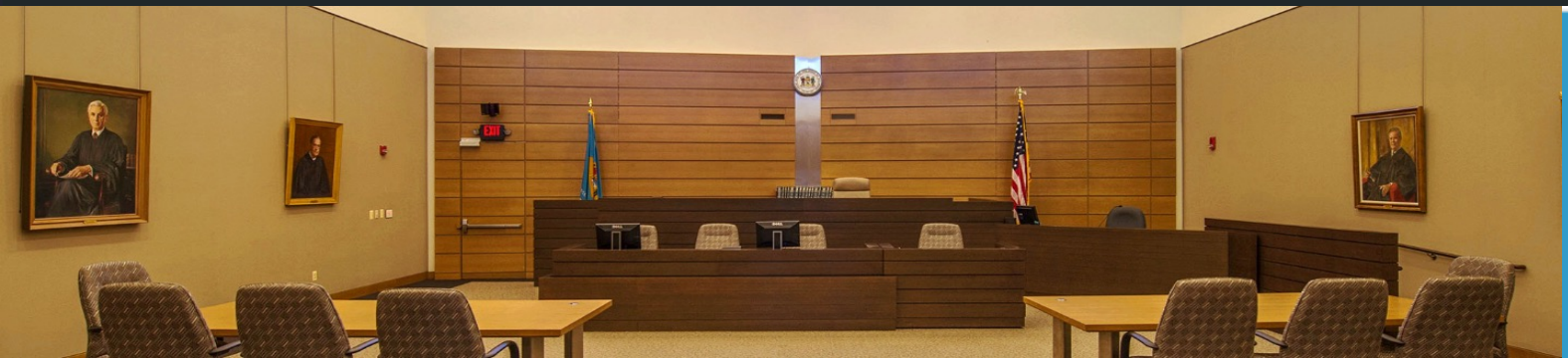
Education

Widener University Delaware Law School, JD, 2012

Wesley College, BA, summa cum laude, 2009

Deposition Skills in the Court Of Chancery

Delaware State Bar Association: May 25, 2023 @ 2:00 PM - 3:00 PM

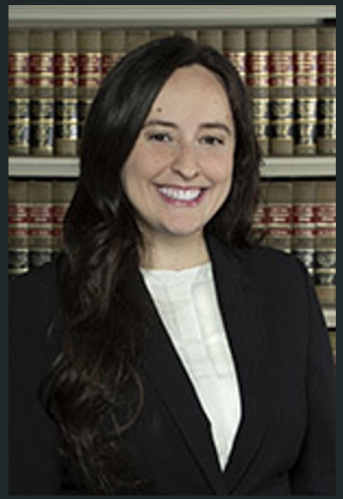


Caveats!

- Individual Fact Witnesses
- Practical Lens
- Personal Views Only

The Panel

Vice Chancellor Nathan Cook



Master Selena Molina

Travis Hunter

Sarah Ennis

Eric Hacker

Deposition Timeline

Scheduling/Logistics **Preparation** **Taking/Defending** **Using the Record**

Scheduling

Court of Chancery of Delaware,
New Castle County.

RE: PHILLIPS

v.

FIREHOUSE GALLERY, LLC, et al.

C.A. No. 3644–VCL.

Aug. 9, 2010.

Court of Chancery Rule 30(b)(1) provides that "[a] party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action." Delaware lawyers are expected to (and customarily do) approach deposition scheduling with due regard for the ethic of civility that animates practice in this jurisdiction. Deposition scheduling is a cooperative endeavor. Counsel openly discuss witness availability and their own calendars so that depositions can take place at times convenient for all parties. When initially issued, deposition notices typically contain nominal dates and are designed to provide notice of the identity of the witness to be deposed, rather than unilaterally setting the date, time, and place when the deposition will go forward.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

X Corporation Plaintiff, v. Y Corporation, Defendant.	C.A. No. 2023-0001-NAC

NOTICE OF DEPOSITION

TO: Sally Smith, Esquire
Smith Firm LLC
920 N. King St., Suite 100
Wilmington, DE 19806

PLEASE TAKE NOTICE THAT, pursuant to Court of Chancery Rules 26 and 30, Plaintiff X Corporation will take the deposition of Jimmy Jones, at the law offices of Patterson Davis on May 24, 2023. The deposition will take place before a Notary Public or other person authorized to admit or administer oaths and will begin at 9:00 a.m. (ET) and continue from day to day until completed. You are invited to attend and participate.

Preparation

The Witness

The Documents

The Outline

Taking The Deposition

Credit: *The Social Network*

Defending The Deposition

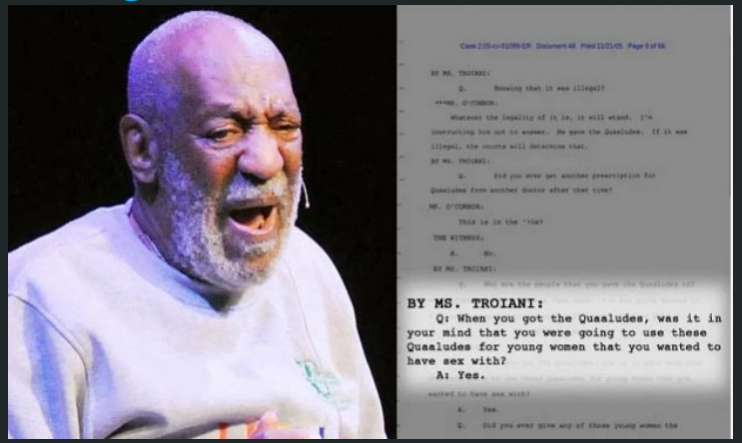
Do’s & Don’ts

Use at Trial


"'Lying' is such a harsh word, your honor. We prefer to call it 'testimony without borders.'"


"Perhaps you would like to change your last answer."

So How Important Are They?



Q&A

Pre-Admission Conference
Delaware Supreme Court
November 7, 2014

Best Practices in Trial Practice—Depositions

Presenters: The Honorable Vivian L. Medinilla
Delaware Superior Court

William D. Johnston
Monté T. Squire
Young Conaway Stargatt & Taylor, LLP
The Brandywine Building
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Wilmington, Delaware 19899-0391
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wjohnston@ycst.com
msquire@ycst.com

Gregory Brian Williams
Fox Rothschild LLP
919 North Market Street, Suite 1300
P.O. Box 2323
Wilmington, Delaware 19899-2323
(302) 622-4211
gwilliams@foxrothschild.com

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Deputy Legal Counsel
Office of the Governor
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Danielle.Blount.state.de.us

Table Of Contents

BEST PRACTICES IN TRIAL PRACTICE -- DEPOSITIONS[1]

I. *Nature* and *Purpose/Use* of Deposition Testimony

A. Nature

1. Sworn (or "affirmed") out-of-court testimony.

2. But conduct of witness and counsel should closely replicate *in*-court conduct.

3. May be a "discovery" deposition or a "trial" deposition.

B. Purpose/Use

1. Pretrial *motion* practice (preliminary injunction, summary judgment, etc.).

2. Use at or in connection with *trial*.

   (a) Impeachment during cross-examination.

   (b) Affirmative use during case-in-chief or rebuttal, of party's own witness if witness is not available to testify "live," or of any adverse witness irrespective of availability.

   (c) Designation/counter-designation of deposition testimony in post-trial briefing.

II. Governing *"Rules of the Road"*

A. Applicable Court Rules

1. *Federal* Court

   (a) Fed. R. Civ. P. 26, 27, 28, 29, 30, 31, 32, 37, 45

   (b) D. Del. Local Rules

   (c) Fed. R. Evid. 612 (Writing Used to Refresh Memory)

   (d) Fed. R. Evid. 613 (Prior Statements of Witnesses)

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[1] The presenters gratefully acknowledge the assistance of Karen E. Keller, Esquire of Young Conaway Stargatt & Taylor, LLP in providing material used in portions of this outline.

(e) Fed. R. Evid. 501 (Privilege)

(f) Fed. R. Evid. 801 (d)(1) (Statements Which Are Not Hearsay)

2. *State* Court

(a) Ct. Ch. R. 26, 28, 29, 30, 31, 32, 37, 45
Super. Ct. Civ. R. 26, 28, 29, 30, 31, 32, 37, 45
Ct. Com. Pl. Civ. R. 26, 28, 29, 30, 31, 32, 37, 45
Fam. Ct. Civ. R. 26, 28, 29, 30, 31, 32, 37, 45
J.P. Ct. R. 27 (but note reference only to discovery as permitted by the Court, on motion, "as authorized in Superior Court Civil Rules 33, 34, and 36"), 37

(b) Del. R. Evid. 612 (Writing or Object Used to Refresh Memory)

(c) Del. R. Evid. 613 (Prior Statements of Witnesses)

(d) Del. R. Evid. 501 – 512 (Privileges)

(e) Del. R. Evid. 801 (d)(1) (Statements Which Are Not Hearsay)

B. Interpretive Case law

1. *Federal*

2. *State*

C. Any "Standing" or Case-Specific Orders of the Court

D. "Principles Of Professionalism For Delaware Lawyers"
(*see* Del. Supr. Ct. R. 71)

"Only those depositions necessary to develop or preserve the facts should be taken. Questions and objections at depositions should be restricted to conduct appropriate in the presence of a judge."

III. Best Practices in *Advance* of a Deposition

A. If *Taking* the Deposition

1. Careful consideration of the *type and number* of deponents—be comprehensive but avoid "overkill."

2. Work out *scheduling* with your opponent prior to serving and filing the Notice of Deposition, if at all possible.

3. Obtain a *commission* for the taking of depositions of third-party witnesses (and perhaps the production of documents in advance of the deposition) outside of Delaware, if the deponent will not appear consensually. (*See, e.g.*, Ct. Ch. R. 30; Ct. Ch. R. 45; 10 Del. C. § 368). And consider the "insurance" afforded by a commission and resulting subpoena even if the witness is willing to appear.

4. Make certain that the *Notice of Deposition* contains all required information (e.g., if the testimony will be videotaped).

5. Determine whether the deposition will be a "discovery" deposition or a "trial" deposition.

6. Consider noticing a deposition pursuant to Rule 30(b)(6) ("person most knowledgeable").

7. Make arrangements for the *court reporter* and (if desired) *videographer* as soon as you can, to provide as much notice to them as possible. Likewise, advise them of any special needs (expedited preparation of transcript, etc.), and keep them advised of any scheduling changes.

8. Prepare an *outline of deposition questions* and copies of any *exhibits* to be used during deposition (the "original" exhibit for the witness; working copy for questioner; courtesy copies for other counsel).

B. If *Defending* the Deposition

1. Work with deposing counsel to promptly confirm witness availability and to agree on mutually convenient (or mutually inconvenient) location, etc.

2. Promptly identify any Rule 30(b)(6) deponents.

3. Prepare the deponent[2]

   (a) Nature and purpose/use of the deposition.

   (b) Strategy in responding ("discovery" versus "trial," etc.).

   (c) Permissible scope of objections, instructions not to answer.

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[2] *See* Appendix A hereto (Example of Preparation Tips To Be Shared With The Deponent).

(d) Conferring during deposition limited to matters of privilege.

(e) Anticipated questioning.

(f) Anticipated documents (exhibits), Rule 612 concerns. Out of an abundance of caution, assume that the witness would be required by the Court to identify documents reviewed in preparation for the deposition, though perhaps not in the order selected by counsel for review. *See, e.g., Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985); *Douglas v. State*, 879 A.2d 594 (Del. 2005); *Kellner v. Interlakes (Canada) Realty Corp.*, 1982 Del. Ch. LEXIS 509, Brown, V.C. (Del.Ch. Mar. 19, 1982); *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D 138 (D. Del. 1982).

(g) Opportunity to review transcript and make any corrections.

(h) Consider some role-playing.

(i) Importance of appearance, body movements, and intonation if deposition will be videotaped.

(j) Be careful not to waive privilege during preparation by the presence of third-parties.

C. Whether Taking or Defending A Deposition

1. Make certain that all non-Delaware attorneys expected to participate in the deposition have been admitted *pro hac vice* in advance of the deposition. *See Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1993); *see also E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 2008 WL 525908, at *1 (Del. Super. Ct. Feb. 20, 2008).

2. If disruptive behavior on the part of the deponent or opposing counsel is anticipated, consider (i) videotaping the deposition, (ii) having the phone number of the trial judge close at hand during the deposition, (iii) alerting the Court to the anticipated problem and the possible need to contact the Court during the deposition, and/or (iv) in the most extreme circumstances, requesting that the deposition take place in Delaware before a master or special master. *See Paramount Communications*, 637 A.2d at 55n.31 (trial court is only a phone call away).

3. Always preferable to have Delaware counsel in attendance at a deposition (*see Paramount Communications, supra*), but in all events important that Delaware counsel be available to participate in bringing a matter before the trial court if a dispute arises (even if participating by phone).

IV. Best Practices *During* A Deposition

A. Work together to complete the deposition promptly and fairly.

B. No "usual stipulations."

C. Client representative is entitled to attend deposition, and can be a helpful "truth-check."

D. Deponent and attorneys should not "talk over one another," out of consideration for the court reporter.

E. No conferring between the deponent and his or her counsel is permitted once the deposition is under way, unless privilege appears to be implicated. *See, e.g.,* Ct. Ch. R. 30; Super Ct. Civ. R. 30; D. Del. LR 30.6; *see also Dyson Tech. Ltd. v. Maytag Corp.*, C.A. Nos. 05-434-GMS, 06-654-GMS, Order (D. Del. Dec. 18, 2006); *Cytyc Corp. v. Autocyte, Inc.* C.A. No. 99-610-SLR, Transcript (D. Del. June 14, 2000); *Tuerkes-Beckers, Inc. v. New Castle Assocs.*, 158 F.R.D. 573 (D. Del. 1993); *Peter Kalton Defined Contribution Plan v. Gulf USA Corp.*, C.A. Nos. 93-50-RRM, 93-69-RRM (Consol.), Order (D. Del. June 28, 1993); *Deutschman v. Beneficial Corp.*, C.A. No. 86-595-MMS, Memo. Op. (D. Del. Feb. 20, 1990); *In re USN Commc'n, Inc.*, 280 B.R. 573 (Bankr. D. Del. 2002); *In re Fuqua Indus., Inc. Shareholder Litig.*, C.A. No. 11974 (Consol.) (Del. Ch. 1999); *Cascella v. GDV, Inc.*, C.A. No. 5899 (Del. Ch. Jan. 15, 1981); *State v. Mumford*, 731 A.2d 831 (Del. Super. 1999); *In re Asbestos Litig.*, 492 A.2d 256 (Del. Super. 1985).

If conferring apparently has occurred, be aware of the scope of the permissible follow-up questioning by the deposing attorney.

Questions allowed upon resuming the deposition after a break:

"A. Did you consult with your attorney, employee of your attorney and/or agent of your attorney (hereinafter "said person") during the recess and/or continuance?

- If answer is "no," end questioning.

- If answer is "yes," identify the person by name and proceed to question B.

B. Did you consult with said person with regard to your deposition testimony either already given and/or expected or which may be anticipated to be given?

- If answer is "no," end questioning.

- If answer is "yes," proceed to question C.

C. Did you consult with said person, and/or did said person give you any instruction and/or advice regarding how you should answer questions during the remainder of the deposition? (Note - not what was said.)

- If answer is "no," end questioning.

- If answer is "yes," proceed to question D.

D. About what areas of your testimony already given and/or expected or which may be anticipated to be given did you consult with said person? (Note – not what was said.)"

In re Asbestos Litig., 492 A.2d 256, 260 (Del. Super. 1985); *Deutschman v. Beneficial Corp.*, C.A. No. 86-595-MMS, Memo. Op. (D. Del. Feb. 20, 1990) (same).

F. No "tag team" questioning of deponent. Lead questioner can receive notes from co-counsel and/or client representative.

G. If a "discovery" deposition, deposing attorney is cross-examining and, as a result, may use leading questions. In contrast, if a "trial" deposition, deposing attorney may not use leading questions unless the witness is adverse ("hostile").

H. If a "discovery" deposition, objections, other than objections as to "form," are reserved until trial "unless the ground of the objection is one which might have been obviated or removed if presented at that time." *See, e.g.*, Ct. Ch. R. 32 (d)(3). And objections as to relevance, etc. may still be asserted so that they are part of the deposition record. If a "trial" deposition, defending attorney is generally *obligated* to assert *all* objections; otherwise, the objection will be deemed waived.

I. Examples of "Form" Objections:

- Compound question.
- Question assumes fact not in evidence.
- Question is argumentative.
- Question calls for speculation.
- Question calls for a legal opinion.

- Question has been asked and answered.
- Question misstates the deponent's prior testimony.
- Question mischaracterizes the exhibit.

J. Examples of Objections *Other Than* As To Form:

- Relevance.
- Not calculated to lead to the discovery of admissible evidence.
- Witness not competent to testify to the subject.
- Materiality.
- Cumulative.

K. Instructing A Witness Not To Answer

1. Typical basis is that response to the question will reveal information subject to attorney-client privilege. *See Tuerkes-Beckers, supra; Peter Kalton Defined Contribution Plan, supra; Cardinal Capital Management, supra; State v. Mumford, supra; Cascella, supra; Rose Hall, supra.*

2. Can also be used to guard against disclosure of information subject to attorney work product protection or "business strategy" privilege.

3. Rarely used in response to questions which call for irrelevant information or information not calculated to lead to the discovery of admissible evidence, and risky to do so—repeated questioning must rise to the level of harassment.

4. Sample instruction: "I instruct the witness not to answer the question to the extent the answer would reveal information subject to attorney-client privilege. Otherwise, the witness may answer."

5. Note the requirement of Fed. R. Civ. P. 30(d) that deposing counsel intend to promptly move to terminate or limit examination.

L. Unless the deponent is instructed not to answer, he or she is obligated to answer the question after the objection is asserted.

M. Even in the face of an instruction not to answer, questioning attorney may explore existence, extent, and/or waiver of privilege.

N. Some judges prefer that objections as to form be limited to "Objection, form" (rather than, for example, "Objection, calls for speculation"). Objections other than as to form should be limited to the word "Objection," followed by a very brief description of the basis for the objection.

O. In no event should an objection be used to "coach" (suggest the answer to) the witness. *See, e.g.*, Ct. Ch. R. 30; Super. Ct. Civ. R. 30; *In re USN Commc'n, Inc., supra; In re Fuqua Indus., supra*; *Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp.*, C.A. No. 79-182, Order (D. Del. Dec. 12, 1980); *Cascella, supra.*

P. Defending (or attending) counsel should not continually interrupt questioning. *Paramount Communications, supra; Rose Hall, supra.*

Q. Defending (or attending) counsel should not press the questioner for time. *Paramount Communications, supra; Cardinal Capital Management, LLC v. Amerman,* C.A. No. 19876, Transcript (Del. Ch. Sept. 27, 2002).

R. Typical Order of Questioning

1. If "discovery" deposition:

- Deposing attorney
- Defending attorney
- Deposing attorney

2. If "trial" deposition:

- Same as above
- Or "trial" order of separate cases-in-chief, etc.

S. If an issue arises which could have an impact on the substance of a witness' answer, counsel should either excuse the witness from the deposition room or (better yet) excuse themselves and discuss the matter outside the presence of the witness and the court reporter.

T. Being Aware of the Importance of the Written Record

1. Either as the deposing attorney or as the defending (or attending) attorney, don't hesitate to clarify whether a "No" by the witness may really mean "Yes" (or vice versa) depending on how the question was asked.

2. Be careful, as the deposing attorney, to make sure that the witness answers the pending question after any objection is made (assuming no instruction not to answer).

3. If the witness interrupts the deposing attorney before he or she completes the question, it is best to restate the question and make sure that the record reflects an uninterrupted question and an uninterrupted answer.

U. If Counsel Reach An Impasse

1. Deposition may proceed, with the matter to be addressed later via motions for a protective order and/or to compel.

2. Or the deposition may be adjourned, with the matter addressed to the Court immediately.

3. Note the appropriate court (Delaware or non-Delaware) in which to seek relief. *See, e.g.*, Ct. Ch. R. 26(c) (motion for a protective order); Ct. Ch. R. 37(a)(1) (motion to compel).

V. *Pro hac vice* admission may be revoked where the conduct of the non-Delaware attorney is shown to affect the fairness of the proceeding, including failing to attempt to restrain inappropriate behavior on behalf of the deponent.. *See, e.g., Crowhorn v. Nationwide Mutual Insurance Co.*, 2002 Del. Super. LEXIS 397, Witham, J. (Del. Super. May 6, 2002); *State v. Mumford*, 731 A.2d 831 (Del. Super. 1999); *State v. Grossberg*, 705 A.2d 608 (Del. Super. Ct. 1997).

V. At the End of the Deposition

1. Counsel may take the position that the deposition is not yet concluded because of one or more open matters.

2. Defending counsel should make clear that the witness does *not* waive the reading and signing of the transcript.

V. Best Practices *After* A Deposition

A. Confirm with court reporter when the transcript will be available and in what form (reporter may be able to forward a "rough" cut of the transcript promptly if it is needed for ongoing brief preparation, etc.).

B. Can be helpful to receive transcript in searchable electronic form. Also helpful to receive transcript in "mini-script" form and with an index.

C. Deponent and counsel should carefully review transcript for any needed corrections. Corrections may be to form (spellings, etc.) or to substance, but recognize that altering the testimony substantively could prompt a follow-up deposition.

D. Promptly return the completed "errata" sheet to the court reporter. Transcript must be signed within 30 days of when it becomes available; otherwise, the deposition "may then be used as fully as though signed." *See, e.g.,* Ct. Ch. R. 30 (e).

E. Promptly pay the court reporter.

Appendix A

Example of Preparation Tips To Be Shared With Deponent

1. No need to be nervous about your testimony. Remember that you are in control—what you answer, when, and how. Also remember that your only obligation will be to testify truthfully, to the best of your knowledge and recollection.

2. If you don't understand a question, say so and ask for clarification.

3. If you cannot answer a question "yes" or "no," say so and don't allow yourself to be bullied. Or, if the question can be answered "yes" or "no" but only with follow-up explanation, say so. Politely, but firmly, stand your ground.

4. If you don't know or recall, say so. It's only natural—don't speculate.

5. Your deposition is not intended to "tell our story." That will happen at trial. Don't volunteer information. Don't assume that the "facts" included in a question are true. Don't assume that a document shown to you by the questioner is what the questioner has represented it to be. Take as much time as you need to review a document. And if you then need to have a pending question repeated, don't hesitate to ask the questioner to repeat it or to ask that the court reporter please "read back" the question.

6. Don't get drawn into a question-answer "rhythm" established by the questioning attorney. Take your time!

7. I will be limited in my ability to object to questions and even more limited in my ability to instruct you not to answer questions. I may not be aware that a particular question calls for you to reveal privileged information. If you believe that to be the case, please say that you need to confer with me regarding a matter of privilege. We will then have the opportunity to confer privately. I will then determine whether it is appropriate to instruct you not to answer the pending question.

8. With regard to objections to questions, please listen carefully to each question to determine if, in your view, the question as stated is not capable of a fair response. For example, does the question include multiple subjects? Does it assume certain facts? Is it calling for you to speculate? Is it argumentative? Have you been asked the same question before, suggesting an effort to prompt inconsistent responses? Does the question misstate your previous testimony? Does the question mischaracterize an exhibit?

In any of these instances, I may be limited to saying "Objection" or "Objection as to form." Please be sure to "take a breath" and give me an opportunity to make an objection before you answer. And then please consider carefully what may be objectionable about the question. Unless I instruct you not to answer a question, you will be obligated to respond, but it will be entirely appropriate for you to say to the questioner, on the record, that the question is not capable of fair response because of one or more of the concerns touched on above.

9. During the deposition, you and I will not be permitted to confer with one another regarding the testimony that you have given or are about to give, with the exception of the "privilege" discussion I mentioned previously. After the deposition is concluded, we will have the opportunity to discuss your testimony, and you will have the opportunity to review the deposition transcript and to make any corrections.

10. You'll do great during the deposition. Now, let's go over a few documents so that you won't be surprised if they're shown to you and you're asked about them....

11. Finally, if you're asked what you did to prepare for the deposition, you shouldn't hesitate in responding that you met with counsel. (That should be no surprise!) But, if you are asked what we talked about during the preparation, please give me the opportunity to instruct you not to answer the question unless you can do so without revealing information subject to attorney-client privilege. Likewise, if you are asked whether you reviewed any documents during the preparation, you may answer "yes." But, if you are asked *which* documents you reviewed, I will instruct you not to answer the question as to any specific document unless the questioner can establish that that document refreshed your recollection for the purpose of testifying during the deposition.

12. Any questions?

2021 WL 3598208 (Del.Ch.) (Trial Order)
Chancery Court of Delaware.

DG BF, LLC, a California limited liability company; Jeff A. Menashe, individually and derivatively on behalf of American General Resources LLC, a Delaware limited liability company, Plaintiffs,

v.

Michael RAY, an individual, and Vladimir Efros, an individual, Defendants,

and

American General Resources LLC, a Delaware limited liability company, Nominal Defendant.

No. 2020-0459-MTZ.
August 11, 2021.

[Proposed] Order

Morgan Zurn, Judge.

***1 [EDITOR'S NOTE: By ruling of the court, Proposed Order is GRANTED WITH MODIFICATIONS. Please see PDF for full proposed order.]**

AND NOW, this day of ___, ___, 2021, upon consideration of Defendants' Motion to Compel Proper Deposition ("Motion"), and Plaintiffs' opposition thereto,

IT IS HEREBY ORDERED THAT:

1. Defendants' Motion is Denied except for the conditions below.

2. Mr. Menashe will present himself on two separate days for deposition-one day for the continuation of the Rule 30(b)(6) deposition, and one day for his deposition in his personal capacity.

3. The two dates will be agreed to by the parties.

4. The two depositions of Mr. Menashe will be limited to 7 hours each.

Mr. Menashe's Rule 30(b)(6) deposition has already used 3 of its allotment of 7 hours, leaving 4 remaining.

5. Mr. Menashe may choose which counsel he wishes to defend him during the depositions, and there is no need for Mr. Bellew to attend unless Mr. Menashe requests it.

6. Objections during Mr. Menashe's depositions will be limited to objections regarding attorney-client privilege. All other objections will be reserved until after the conclusion of the depositions.

.....

The Honorable Morgan T. Zurn

Court Authorizer Comments:

I have observed Mr. Fox's tendency to interrupt opposing counsel's presentation and the Court, and to insult opposing counsel, most recently at the August 3 hearing in this matter. I was therefore dismayed, but not surprised, that his behavior at DG BF's 30(b)(6) deposition reminded me of Mr. Jamail of Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34 (Del. 1994). Like Mr. Jamail, Mr. Fox "(a) improperly directed the witness not to answer certain questions; (b) was extraordinarily rude [and] uncivil ... ; and (c) obstructed the ability of the questioner to elicit testimony to assist the Court in this matter." *Id.* at 53. Plaintiffs' Delaware counsel was expected to put an end to Mr. Fox's misconduct, but did not.

Mr. Fox's abusive tactics for tactical gain have interfered with the fair and efficient administration of this matter. See Kaung v. Cole Nat. Corp., 884 A.2d 500, 507-08 (Del. 2005); Hunt v. Ct. of Chancery, 2021 WL 2418984, at *7 (Del. June 10, 2021). While I expect he has done so already as part of his application to appear pro hac vice, Mr. Fox shall, for the first time or again, review the Statement of Principles of Lawyer Conduct. See Ct. Ch. R. 170(c). Mr. Fox and Delaware counsel shall also review the Court of Chancery's 2021 Guidelines To Help Lawyers Practice In The Court Of Chancery. Mr. Fox and Delaware counsel shall submit a certification that they have done so.

Fees for the Motion, for reviewing Plaintiffs' letters regarding the deposition, and for the Reconvened Deposition shall be shifted to Plaintiffs. Delaware counsel shall attend the Reconvened Deposition. The parties shall notify the Court of the date and time of the Reconvened Deposition so that the Court may make itself available to address any continuing misconduct. This motion shall not be heard at tomorrow's hearing.

End of Document

114 A.3d 541
Court of Chancery of Delaware.

IN RE APPRAISAL OF DOLE FOOD COMPANY, INC.

CONSOLIDATED C.A. No. 9079–VCL

Submitted: October 14, 2014

Decided: December 9, 2014

Synopsis

Background: After a take-private merger, minority shareholders pursued their statutory right to an appraisal of their shares of common stock. During discovery, corporation moved to compel production of valuation-related materials and for supplemental depositions of designated witnesses for shareholders.

Holdings: The Court of Chancery, Laster, Vice Chancellor, held that:

[1] valuation-related materials prepared by shareholders when deciding whether to purchase or sell the common stock were relevant;

[2] the valuation-related materials were reasonably calculated to lead to the discovery of admissible evidence;

[3] status of designated witnesses for shareholders as lay witnesses, rather than expert witnesses, did not foreclose their ability to testify about their valuation work or their views on valuation;

[4] with a possible exception, valuation-related materials prepared by one designated witness were not protected by the attorney-client privilege or the work product doctrine; and

[5] corporation was entitled to reasonable costs, including attorney fees, incurred as a result of shareholders' failure to provide discovery.

Ordered accordingly.

West Headnotes (30)

[1] **Pretrial Procedure** ⇐ Corporate records

Valuation-related materials prepared by minority shareholders when deciding whether to purchase or sell common stock after a take-private merger announcement were relevant in a subsequent statutory appraisal proceeding initiated by those shareholders, so as to support a determination that the materials were discoverable by corporation; the materials went to the central issue in the proceeding, which was corporation's value, and to issues such as the appropriate inputs and considerations for valuation methodologies, and the materials could also potentially bear on witness credibility. 8 Del. Code. § 262(h); Del. Ch. Ct. R. 26(b)(1).

[2] **Pretrial Procedure** ⇐ Relevancy and materiality

Information sought in discovery is considered "relevant" if there is any possibility that the information sought may be relevant to the subject matter of the action. Del. Ch. Ct. R. 26(b)(1).

1 Cases that cite this headnote

[3] **Pretrial Procedure** ⇐ Relevancy and materiality

For purposes of discovery, the requirement of relevancy must be construed liberally. Del. Ch. Ct. R. 26(b)(1).

3 Cases that cite this headnote

[4] **Corporations and Business Organizations** ⇐ Proceedings for Appraisal

An "appraisal" is a legislative remedy that is intended to provide shareholders, who dissent from a merger asserting the inadequacy of the offering price, with an independent judicial determination of the fair value of their shares. 8 Del. Code. § 262.

1 Cases that cite this headnote

[5] **Corporations and Business Organizations** ⇐ Proceedings for Appraisal

In a statutory appraisal proceeding, the central issue is the determination of the value of the dissenting shareholder's shares on the date of the merger. 8 Del. Code. § 262(h).

[6] **Pretrial Procedure** ⇐ Construction of discovery provisions

In a statutory appraisal proceeding, the rules of discovery should be construed liberally. 8 Del. Code. § 262; Del. Ch. Ct. R. 26.

1 Cases that cite this headnote

[7] **Pretrial Procedure** ⇐ Probable admissibility at trial

Pretrial Procedure ⇐ Corporate records

Valuation-related materials prepared by minority shareholders when deciding whether to purchase or sell common stock after a take-private merger announcement were reasonably calculated to lead to the discovery of evidence that would be admissible in a statutory appraisal proceeding initiated by those shareholders, so as to support a determination that the materials were discoverable by corporation in the proceeding. 8 Del. Code. § 262(h); Del. Ch. Ct. R. 26(b)(1).

1 Cases that cite this headnote

[8] **Corporations and Business Organizations** ⇐ Proceedings for Appraisal

A statutory appraisal proceeding is not a fault-based case in which one side has the burden of proof and loses if it fails to meet its burden. 8 Del. Code. § 262.

[9] **Corporations and Business Organizations** ⇐ Decision and award

In a statutory appraisal proceeding, both sides have the burden of proving their respective valuation positions by a preponderance of evidence. 8 Del. Code. § 262(h).

1 Cases that cite this headnote

[10] **Corporations and Business Organizations** ⇐ Decision and award

In a statutory appraisal proceeding, no presumption, favorable or unfavorable, attaches to either side's valuation, including the actual merger price. 8 Del. Code. § 262(h).

1 Cases that cite this headnote

[11] **Corporations and Business Organizations** ⇐ Decision and award

In a statutory appraisal proceeding, when the court makes a determination of the fair value of the subject corporation's shares, which the court is obligated to do if the parties do not retain experts or if the experts prove not to be credible, the court can consider a wide range of factual evidence, including, but not limited to, the market price, the merger price, other offers for the company or its assets, prices at which knowledgeable insiders sold their shares, internal corporate documents from the respondent, and valuation work prepared for non-litigation purposes. 8 Del. Code. § 262(h).

3 Cases that cite this headnote

[12] **Corporations and Business Organizations** ⇐ Proceedings for Appraisal

That a party has retained an expert in a statutory appraisal proceeding does not enable the party to shield factual material relating to valuation that otherwise would be discoverable and admissible. 8 Del. Code. § 262(h); Del. Ch. Ct. R. 26(b)(1).

[13] **Pretrial Procedure** ⇐ Discovery methods and procedure

Burden that a party must meet to obtain discovery is slight, but it does rest on the party seeking the discovery. Del. Ch. Ct. R. 26(b)(1).

1 Cases that cite this headnote

[14] **Evidence** ⇐ Stocks and bonds; securities

Valuation of a corporation's shares is a subject where expert testimony is appropriate and helpful in a statutory appraisal proceeding. 8 Del. Code. § 262(h); Del. R. Evid. 702.

[15] **Evidence** ⇐ Accident reconstruction

A witness need not be qualified as an expert in accident reconstruction to testify that based on the damage to the right side of a vehicle, the vehicle was moving to the left at the time of impact, or that a driver in front of the witness did have time to complete her turn safely; factual observations of this type, even if expressed as opinion, differ from lay attempts at after-the-fact accident reconstruction, which is a matter reserved for experts. Del. R. Evid. 701, 702.

[16] **Evidence** ⇐ Personal property

Status of designated witnesses for minority shareholders as lay witnesses, rather than expert witnesses, in a statutory appraisal proceeding did not foreclose witnesses' ability to testify about their valuation work or their views on valuation, for the purpose of determining whether corporation could question witnesses about those matters during supplemental depositions; based on witnesses' training and experience and their previous depositions, witnesses seemed more than capable of testifying from personal knowledge about corporation and the value of its shares. 8 Del. Code. § 262(h); Del. R. Evid. 701.

[17] **Evidence** ⇐ Personal property

In a statutory appraisal proceeding, sales of stock by knowledgeable officers and directors at the merger price do not constitute expert opinion on the value of the subject corporation's stock; rather, the sales provide indirect evidence of what knowledgeable lay people believed the value to be. 8 Del. Code. § 262(h); Del. R. Evid. 701, 702.

[18] **Evidence** ⇐ Amount for which property can be purchased or sold; offers and quotations

Evidence ⇐ Value

In a statutory appraisal proceeding, offers to purchase a wholly owned subsidiary whose operations were not altered by the merger do not constitute expert opinion but, instead, are market evidence of what knowledgeable lay people believed about the value of the asset. 8 Del. Code. § 262(h); Del. R. Evid. 701, 702.

1 Cases that cite this headnote

[19] **Evidence** ⇐ Personal property

In a statutory appraisal proceeding, the market price of the subject corporation's shares does not constitute expert testimony; instead, it represents an aggregation of the views that many lay people hold about the value of a stock. 8 Del. Code. § 262(h); Del. R. Evid. 701, 702.

1 Cases that cite this headnote

[20] **Corporations and Business Organizations** ⇐ Decision and award

In a statutory appraisal proceeding, market value cannot be the sole source of relevant information in fixing the fair value of the subject corporation's shares. 8 Del. Code. § 262(h).

[21] **Corporations and Business Organizations** ⇐ Decision and award

In a statutory appraisal proceeding, the market price is a relevant factor of some weight in determining the fair value of the subject corporation's stock where the market is active and where no special consideration indicating that it should be given no weight is present. 8 Del. Code. § 262(h).

1 Cases that cite this headnote

[22] **Corporations and Business Organizations** ⇐ Decision and award

In a statutory appraisal proceeding, where there is an established market for the subject corporation's stock, market value must be considered in appraising the value of the corporation's shares. 8 Del. Code. § 262(h).

1 Cases that cite this headnote

[23] **Corporations and Business Organizations** ⇐ Decision and award

In a statutory appraisal proceeding, the market price of a traded security must always be evaluated to ascertain the degree of weight it deserves. 8 Del. Code. § 262(h).

[24] **Pretrial Procedure** ⇐ Corporate records

Privileged Communications and Confidentiality ⇐ Relation of Attorney and Client

With the possible exception of a certain memorandum, minority shareholder did not show that designated witness was acting as a lawyer when he prepared valuation-related materials for shareholder when it was deciding whether to purchase or sell corporation's common stock after a take-private merger announcement, and thus the materials were not protected by the attorney-client privilege or the work product doctrine in a statutory appraisal proceeding, even though witness had a law degree and originally joined investment group's legal department, where witness no longer served as an in-house lawyer and did not practice law but instead, was a managing director whose job included sourcing investments, and witness testified that his aim was to make money for his firm, not provide legal advice. Del. Ch. Ct. R. 30(b)(6).

[25] **Privileged Communications and Confidentiality** ⇐ Presumptions and burden of proof

Burden of proving that the attorney-client privilege applies to a particular communication is on the party asserting the privilege.

2 Cases that cite this headnote

[26] **Pretrial Procedure** ⇐ Work-product privilege

Privileged Communications and Confidentiality ⇐ Business communications

An attorney performing a business function cannot avail himself of the protection associated with the attorney-client privilege or the work product doctrine.

1 Cases that cite this headnote

[27] **Privileged Communications and Confidentiality** ⇐ Professional Character of Employment or Transaction

When information contains both legal and business aspects, it will be considered protected by the attorney-client privilege only if the legal aspects predominate.

1 Cases that cite this headnote

[28] **Privileged Communications and Confidentiality** ⇐ Business communications

Question of whether an attorney was performing a business function or a legal function, for the purpose of determining whether information is protected by the attorney-client privilege, depends in part on the context; a particular task may be a business function in one context and a legal function in another context without any changes in the task itself.

1 Cases that cite this headnote

[29] **Pretrial Procedure** ⇐ Failure to Comply; Sanctions

Failure of minority shareholders to provide certain discovery requested by corporation in a statutory appraisal action, specifically valuation-related materials prepared by shareholders when deciding whether to purchase or sell corporation's common stock after a take-private merger announcement, as well as related depositions of designated witnesses for

shareholders, was not substantially justified, and thus corporation was entitled to an award of reasonable costs, including attorney fees, incurred as a result of the failure; objection by shareholders on the ground of relevancy was unfounded, objection by shareholders on the ground of potential admissibility was contrary to prior precedent, and to the extent that shareholders believed that a different result was warranted, it was incumbent on shareholders to seek relief, which they did not do. Del. Ch. Ct. R. 30(b)(6), 37(b)(2).

[30] **Pretrial Procedure** ⇐ Failure to Disclose; Sanctions

Under the rule providing for sanctions for failure to make discovery, an award of expenses and fees is mandatory where a party is found to have failed to honor a discovery request unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Del. Ch. Ct. R. 37(b)(2).

1 Cases that cite this headnote

Attorneys and Law Firms

***545** Stuart M. Grant, Geoffrey C. Jarvis, Kimberly A. Evans, GRANT & EISENHOFER, P.A., Wilmington, Delaware; Attorneys for Petitioners Hudson Bay Master Fund Ltd., Hudson Bay Merger Arbitrage Opportunities Master Fund Ltd., and Ripe Holdings LLC.

Bruce Silverstein, Elena C. Norman, James M. Yoch, Jr., Nicholas J. Rohrer, YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware; Attorneys for Respondent Dole Food Company, Inc.

OPINION

LASTER, Vice Chancellor.

Petitioners Hudson Bay Master Fund Ltd. and Hudson Bay Merger Arbitrage Opportunities Master Fund Ltd. (together, "Hudson Bay") and Ripe Holdings LLC ("Ripe") have pursued their statutory right to an appraisal of their shares of common stock of Dole Food Company, Inc. ("Dole"). In discovery, Dole sought information regarding valuations of Dole common stock that the petitioners prepared, reviewed, or otherwise considered when deciding whether to purchase or sell Dole common stock or seek appraisal. The petitioners objected to producing the information. Dole then noticed Rule 30(b)(6) depositions of the petitioners and identified the valuations as a topic of questioning. During the depositions, petitioners' counsel instructed the Rule 30(b)(6) witnesses not to testify about the valuations, citing a lack of relevance.

Dole has moved to compel production of the valuation-related materials and for supplemental depositions of the Rule 30(b)(6) witnesses. The motion is granted.

I. FACTUAL BACKGROUND

On June 11, 2013, Dole announced that its board of directors had received an unsolicited ***546** proposal from David H. Murdock, Dole's CEO, Chairman, and controlling stockholder, to acquire all of the shares of Dole common stock that he did not already own for $12.00 per share in cash. On August 12, Dole and Murdock announced their agreement on a take-private merger at $13.50 per share in cash (the "Merger").

On October 31, 2013, Dole held a special meeting of stockholders to consider the Merger. The record date for the Merger was September 27. Dole's stockholders approved the Merger, which closed on November 1.

After the Merger closed, Hudson Bay filed a petition seeking appraisal for more than 3.6 million shares of Dole common stock. Hudson Bay purchased all of the shares after Murdock announced his take-private proposal on June 11, 2013. Hudson Bay purchased 1.1 million of its shares after the record date for the special meeting. Also during June and July, Hudson Bay sold at least 156,280 shares of Dole common stock for prices ranging from $12.69 to $12.90 per share. During the days before the Merger closed, Hudson Bay purchased nearly 4.6 million shares of Dole common stock for which it received the Merger consideration.

Ripe filed a petition seeking appraisal for approximately 2.8 million shares of Dole common stock. Ripe is a special-purpose investment vehicle jointly owned by different funds managed by affiliates of Fortress Investment Group

("Fortress"). Ripe purchased all of its shares after Murdock announced his take-private proposal. It acquired 250,000 of the shares after the record date for the special meeting.

During discovery, Dole served document requests and interrogatories seeking information about any valuations or similar analyses of Dole that Hudson Bay or Ripe prepared, reviewed, or considered when buying or selling Dole stock or when seeking appraisal. Dole only sought pre-litigation materials. The petitioners objected to the document requests on the grounds that the information was irrelevant and that it was premature to provide discovery on valuation before the expert discovery phase. The petitioners objected to the interrogatories as "seek[ing] an opinion on areas where an expert will be opining, not the Petitioners." Dole sent the petitioners a deficiency letter that cited authority supporting production of the information. The petitioners responded by letter in which they maintained their objections. Counsel met and conferred by telephone and email, but they were unable to resolve their disagreements.

Dole then served notices of deposition for each of the petitioners pursuant to Court of Chancery Rule 30(b)(6). The noticed topics included any valuations of Dole performed, reviewed, or considered by the petitioners when purchasing Dole stock or seeking appraisal. The petitioners objected to the deposition notices, contending that the valuation information was neither relevant nor reasonably calculated to lead to the discovery of admissible evidence and that it was protected by the attorney-client privilege. Dole sent a deficiency letter insisting on the production of witnesses to testify about valuation. The petitioners maintained their objection.

Hudson Bay designated Henry Choi, a portfolio manager, as its Rule 30(b)(6) witness. Hudson Bay maintained its objection to producing a witness on (i) Hudson Bay's reasons for purchasing or selling Dole shares, (ii) its business models, and (iii) its pre-litigation internal valuations of Dole. At the outset of the deposition, Choi stated that he was not prepared to testify about the topics to which Hudson Bay objected. During the deposition, Hudson Bay's counsel consistently objected to questions about valuation and instructed ***547** Choi not to answer on the basis of relevance. Choi followed his counsel's instructions. Dole learned from the deposition that, before the Merger, Hudson Bay created an Excel file that valued Dole that using three standard methodologies: (i) discounted cash flows ("DCF"), (ii) comparable companies, and (iii) sum of the parts.

Ripe designated John Neumark as its Rule 30(b)(6) witness and made the same objections as Hudson Bay to topics in the deposition notice. Neumark is a managing director at FIG, LLC, the subsidiary that serves as the investment manager for all of the Fortress funds. Like Choi, Neumark stated at the outset of the deposition that he was not prepared to testify about the topics to which Ripe objected. During the deposition, Ripe's counsel objected to questions relating to valuation and instructed Neumark not to answer on the basis of relevance. Neumark followed his counsel's instructions. Dole learned from the deposition that, before the Merger, Neumark prepared a seven to ten page memorandum that was presented to Fortress' investment management committee with his recommendation about the investment strategy for Dole common stock (the "Fortress Memorandum"). Neumark testified that the Fortress Memorandum set out a valuation of Dole based on a DCF analysis and included a downside case that valued Dole at less than the Merger consideration.

Dole moved to compel production of information regarding valuations or analyses of Dole's value that the petitioners prepared, reviewed, or considered in connection with their decision to purchase Dole stock or seek appraisal. Dole also sought supplemental Rule 30(b)(6) depositions to address the topics that were not covered during the original depositions.

II. LEGAL ANALYSIS

Rule 26(b)(1) frames the scope of permissible discovery:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any documents, electronically stored information, or tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will

> be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Ct. Ch. R. 26(b)(1). Under this rule, the essential characteristic of discoverable information is relevance, "for it is only relevant matter that may be the subject of discovery." 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, FEDERAL PRACTICE AND PROCEDURE § 2008 (3d ed.2007).

The last sentence of Rule 26(b)(1) anticipates a potential objection that a responding party might raise to producing otherwise relevant material, namely that the material would not be admissible at trial. Rule 26(b)(1) rejects the potential objection, stating: "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

The federal version of Rule 26(b)(1), on which this court's Rule 26(b)(1) was based, originally did not include a sentence on admissibility. In 1948, the United States Supreme Court added the following sentence ***548** to the federal rule: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The amendment responded to a few "early cases [that] misread the word 'relevant' in Rule 26(b) as meaning 'competent' under the rules of evidence." WRIGHT, MILLER & MARCUS, *supra,* § 2008. The additional sentence clarified that "it is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* When Delaware adopted its new rules of procedure in 1948, they were modeled on the federal rules, and the Delaware version of Rule 26(b)(1) from the outset included the current language on admissibility. *See* Daniel L. Herrmann, *The New Rules of Procedure in Delaware,* 18 F.R.D. 327, 327 (1956) ("In 1948, the Courts of Delaware shook off the shackles of mediaeval scholasticism and adopted Rules governing civil procedure modeled upon the Federal Rules of Civil Procedure." (internal quotation marks omitted)).

Under Rule 26(b)(1), therefore, relevance is the touchstone for discoverability, and lack of admissibility is not an objection so long as the discovery is "reasonably calculated to lead to the discovery of admissible evidence." To be discoverable, the material must be both relevant and, at a minimum, "reasonably calculated to lead to the discovery of admissible evidence." As a shorthand, this decision refers to the latter aspect of Rule 26(b)(1) as potential admissibility.

A. Relevance

[1] In their discovery responses and during the Rule 30(b)(6) depositions, the petitioners objected to discovery into their valuations on grounds of relevance. In response to the motion to compel, they withdrew that implausible objection.

[2] **[3]** Information sought in discovery is considered relevant "if there is any possibility that the information sought may be relevant to the subject matter of the action." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Stauffer Chem. Co.,* 1990 WL 177572, at *3 (Del.Super.Nov. 9, 1990) (citation omitted).

> [T]he requirement of relevancy must be construed liberally.... [T]he spirit of Rule 26(b) calls for all relevant information, however remote, to be brought out for inspection not only by the opposing party but also for the benefit of the Court.... Thus, discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought can have no possible bearing upon the subject matter of the action.

Boxer v. Husky Oil Co., 1981 WL 15479, at *2 (Del.Ch. Nov. 9, 1981)(citation omitted).

[4] **[5]** **[6]** An appraisal is a "legislative remedy which is intended to provide shareholders, who dissent from a merger asserting the inadequacy of the offering price, with an independent judicial determination of the fair value of their shares." *Ala. By–Products Corp. v. Neal,* 588 A.2d 255, 256 (Del.1991). The central "issue is the determination of the value of the appraisal petitioners' shares on the date of the merger[.]" *Cede & Co. v. Technicolor, Inc.,* 542 A.2d 1182, 1187 (Del.1988). Even in a statutory appraisal proceeding, "the rules of discovery should [ ] be construed

liberally." *Bershad v. Curtiss–Wright Corp.*, 1983 WL 10916, at *7 (Del.Ch. Mar. 21, 1983); *see MacLane Gas Co. v. Enserch*, 1990 WL 96247, at *3 (Del.Ch. July 5, 1990); *Kaye v. Pantone, Inc.*, 1981 WL 15072, at *1 (Del.Ch. Oct. 6, 1981).

***549** Several Court of Chancery decisions have ordered production of pre-suit valuation material prepared by appraisal petitioners. [1] These decisions recognize that the pre-litigation valuations are relevant to the central issue in the proceeding, which is the value of the subject company. They also are relevant to issues of such as the appropriate inputs and considerations for valuation methodologies. *See Kaye*, 1981 WL 15072, at *1. They also may bear on witness credibility, for example if a petitioner or its expert advances positions in litigation that differ materially from the petitioner's pre-litigation views. This information could therefore potentially be used "for purposes of cross-examination or rebuttal of [ ] expert testimony." *NetSpend*, 2014 WL 2536825, at *1.

These precedents are persuasive. The petitioners' objection to producing the valuation-related materials on the basis of relevance was not well-founded. Dole should not have been forced to file a motion to compel to induce the petitioners to abandon it.

B. Potential Admissibility

[7] Rather than continuing to fight a losing battle on relevance, the petitioners oppose the motion to compel on the basis of potential admissibility, namely that that an inquiry into their pre-litigation valuations is not be reasonably calculated to lead to the discovery of admissible evidence. The petitioners argue that their valuations are opinions, not facts, and that the question of valuation in an appraisal is purely a matter for the experts. As petitioners see it, their witnesses are not experts, and their valuations do not satisfy the narrow exceptions that the rules of evidence make for lay opinions. Therefore, they say, there is no basis upon which any information about their opinions could be admissible at trial. According to the petitioners, the decisions in which this court ordered production of similar valuation-related materials either did not consider potential admissibility (*Highfields Capital* and *Greenlight Capital*) or erred in concluding that the information could lead to the discovery of admissible evidence (*NetSpend*).

[8] [9] [10] In my view, the valuation-related information that Dole seeks easily satisfies the potential admissibility requirement. A statutory appraisal proceeding is not a fault-based case in which one side has the burden of proof and loses if it fails to meet its burden. "In a statutory appraisal proceeding, both sides have the burden of proving their respective valuation positions by a preponderance of evidence." *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 520 (Del.1999). "No presumption, favorable or unfavorable, attaches to either side's valuation, including the actual merger price." *Pinson v. Campbell–Taggart, Inc.* 1989 WL 17438, at *6 (Del. Ch. Feb. 28, 1989); *accord Gilbert v. M.P.M. Enters., Inc.*, 709 A.2d 663, 667 (Del.Ch.1997) ("[N]either party is entitled to any preference or presumption in [an appraisal] proceeding.").

> ***550** Each party also bears the burden of proving the constituent elements of its valuation position by a preponderance of the evidence, including the propriety of a particular method, modification, discount, or premium. If both parties fail to meet the preponderance standard on the ultimate question of fair value, the Court is required under the statute to make its own determination.

Jesse A. Finkelstein & John D. Hendershot, *Appraisal Rights in Mergers and Consolidations*, 38–5th C.P.S. §§ IV(H)(3), at A–89 to A–90 (BNA) (collecting cases).

[11] [12] If the parties to an appraisal do not retain experts, or if their experts prove not to be credible, then, by statute, this court is obligated to determine the fair value of the subject corporation's shares. 8 *Del. C.* § 262(h) ("the Court shall determine the fair value of the shares"). In making its determination, this court can consider a wide range of factual evidence, including, but not limited to, the market price, the merger price, other offers for the company or its assets, prices at which knowledgeable insiders sold their shares, internal corporate documents from the respondent, and valuation work prepared for non-litigation purposes. Even when parties have retained valuation experts and the court has relied on their opinions when determining fair value, the court has considered factual evidence relating to valuation as a cross-check, or reality-check, on the litigation-driven figures generated by the experts. The fact that a party

has retained an expert does not enable the party to shield factual material relating to valuation that otherwise would be discoverable and admissible.

1. The Discovery–Stage Burden As To Potential Admissibility

As noted, several Delaware decisions have ordered the production of the type of valuation-related materials that the petitioners here wish to shield from discovery. In *NetSpend,* Vice Chancellor Glasscock rejected the same argument against potential admissibility that the petitioners now advance, stating "I cannot say with confidence ... that the possibility of [admissible] evidence coming to light is entirely foreclosed." 2014 WL 2536825, at *1. The petitioners argue that he erred by placing the burden on the party resisting discovery to prove a negative by foreclosing admissibility, rather than placing the burden on the party seeking discovery to establish that the discovery was reasonably likely to lead to the discovery of admissible evidence.

[13] The burden that a party must meet to obtain discovery under Rule 26(b)(1) is slight, but it does rest on the party seeking the discovery. [2] Admittedly, there are some Delaware decisions which, like *NetSpend.* could be read to have placed the burden on the objecting party to show that the information sought was not reasonably calculated to lead to admissible evidence. Like *NetSpend.* each decision has done so indirectly and implicitly by expressing doubt about whether the inquiry would be productive. [3]

***551** I do not share the petitioners' view that this elocution evidences a misunderstanding about the proper allocation of the Rule 26(b)(1) burden. Rather, the language reflects a proper understanding of the minimal nature of the burden and a practical form of burden-shifting similar to the approach used by the federal courts. *See generally* WRIGHT, MILLER & MARCUS, *supra,* § 2008. Under this approach, the party seeking the information must first provide some minimal explanation as to why the discovery satisfies the requirements of relevance and conditional admissibility. [4] It is then up to the party opposing discovery to show that the explanation is erroneous and that the Rule 26(b)(1) standard has not been met. [5] Delaware decisions addressing relevance suggest a similar approach. [6]

***552** As I read it, *NetSpend* did not misallocate the burden of showing potential admissibility. The decision therefore provides persuasive authority for the proposition that pre-litigation valuation materials prepared by appraisal petitioners are generally discoverable because the information is reasonably calculated to lead to the discovery of admissible evidence.

2. The Potential Admissibility Of Lay Opinion On Valuation

With the burden conscientiously allocated to the defendants, the petitioners' valuations continue to meet the requirement of potential admissibility. As noted, the petitioners argue otherwise, contending that their valuations are opinions, that the question of valuation in an appraisal is purely a matter for experts, and that their Rule 30(b)(6) designees were lay witnesses whose opinion testimony is inadmissible unless it falls within an exception for lay opinion testimony under Delaware Rule if Evidence 701. That rule permits consideration of

> opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702 [relating to expert testimony].

D.R.E. 701.

Assuming Rule 701 applies, I do not believe that the subject of valuation can be cabined easily as a matter requiring "scientific, technical or other specialized knowledge within the scope of Rule 702." Nor, in this case, are the petitioners' witnesses unqualified to express views on value. In my view, their testimony and their pre-litigation valuations will be "helpful to ... the determination of a fact in issue," namely the determination of the fair value of Dole.

a. Rule 703 As An Alternative Basis For Admissibility

As a threshold matter, it is not clear at this stage that the only way that the petitioners' valuation materials might

be considered at trial is as lay opinion under Rule 701. Alternatively, Rule 703 provides that

> [a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

D.R.E. 703. Facts or data that "would otherwise be inadmissible" thus can be admitted as part of an expert's report if an expert in that field "would reasonably rely ***553** on those kinds of facts or data in forming an opinion on the subject."

Experts on valuation in this court often consider other valuation work when rendering their opinions. For example, when developing a weighted average cost of capital for the subject company, an expert may prepare her own calculation and then demonstrate the reasonableness of the selected inputs by showing that other valuations have used the identical or similar inputs, or that the inputs that the expert selected were more conservative than the inputs used by others. The expert may employ similar reasoning to attack the opposing expert's work by showing that other valuations have not used comparable inputs or that the approach selected by the other side's expert was particularly aggressive. Comparisons are made frequently to reports from securities analysts, presentations by the investment bankers who worked on the deal, or internal materials prepared by corporate personnel.

In my view, even assuming that the petitioners were correct and that their valuation work was otherwise inadmissible, it could be reviewed and considered by the respondent's expert. The respondent's expert could discuss the valuation work in her report, either to reinforce the reasonableness of her own approach or to criticize her opponent's work. Under Rule 703, the report of the respondent's expert would be admissible, including the portions discussing the petitioners' valuation work, regardless of whether the petitioners' valuation work was not independently admissible.

b. The Valuation Exercise As Specialized Knowledge

[14] **[15]** Addressing the petitioners' Rule 701 theory more directly, their anti-admissibility argument rests on the premise that valuation is a matter requiring "scientific, technical or other specialized knowledge," making it exclusively a matter for experts under Rule 702. Although valuation is certainly a subject where expert testimony is appropriate and helpful, the field is not an esoteric specialty. Rather than resembling rare disciplines like nuclear physics, brain surgery, or accident reconstruction, valuation more closely resembles the common skill of driving a car. There are professional drivers and quotidian commuters, and while the abilities and knowledge of the former dwarf those of the latter, even a quotidian commuter can offer insight into how a fellow driver handles himself on the road. A witness need not be "qualified as an expert in accident reconstruction" in order to testify, for example, that "based on the damage to the right side of [a vehicle], that [it] was moving to the left at the time of impact," *McKinley v. Casson*, 80 A.3d 618, 627 (Del.2013), or that the driver in front of the witness "did have time to complete her turn" safely, *Norton v. Mulligan*, 2001 WL 1738871, at *4 (Del.Super. June 29, 2001) *aff'd*, 788 A.2d 131 (Del.2001). Factual observations of this type, even if expressed as opinion, differ from lay attempts at after-the-fact accident reconstruction, which is a matter reserved for experts. *See* *Alexander v. Cahill*, 829 A.2d 117, 121 (Del.2009).

Like driving, the valuation field does not lend itself to metes-and-bounds demarcations of expert-only territory.[7] ***554** Some degree of knowledge about valuation has become a practical necessity for contemporary citizens of the American Republic. As Chief Justice Strine has explained, "most ordinary Americans have little choice but to invest in the market. They are in essence 'forced capitalists,' even though they continue to depend for their economic security on their ability to sell their labor and to have access to quality jobs." Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and*

Labor in A More Rational System of Corporate Governance, 33 J. Corp. L. 1, 4 (2007).

> Individuals have become increasingly active in financial markets, and market participation has been accompanied or even promoted by the advent of new financial products and services.... At the same time, market liberalization and structural reforms in Social Security and pensions have caused an ongoing shift in decision power away from the government and employers toward private individuals. Thus, individuals have to assume more responsibility for their own financial well-being.

Maarten van Rooij, Annamaria Lusardi & Rob Alessie, *Financial Literacy And Stock Market Participation,* 101 Journal of Financial Economics 449, 449 (2011). "The investor class is now widespread and will only grow larger as the 401(k) money machine continues to churn." Leo E. Strine, Jr., *Breaking the Corporate Governance Logjam in Washington: Some Constructive Thoughts on A Responsible Path Forward,* 63 Bus. Law. 1079, 1082 (2008).

Implicit in the decision to buy, hold, or sell a stock is an assessment of the stock's value. "Our law should ... hesitate to ascribe rube-like qualities to stockholders." *Chesapeake Corp. v. Shore,* 771 A.2d 293, 328 (Del. Ch.2000) (Strine, V.C.). If stockholders are presumed competent to own stock in the first place, and effectively required to do so by the federal government's policies on saving for college and retirement, then they should be presumed competent to buy, sell, or seek appraisal. If they have done these things, then they should be competent to explain why, as a factual matter, the made the decisions they did, including the views they held contemporaneously about the value of the subject company. *Cf. id.* ("If stockholders are presumed competent to buy stock in the first place, why are they not presumed competent to decide when to sell in a tender offer after an adequate time for deliberation has been afforded them?").

For stockholders to be competent to express views on valuation, and for the court to be able to consider them, seems particularly appropriate given that the ultimate product of an appraisal proceeding is an opinion by a non-expert. As noted, the court is obligated to determine the fair value of the subject corporation's shares. 8 *Del. C.* § 262(h); Finkelstein & Hendershot, *supra,* at A–89 to A–90 (BNA) ("If both parties fail to meet the preponderance standard on the ultimate question of ***555** fair value, the Court is required under the statute to make its own determination."). But as this court's opinions frequently have observed, the past and current members of this court are "law-trained judges," not valuation experts. [8] Ironically for the petitioners' position that valuation is exclusively a matter for experts, the appraisal statute mandates that a lay individual express the final conclusion on the fair value of the petitioners' shares.

To hear from the petitioners about their contemporaneous views on valuation, and to permit respondent's counsel to take discovery into those views, does not determine how much weight a court will give to the evidence. It could be that in a given case, a petitioner has not given much thought to valuation, or had no meaningful basis for deciding to seek appraisal. But that is not the case here. While the petitioners' Rule 30(b)(6) designees may technically have been lay witnesses, they were hardly unqualified to express views about valuation. If Hudson Bay and Fortress believe otherwise, then perhaps they should begin disclosing to their investors that the financial professionals who manage their funds are not qualified to do their jobs.

[16] Hudson Bay's Rule 30(b)(6) designee was Choi, who is currently a portfolio manager for the fund and has held that position for six years. He received his undergraduate degree from Boston University in 1998, having majored in business with a dual concentration in finance and information systems, and minored in economics. After college, he worked as an investment banker, first spending a year as a securities analyst with a boutique firm called Montgomery Securities, then joining Goldman Sachs. He started at Goldman Sachs as an analyst. Over the course of five years at the firm, he rose to the level of vice president. In 2005, he joined Thales Fund Management, a hedge fund, as a portfolio manager. After spending two years there, he moved to Hudson Bay.

Choi testified that as a portfolio manager, he manages a portfolio of securities and regularly makes decisions about buying ***556** and selling stocks. Although sometimes he makes decisions based on market events, on other occasions he makes decisions based on extensive research and analysis. For Dole, he took into account a valuation that used three

methodologies: DCF, comparable companies, and sum of the parts. Choi testified in general terms about the methodologies and demonstrated a level of familiarity with the relevant concepts, as one would expect a portfolio manager to have.

Ripe's Rule 30(b)(6) designee was Neumark, a managing director of FIG. He graduated from Vanderbilt University and then obtained a law degree at UCLA. Although he originally joined FIG's legal department, he subsequently became a managing director and no longer practices law. His current job includes sourcing investments for the company, and he reports to the co-heads of the corporate securities group. He frequently prepares valuation analyses using the DCF method, and the petitioners concede that Neumark "has business skills that enable him to conduct a discounted cash flow and other financial analyses." Opp. at 29 n.22.

Neumark was the investment professional with lead responsibility for the Dole investment, including the buying of Dole shares. He prepared the business case for the investment committee which recommended that the fund buy Dole shares, and the investment committee authorized the transaction based on his analysis. As part of his work, he prepared a valuation of Dole that used the DCF methodology. He also considered using other methodologies. Like Choi, Neumark evidenced his familiarity with the components and assumptions that comprise a DCF analysis. Neumark's valuation included different assumptions, including a downside case.

Based on their depositions, training, and experience, both Choi and Neumark seem more than capable of testifying from personal knowledge about Dole and the value of its shares. To the extent their testimony carries overtones of opinion testimony, those opinions will be helpful to the court. Although not necessary for them to express their opinions, both likely could be qualified as experts by dint of their training and experience. In my view, their status as lay witnesses does not foreclose their ability to testify on the valuation work the performed or their views on valuation.

c. Appraisal As A "Battle Of The Experts"

As the keystone for their assertion that valuation should be exclusively a matter for experts such that lay opinion is not admissible, the petitioners point to the Delaware Supreme Court's description of an appraisal proceeding as a "battle of experts." Opp. at 20 (citing *Rapid–Am. Corp. v. Harris*, 603 A.2d 796, 802 (Del.1992)). The *Rapid–American* decision is only one of many cases to have made this observation.[9] These decisions have not employed this phrase approvingly to suggest limitations on the scope of admissible evidence. Rather, they have used the term as a shorthand reference to what the Delaware Supreme Court identified as "a recurring theme in ... appraisal cases—the ***557** clash of contrary, and often antagonistic, expert opinions on value." *In re Shell Oil Co.*, 607 A.2d 1213, 1222 (Del. 1992).

In appraisal proceedings, the battling experts tend to generate widely divergent valuations as they strive to bracket the outer limits of plausibility. Chief Justice Strine, writing as a Vice Chancellor, described the phenomenon as follows:

> Men and women who purport to be applying sound, academically-validated valuation techniques come to this court and, through the neutral application of their expertise to the facts, come to widely disparate results, even when applying the same methodology. These starkly contrasting presentations have, given the duties required of this court, imposed upon trial judges the responsibility to forge a responsible valuation from what is often ridiculously biased "expert" input.

Finkelstein, 2005 WL 1074364, at *13(footnote omitted). Five years later, again writing as a Vice Chancellor, the Chief Justice described another example of this process in operation:

> As is typical, the outcome of this appraisal proceeding largely depends on my acceptance, rejection, or modification of the views of the parties' valuation experts. Both experts were well qualified to testify about the appropriate inputs to use ... Both these men of valuation science purported to apply the same primary method of valuation—the discounted cash flow

> ("DCF") method—but the expert for the petitioners came up with a value of $139 per share and the expert for [respondent] came up with a value of only $88 per share—a modest $51 per share valuation gap.

Global GT, 993 A.2d at 499–50. Numerous other decisions express similar sentiments about widely divergent, litigation-driven expert valuations. [10]

Rather than supporting the petitioners' idealized depiction of valuation as a scientific process that should be reserved exclusively for neutral opiners, the martial metaphor suggests the need to consider other evidence as a check on the warring experts' models. One informative source of probative evidence is the contemporaneous views of financial professionals who make investment decisions with real money:

> [S]elf-interest concentrates the mind, and people who must back their beliefs ***558** with their purses are more likely to assess the value of the judgment accurately than are people who simply seek to make an argument. Astute investors survive in competition; those who do not understand the value of assets are pushed aside. There is no similar process of natural selection among expert witnesses and [ ] judges.

Matter of Cent. Ice Cream Co., 836 F.2d 1068, 1072 n. 3 (7th Cir.1987)(Easterbrook, J.); *see* *Union Ill. 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd.*, 847 A.2d 340, 359 (Del.Ch.2004) (Strine, V.C.) ("The benefit of the active market for UFG as an entity that the sales process generated is that several buyers with a profit motive were able to assess these factors for themselves and to use those assessments to make bids with actual money behind them. For me (as a law-trained judge) to second-guess the price that resulted from that process involves an exercise in hubris and, at best, reasoned guess-work.")

The petitioners' internal, contemporaneous valuations are real-world assessments by "astute investors" who must "back their beliefs with their purses." Their views may prove to be as or even more credible than the litigation-crafted opinions of valuation experts. Consistent with this approach, Justice Jacobs, then a Vice Chancellor, ruled that an appraisal petitioner who had prepared a valuation of the subject company was not "protected from giving valuation testimony." *Greenlight I*, 2000 WL 33521110, at *1. He held that "if *in fact* [the petitioner] arrived at a valuation of the Respondent corporation," then the witness can "be questioned about his valuation and the basis therefor." *Id.* (emphasis in original). The scope of permissible inquiry included, among other things, the witness' " 'bottom line' valuation range, and any intermediate data and calculations leading thereto." *Greenlight II*, 2001 WL 220861, at *1. The facts about the petitioners' pre-litigation analyses can be used similarly both as evidence of value and to cross-examine their experts.

[17] **[18]** The approach that Delaware courts have taken to other types of real-world evidence reinforces the propriety of considering the petitioners' pre-litigation assessments of value. A court may consider contemporaneous evidence of market behavior, such as the fact that "knowledgeable officers and directors all sold their stock" at the transaction price. *Technicolor I*, 1990 WL 161084, at *32. Sales of this type are not expert opinion; they provide indirect evidence of what knowledgeable lay people believed the value to be. Similarly, a court may consider third party offers to purchase corporate assets "as a 'reality check' [on] any independently determined valuation," such as offers to purchase a wholly owned subsidiary whose operations were not altered by the merger giving rise to appraisal rights. *Ryan v. Tad's Enters., Inc.*, 709 A.2d 682, 702 (Del. Ch.1996) (considering offers to purchase one of corporation's two remaining businesses four months after the merger, one year after the merger, and two years after the merger). The offers are not expert opinion but rather market evidence of what knowledgeable lay people believed about the value of the asset.

The same logic can be extended to the consideration offered in the merger giving rise to the appraisal proceeding. Technically, the merger price is not an expert opinion. It is a data point evidencing what knowledgeable lay people (the buyers and sellers) believed about the value of the company. Yet the Delaware Supreme Court has held that a trial court can consider the merger price as evidence of fair ***559** value. [11]

And this court has remarked that "[t]he fact that a transaction price was forged in the crucible of objective market reality (as distinguished from the unavoidably subjective thought process of a valuation expert) is viewed as strong evidence that the price is fair." *Van de Walle v. Unimation, Inc.*, 1991 WL 29303, at *17 (Del.Ch. Mar. 6, 1991); *accord M.P.M. Enters.*, 731 A.2d at 796 ("A merger price resulting from arms-length negotiations where there are no claims of collusion is a very strong indication of fair value.").

[19] [20] [21] [22] [23] Similar reasoning applies to the subject company's market price. The market price is not expert testimony. It represents an aggregation of the views that many lay people hold about the value of a stock. Under Delaware law, "market value cannot be the sole source of relevant information in fixing 'fair value.' "[12] Yet within the statutory command to consider "all relevant factors" when determining fair value, *see* 8 *Del. C.* § 262(h), the "market price is a relevant factor of some weight where the market is active and where no special consideration indicating that it should be given no weight is present."[13] Indeed, "[w]here there is an established market for a corporation's stock, market value must be considered in appraising the value of the corporation's shares."[14] At a minimum, the "[m]arket ***560** price of a traded security must always be evaluated to ascertain the degree of weight it deserves in an appraisal." *Technicolor I*, 1990 WL 161084, at *31.

In addition to using non-expert evidence when determining the ultimate question of fair value, Delaware courts have used non-expert evidence to evaluate the credibility of valuation inputs. Experts can act strategically when selecting comparable companies or precedent transactions, when picking multiples, or when choosing inputs for their cost-of-capital calculations. Perhaps more importantly, academic studies have shown that experts unconsciously reach higher or lower results depending on whether they represent the plaintiff or the defendant due to cognitive phenomena like attachment bias.[15] It is helpful to check an expert's litigation-driven work or a party's litigation-inspired arguments against other valuations, particularly pre-litigation analyses.[16] The potential for testing courtroom advocacy with pre-litigation positions helps temper "the adversarial hyperbole that inevitably influences an expert's opinion in valuation proceedings." *Kleinwort Benson*, 1995 WL 376911, at *5.

Discovery into the petitioners' analyses also should help promote settlement.[17] When parties and their experts start from extreme points on a bargaining range, ***561** compromise is more difficult.[18] Access to both sides' pre-litigation valuations should help de-bias the litigation positions, constrain the range, and promote settlement.

3. The Objection To Potential Admissibility Is Overruled.

In requesting documents relating to petitioners' valuations, serving interrogatories about them, and identifying the valuations as topics for the Rule 30(b)(6) depositions, Dole sought discovery that fell within the scope of Rule 26(b)(1) under this court's precedents. Having considered the petitioner's arguments at length, this decision concludes that the information is discoverable under Rule 26(b)(1) because it is both relevant and reasonably calculated to lead to the discovery of admissible evidence.

C. Privilege And Work Product

[24] Ripe has claimed separately that its valuation information is not discoverable because it is privileged or constitutes work product. Ripe focuses in particular on the Fortress Memorandum, which Neumark prepared after consultation with petitioners' counsel. Ripe should submit the Fortress Memorandum for *in camera* review.

[25] [26] [27] "The burden of proving that the [attorney-client] privilege applies to a particular communication is on the party asserting the privilege." *Moyer v. Moyer*, 602 A.2d 68, 72 (Del.1992). An attorney performing a business function "cannot avail himself of the protection associated with the attorney-client privilege or the work product doctrine." *Lee v. Engle*, 1995 WL 761222, at *3 (Del.Ch. Dec. 15, 1995) (rejecting privilege assertion where attorney was "not act[ing] in the capacity of ... in-house counsel") (emphasis removed); *Texaco, Inc. v. Phx. Steel Corp.*, 264 A.2d 523, 526 (Del.Ch.1970) (rejecting privilege assertion with respect to memorandum prepared by in-house counsel where counsel was "not ... acting as counsel with regard to the memorandum in question"). When information contains both legal and business aspects, it "will be considered privileged only if the legal aspects predominate." *MPEG LA, L.L.C. v. Dell Global B.V.*, 2013 WL 6628782, at *2 (Del.Ch. Dec. 9, 2013).

[28] The question of whether an attorney was performing a business function or a legal function depends in part on the context. A particular task may be a business function in one context and a legal function in another context without any changes in the task itself. The situation in *AM General Holdings LLC v. Renco Group, Inc.*, 2013 WL 1668627 (Del.Ch. Apr. 18, 2013), while not an appraisal action, is instructive. In *AM General*, attorneys were engaged in valuing an asset according to a method specified by a contract. *Id.* at *2. The court held that during one period of time the attorneys had the primarily business purpose of complying ***562** with the contractual requirement to prepare a valuation analysis, so work product protection was not available, while in another period of time the work was "carried out primarily for the purpose of assessing legal options, strategies, and consequences," so work product protection was available. *Id.* Here, it is necessary to make the same distinction between analyses prepared for business purposes, such as analyzing investment opportunities, and analyses primarily focused on assessing legal strategies in anticipation of litigation.

Except for the Fortress Memorandum, Ripe has failed to show that its valuation materials warrant protection. Neumark has a law degree, and he originally joined FIG's legal department, but he no longer serves as an in-house lawyer and does not practice law. He is currently a Managing Director whose job includes sourcing investments for the company. In the case of Dole, he prepared valuation analyses to make investment decisions, including a recommendation to his firm's investment committee. He testified that his aim was to make his firm money, not provide legal advice. Absent a particularized showing about a specific document or communication, Ripe has failed to carry its burden of demonstrating that Neumark was acting as a lawyer.

The Fortress Memorandum potentially stands on a different footing. Neumark testified that it contains an analysis of the appraisal statute and was prepared after consultation with outside counsel. It is possible that it contains legal advice or work product and that the legal material can be redacted or otherwise excised. To enable the court to evaluate these claims, Ripe shall provide the Fortress Memorandum to the court for *in camera* review.

D. Fee Shifting

[29] [30] Rule 37(b)(2) provides that if a defendant has violated a discovery order, the court "shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure." "An award of expenses and fees is mandatory under Rule 37 where a party is found to have failed to honor a discovery request 'unless the Court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.' " *Beck v. Atl. Coast PLC*, 868 A.2d 840, 851–52 (Del.Ch.2005) (Strine, V.C.) (citations omitted).

The petitioners' relevance objection was unfounded and does not provide a reason to waive fee shifting. The petitioners' objection to potential admissibility was contrary to prior precedent, and, to the extent the petitioners believed that the court should distinguish those cases or reach a different result, it was incumbent upon the petitioners to seek relief. The need for the petitioners to seek a judicial ruling to maintain their objections crystallized once Dole noticed the Rule 30(b)(6) depositions and identified topics to which the petitioners objected on grounds of relevance. Rule 30(d)(1) permits a lawyer to instruct a deponent not to answer "only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the Court, or to present a motion [for protective order]." Rule 30(c) states that during a deposition, "[e]vidence objected to shall be taken subject to the objections." These rules made clear that the petitioners could not stand on their objections by instructing their witnesses not to answer Dole's questions. Instructions not to answer only would be permissible on grounds of privilege or to "enforce a limitation on evidence directed by the Court." The petitioners were obligated to obtain that limitation if they wanted to enforce it.

***563** Under the circumstances, the petitioners' failure to provide the discovery was not substantially justified. Dole is awarded the reasonable costs, including attorneys' fees, that it incurred in taking the Rule 30(b)(6) depositions of Choi and Neumark and in bringing this motion to compel. The award should not be interpreted as a sanction for bad faith litigation conduct. It is simply the consequence contemplated by Rule 37 as part of an incentive structure intended by the drafters of the amended rule to limit the need for judicial intervention in discovery disputes.

III. CONCLUSION

Within one week of the date of this decision, petitioners shall (i) produce all documents reflecting or relating to any valuations or similar analyses of Dole that Hudson Bay and Ripe prepared, reviewed, or considered, (ii) serve supplemental responses to interrogatories that answer questions directed to these issues, and (iii) designate Rule 30(b)(6) witnesses to testify about the topics to which Hudson Bay and Ripe previously objected. The materials covered by this decision include:

- All written documents, including Excel files, that set forth, summarize, or otherwise reflect valuation analyses of Dole or Dole stock, including the Hudson Bay valuation analysis Excel file;
- Any internal valuations of Dole or Dole stock;
- Any valuations of Dole or Dole stock reviewed or considered by Petitioners in connection with this action;
- All non-privileged documents and communications in Petitioners' possession, custody, or control that are responsive to Request Nos. 11 and 17; and
- All non-privileged information in Petitioners' possession, custody, or control that is responsive to Interrogatory Nos. 1 and 4–7.

The lone exception is the Fortress Memorandum, which Ripe shall provide to the court for *in camera* review. For the Rule 37 award of fees and costs, Dole's counsel shall submit a Rule 88 affidavit and a proposed form of implementing order. If the petitioners object to the reasonableness of the amounts sought, they may file an opposition within ten days, to which Dole may reply.

All Citations

114 A.3d 541

Footnotes

1 *See In re Appraisal of NetSpend Hldgs., Inc.*, 2014 WL 2536825, at *1 (Del.Ch. June 3, 2014) (ordering production of documents relating to petitioners' pre-suit valuations of respondent); *Highfields Capital, Ltd. v. AXA Fin., Inc.*, C.A. No. 804–N (Del. Ch. July 18, 2006) (ORDER) (same); *Greenlight Capital Qualified, L.P. v. Emerging Commc'ns, Inc. (Greenlight II)*, 2001 WL 220861, at *2 (Del. Ch. Feb. 23, 2001) (ordering petitioner to permit testimony by Rule 30(b)(6) witness on valuation matters in coordinated appraisal proceeding and breach of fiduciary duty action); *Greenlight Capital Qualified, L.P. v. Emerging Commc'ns, Inc. (Greenlight I)*, 2000 WL 33521110, at *1 (Del.Ch. Aug. 21, 2000) (ordering petitioner to produce Rule 30(b)(6) witness on valuation matters in coordinated appraisal proceeding and breach of fiduciary duty action).

2 *See, e.g., Minieri v. Bennett*, 2012 WL 5951514, at *2 (Del. Ch. Nov. 29, 2012); *Grace Bros. v. Siena Hldgs., Inc.*, 2008 WL 441390, at *1 (Del. Ch. Feb. 14, 2008); *Cede & Co. v. Technicolor, Inc.*, 10 Del. J. Corp. L. 158, 162 (Del.Ch.1984); *Hopkins v. Chesapeake Util. Corp.*, 300 A.2d 12, 14 (Del.Super.1972).

3 *See, e.g., Atkins v. Hiram*, 1993 WL 545416, at *3 (Del.Ch. Dec. 23, 1993) ("It is not clear that the evidence sought is not reasonably calculated to lead to the discovery of admissible evidence in this action."); *Weinberger v. UOP, Inc.*, 5 Del. J. Corp. L. 158, 165 (Del.Ch.1979) ("On the record presented for argument on this motion, I cannot say that the responses sought ... are not reasonably calculated to lead to the discovery of admissible evidence.").

4 *See Auguste v. Alderden*, 2008 WL 3211283, at *3 (D.Colo. Aug. 6, 2008) ("When relevance is not apparent on the face of a party's discovery request, the party seeking the discovery has the burden to show the relevance by sufficiently demonstrating that the request appears reasonably calculated to lead to the discovery of admissible evidence."); *E.E.O.C. v. Renaissance III Org.*, 2006 WL 832504, at *1 (N.D.Tex. Mar. 30, 2006) ("As the party seeking discovery, defendant must establish this threshold burden [of showing that

the discovery appears reasonably calculated to lead to the discovery of admissible evidence]"); *Vardon Golf Co. v. BBMG Golf Ltd.*, 156 F.R.D. 641, 650 (N.D.Ill.1994) ("[The party seeking discovery] need only articulate why it is reasonable to believe that information of that nature would be revealed were discovery permitted."); *Fid. Fed. Sav. & Loan Ass'n v. Felicetti*, 148 F.R.D. 532, 534 (E.D.Pa.1993) ("plac[ing] the onus on the plaintiffs to show that the documents ... are relevant and likely to lead to the discovery of admissible evidence.").

5 *See Bennett v. La Pere*, 112 F.R.D. 136, 139 (D.R.I.1986) ("Once it is determined that material sought by discovery is relevant and not privileged, the discoverer has crossed the modest threshold which Rule 26(b) erects. From that point forward, the party opposing discovery should have the burden of establishing some good cause or sound reason for blocking disclosure."); *accord Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 145 F.R.D. 92, 95 (S.D.Iowa 1992) (following *Bennett*). The *Bennett* line of cases rejects a competing approach under which the party seeking discovery must make "some particularized showing of a likelihood that admissible evidence will be generated.... " *Bottaro v. Hatton Assocs.*, 96 F.R.D. 158, 160 (E.D.N.Y.1982). The *Bennett* decision explained why the "particularized showing" requirement is inconsistent with the liberal approach to discovery contemplated by the federal rules. *See Bennett*, 112 F.R.D. at 139–40. In my view, requiring a "particularized showing" is equally inconsistent with this court's rules and with precedent taking a liberal approach to discovery.

6 *See Boxer*, 1981 WL 15479, at *2 (explaining that information is discoverable "unless it is clear that the information sought can have no possible bearing upon the subject matter of the action."); *see also Stauffer Chem.*, 1990 WL 177572, at *3 (explaining that information is discoverable "if there is any possibility that the information sought may be relevant to the subject matter of the action"); *Blaustein v. Standard Oil Co.*, 70 A.2d 716, 727 (Del.Super.1949) ("Broadly speaking, the objection of irrelevancy and immateriality should only be sustained where it appears beyond reasonable doubt that the information sought could not be relevant or material and would not be reasonably calculated to lead to the discovery of admissible evidence."); *Klerlein v. Local Union No. 451*, 1979 WL 174451, at *5 (Del. Ch. Sept. 11, 1979) ("The objections of relevancy should only be sustained where it appears beyond a reasonable doubt that the information sought could not be relevant or material and would not be reasonably calculated to lead to discovery of admissible evidence."); *New Castle Cnty. v. Christiana Town Ctr., LLC*, 2004 WL 1835103, at *1 (Del. Ch. Aug. 16, 2004) (quoting *Boxer*); *Loretto Literary & Benev. Inst. v. Blue Diamond Coal Co.*, 1980 WL 268060, at *4 (Del. Ch. Oct. 24, 1980) ("While discovery must, therefore, be relevant to the subject matter of the suit, relevancy must be viewed liberally and if there is any possibility that the discovery will lead to relevant evidence it should be permitted." (citations omitted)); *Weinberger v. United Fin. Corp*, 1979 WL 2707 (Del. Ch. Nov. 20, 1979) (allowing discovery where the court was "not prepared to state as a blanket proposition that inquiry ... can never lead to the discovery of relevant evidence bearing on the question [at issue]"). A number of cases state the related proposition that discovery should be allowed unless to do so would impede the administration of justice. *See, e.g., Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1061 (Del.1986); *Fish Eng'g Corp. v. Hutchinson*, 162 A.2d 722, 725 (Del.1960); *East v. Tansey*, 1993 WL 330063, at *1 (Del. Ch. Aug. 24, 1993).

7 Indeed, both Delaware decisions and those knowledgeable about valuation recognize that the field is as much art as science. *See, e.g., Matter of Shell Oil Co.*, 607 A.2d 1213, 1221 (Del.1992) ("Valuation is an art rather than a science."); *In re Smurfit–Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *24 (Del.Ch. May 20, 2011) ("[U]ltimately, valuation is an art and not a science."); Peter E. Bronstein & David A. Typermass, *Business Valuation Reports—The Importance of Proactive Lawyering*, N.Y. St. B.J., February 2010, at 12, 16 ("[T]he appraisal process is not an exact science .... Business valuation is often described as part art

and part science because many of the techniques used by business appraisers require the use of subjective assumptions."); Kenton K. Yee, *Control Premiums, Minority Discounts, and Optimal Judicial Valuation,* 48 J.L. & Econ. 517, 536 (2005) ("The practice of valuation is an inexact art, not a precise science."); Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value,* 47 Duke L.J. 613, 629 (1998) ("Each appraisal technique is but a way of estimating the fair value or true value or intrinsic value of a company, and undeniably, valuation is an art rather than a science." (internal quotation marks omitted)).

8 *See, e.g., Laidler v. Hesco Bastion Envtl., Inc.,* 2014 WL 1877536, at *1 (Del. Ch. May 12, 2014) ("This case presents a demand for a statutory appraisal, a response to which should be a daunting task for a law-trained judge ...." (footnote omitted)); *Huff Fund Inv. P'ship v. CKx, Inc.,* 2013 WL 5878807, at *1 (Del. Ch. Nov. 1, 2013) ("A law-trained judge would have scant grounds to substitute his own appraisal for those of the real-estate valuation experts, and would have no reason to second-guess the market price absent demonstration of self-dealing or a flawed sales process. I am faced with a similar situation in this much more complex venue of the sale of a corporate enterprise."); *In re Orchard Enters., Inc.,* 2012 WL 2923305, at *18 (Del. Ch. July 18, 2012) (Strine, C.) ("As a law-trained judge who has to come up with a valuation deploying the learning of the field of corporate finance, I choose to deploy one accepted method as well as I am able, given the record before me and my own abilities."); *Global GT LP v. Golden Telecom, Inc.,* 993 A.2d 497, 517 n.126 (Del. Ch.2010) *aff'd,* 11 A.3d 214 (Del.2010) (explaining that "academics and professionals throw around ... ranges of value [that] are used by a law-trained judge to come to a single point estimate of value" and that "[t]he law-trained judges who must perform such analyses are more conscious than anyone of the inherent risk of error in such an endeavor, and indeed of the reality that no one can really tell if an error was made"); *Finkelstein v. Liberty Digital, Inc.,* 2005 WL 1074364, at *12 (Del. Ch. Apr. 25, 2005) (Strine, V.C.) ("The judges of this court are unremittingly mindful of the fact that a judicially selected determination of fair value is just that, a law-trained judge's estimate that bears little resemblance to a scientific measurement of a physical reality."). Perhaps someday a true valuation expert will join the Chancery bench, or a member of the court will claim that status. To date, none of us have the background, nor been so bold in asserting the expertise.

9 *See, e.g., Kahn v. Household Acq. Corp.,* 591 A.2d 166, 175 (Del.1991); *Cede & Co. v. Technicolor, Inc.,* 2003 WL 23700218, at *2 (Del. Ch. Dec. 31, 2003), *aff'd in part, rev'd in part,* 884 A.2d 26 (Del.2005); *Hanover Direct, Inc. S'holders Litig.,* 2010 WL 3959399, at *1 (Del. Ch. Sept. 24, 2010); *In re Emerging Commc'ns, Inc. S'holders Litig.,* 2004 WL 1305745, at *11 (Del. Ch. May 3, 2004); *see also S. Muoio & Co. LLC v. Hallmark Entm't Invs. Co.,* 2011 WL 863007, at *2 (Del. Ch. Mar. 9, 2011) (describing valuation issues in breach of fiduciary duty case as a "battle of the experts"), *aff'd,* 35 A.3d 419 (Del.2011).

10 *See, e.g., Emerging Commc'ns,* 2004 WL 1305745, at *11 (comparing petitioner's valuation of $41 per share with respondent's valuation of $10.38 per share and noting that "[t]hese widely differing valuations of the same company result from quite different financial assumptions that each sponsoring side exhorts this Court to accept"); *Del. Open MRI Radiology Assocs., P.A. v. Kessler,* 898 A.2d 290, 310–11 (Del.Ch.2006) (noting that "competing experts have provided widely divergent estimates of value, while supposedly using the same well-established principles of corporate finance"); *Gray v. Cytokine Pharmasciences, Inc.,* 2002 WL 853549, at *6 (Del. Ch. Apr. 25, 2002) ("As is all too often the case, the parties' experts ... came up with enormously disparate conclusions as to [the company's value]"); *Kleinwort Benson Ltd. v. Silgan Corp.,* 1995 WL 376911, at *5 (Del. Ch. June 15, 1995) (noting the need to scrutinize analyses "to remove the adversarial hyperbole that inevitably influences an expert's opinion in valuation proceedings"); *Cede & Co. v. Technicolor, Inc. (Technicolor I),* 1990 WL 161084, at *32 (Del.Ch. Oct. 19, 1990), *consolidated with Cinerama, Inc. v. Technicolor, Inc.,* 1991 WL 111134 (Del.Ch. June 24, 1991), *and aff'd in part and rev'd in*

part on other grounds, 634 A.2d 345 (Del.1993) (noting competing valuations and observing that "[t]he dynamics of litigation no doubt contribute to this distressingly wide difference"); *Salomon Bros. v. Interstate Bakeries Corp.*, 1992 WL 94367, at *3 (Del.Ch. May 4, 1992) (noting "each expert's apparent bias toward a result that would yield the highest or lowest possible number in accordance with his client's interests.").

11 *M.P.M. Enters.*, 731 A.2d at 796; *see also Golden,* 11 A.3d at 217–18 (holding that the trial court, when considering the merger price, shall not presumptively defer to it). This court has done so in various cases. *See, e.g., Huff,* 2013 WL 5878807, at *1 (relying on merger price to determine fair value); *Highfields Capital, Ltd. v. AXA Financial, Inc.*, 939 A.2d 34, 59–61 (Del.Ch.2007) (finding on facts of case that the transaction price provided a solid indicator of fair value); *ONTI, Inc. v. Integra Bank,* 751 A.2d 904, 907 (Del.Ch.1999) (basing appraisal valuation in part on merger price).

12 *Technicolor I,* 1990 WL 161084, at *18 n. 39; *see Rapid–Am. Corp.*, 603 A.2d at 806 ("the Court of Chancery long ago rejected exclusive reliance upon market value in an appraisal action"); *Bell v. Kirby Lumber Corp.*, 413 A.2d 137, 141 (Del.1980) ("market value may not be taken as the sole measure of the value of the stock") (citations omitted)' *In re Del. Racing Ass'n,* 213 A.2d 203, 211 (Del.1965) ("It is, of course, equally axiomatic that market value, either actual or constructed, is not the sole element to be taken into consideration in the appraisal of stock."); *Jacques Coe & Co. v. Minneapolis–Moline Co.*, 75 A.2d 244, 247 (Del. Ch.1950) (observing that market price should not be exclusive measure of value); *Chi. Corp. v. Munds,* 172 A. 452, 455 (Del. Ch.1934) (rejecting market price as sole measure of value in an appraisal because "[t]here are too many accidental circumstances entering into the making of market prices to admit them as sure and exclusive reflectors of fair value").

13 *Technicolor I,* 1990 WL 161084, at *18 n. 39; *see Gonsalves v. Straight Arrow Publ'rs, Inc.*, 793 A.2d 312, 326 (Del. Ch.1998) (noting that the "market value model[ ] ... may be used, in an appropriate situation, to provide a relevant estimate of fair value"); *Cooper v. Pabst Brewing Co.*, 1993 WL 208763, at *8 (Del. Ch. June 8, 1993) (determining value of shares "primarily based upon an estimated actual market value of the stock"); *ONTI,* 751 A.2d at 915 (considering stock price by valuing the shares at a discount to that price to "factor in this limited market for the shares"). In addition, where this court has considered comparable company analyses in valuations, it is relying in part upon the market price of other companies that are found to be similar to the company at issue. *See, e.g., Andaloro v. PFPC Worldwide, Inc.*, 2005 WL 2045640, at *18–20 (Del. Ch. Aug. 19, 2005) (Strine, V.C.); *Doft & Co. v. Travelocity.com Inc.*, 2004 WL 1152338, at *8 (Del. Ch. May 20, 2004); *Taylor v. Am. Specialty Retailing Grp., Inc.*, 2003 WL 21753752, at *9 (Del. Ch. July 25, 2003).

14 *Cooper,* 1993 WL 208763, at *8; *see In re Del. Racing Ass'n,* 213 A.2d at 211 ("It is, of course, axiomatic that if there is an established market for shares of a corporation the market value of such shares must be taken into consideration in an appraisal of their intrinsic value."); *In re Creole Petroleum Corp.*, 1978 WL 2487, at *2 (Del.Ch. Jan. 11, 1978) (noting that market value "is normally worthy of great weight"); *cf. Mills v. Elec. Auto–Lite Co.*, 552 F.2d 1239, 1247 (7th Cir.1977) ("In a market economy, market value will always be the primary gauge of an enterprise's worth."); *Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 855 A.2d 1059, 1080 (Del.Ch.2003) ***aff'd,*** 840 A.2d 641 (Del.2003) ("In the real world, market prices matter and are usually considered the best evidence of value.").

15 *See* Larelle Chapple, Peter Crofts, Colin Ferguson & Jane Hronsky, *Professional Independence and Attachment Bias: An Exploratory Study* 2 (seminar paper) (August 2011), http://

www.businessandeconomics.mq.edu.au/our_ departments/accounting_and_corporate_ governance/Accg_ docs/pdf/seminar_ papers/2011/colin_ ferguson.pdf (finding statistically significant variation in estimates of contract damages provided by independent accounting experts depending on whether the expert was identified as a plaintiff's expert or a defense expert, with a mean plaintiff estimate of $4.2 million and a mean defense estimate of $2.7 million); L.A. Ponemon, *The Objectivity of Accountants' Litigation Support Judgments,* 70 The Accounting Review 467 (1995) (finding that auditors allocated to either the plaintiff or defendant in a disputed insurance claim scenario estimated higher damages when assigned to the plaintiff role than when assigned to the defendant insurance company).

16 *See, e.g.,* *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1186 (Del.Ch.1999) (rejecting a corporation's challenge to the comparable companies used by plaintiffs expert where the defendant's investment banker "in preparing his fairness opinion ... included, as comparable companies, essentially the same ones"); *Neal v. Ala. By–Prods. Corp.*, 1990 WL 109243, at *11 n. 9 (Del.Ch. Aug. 1, 1999) *aff'd,* 588 A.2d 255 (Del.1991) (finding "a certain hollowness" in corporation's objection to valuation that used same assumption as company's own internal valuation); *Cavalier Oil Corp. v. Harnett,* 1988 WL 15816, at *12, *16, *18, *31 (Del.Ch. Feb. 22, 1988) (repeatedly noting conflicts between company's positions and internal documents, including earlier internal appraisal).

17 *See Caskey v. Man Roland, Inc.*, 83 F.3d 418 (5th Cir.1996) ("[O]ne of the purposes of open discovery is to promote settlement."); *Bond v. Dist. Court, In & For Denver Cnty.*, 682 P.2d 33, 40 (Colo.1984) ("The purposes of pretrial discovery include: ... the promotion of expeditious settlement of cases."); *Martin v. Long Island R. Co.*, 63 F.R.D. 53, 54 (E.D.N.Y.1974) ("Meaningful settlement discussions will be facilitated if the ... parties can evaluate possible evidence. An overwhelming percentage of civil cases are settled. It is as important to have fair procedures for this kind of disposition as it is for trials.").

18 *See* Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self–Serving Biases,* 11 Journal of Economic Perspectives 109 (1997) (describing a study in which participants assigned to the role of plaintiff generated significantly higher confidential estimates of the amount of damages that a judge would award than defendants, and that the more divergent the amounts, the more likely that a bargaining impasse would be reached); Linda Babcock, *et al., Biased Judgments of Fairness in Bargaining,* 85 Am. Econ. Rev. 1337 (1995) (describing similar experiment generating similar results); George Loewenstein, *et al., Self–Serving Assessments of Fairness and Pre–Trial Bargaining,* 22 J. Legal Studs. 135 (1993) (same); Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict,* 51 Organizational Behavior and Human Decision Processes 176 (1992) (same).

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637 A.2d 34
Supreme Court of Delaware.

PARAMOUNT COMMUNICATIONS INC., Viacom Inc., Martin S. Davis, Grace J. Fippinger, Irving R. Fischer, Benjamin L. Hooks, Franz J. Lutolf, James A. Pattison, Irwin Schloss, Samuel J. Silberman, Lawrence M. Small, and George Weissman, Defendants Below, Appellants,
v.
QVC NETWORK INC., Plaintiff Below, Appellee.
In re PARAMOUNT COMMUNICATIONS INC. SHAREHOLDERS' LITIGATION.

Submitted: Dec. 9, 1993.
Decided by Order: Dec. 9, 1993.
Opinion: Feb. 4, 1994.

Synopsis
Following corporation's announcement of merger, competing tender offeror brought suit for injunctive relief. The Court of Chancery, —— A.2d ——,granted preliminary injunction. The Supreme Court, Veasey, C.J., held that: (1) sale of control implicated enhanced judicial scrutiny, and (2) directors violated their fiduciary duties.

Affirmed and remanded.

Procedural Posture(s): Motion for Preliminary Injunction.

West Headnotes (17)

[1] **Appeal and Error** ⇐ Preliminary injunction; temporary restraining order

Supreme Court's standard and scope of review as to facts on appeal from preliminary injunction entered by Court of Chancery is whether, after independently reviewing entire record, Supreme Court can conclude that findings of Court of Chancery are sufficiently supported by the record and are product of orderly and logical deductive process.

5 Cases that cite this headnote

[2] **Corporations and Business Organizations** ⇐ Actions by minority shareholders; judicial scrutiny

Directors' conduct is subject to enhanced scrutiny in situations involving approval of transaction resulting in sale of control, and adoption of defensive measures in response to threat to corporate control.

12 Cases that cite this headnote

[3] **Corporations and Business Organizations** ⇐ Actions by minority shareholders; judicial scrutiny

Enhanced judicial scrutiny was mandated in sale or change of control transaction, by threatened diminution of current shareholders' voting power, fact that control premium was being sold, and traditional concern of courts for actions which impair or impede shareholder voting rights.

27 Cases that cite this headnote

[4] **Corporations and Business Organizations** ⇐ Duties to, rights and remedies of, and actions by, dissenting shareholders

Key features of enhanced judicial scrutiny applied to sale or change of control transaction are: judicial determination regarding adequacy of decision-making process employed by directors, including information on which directors based their decision; and judicial examination of reasonableness of directors' action in light of circumstances then existing.

34 Cases that cite this headnote

[5] **Corporations and Business Organizations** ⇐ Rights and remedies of, and actions by, dissenting shareholders

In sale or change of control situation, directors have burden of proving that they were adequately informed and acted reasonably.

15 Cases that cite this headnote

[6] **Corporations and Business Organizations** ⇐ Business judgment rule in general

In cases where traditional business judgment rule is applicable and board of directors acted with due care, in good faith and in honest belief that they were acting in best interests of shareholder, court gives great deference to substance of directors' decision and will not invalidate the decision, will not examine its reasonableness, and will not substitute its views for those of the board if latter's decision can be attributed to any rational business purpose.

31 Cases that cite this headnote

[7] **Corporations and Business Organizations** ⇐ Fiduciary Duties as to Management of Corporate Affairs in General

In applying enhanced scrutiny to sale or change of control transaction, courts will not substitute its business judgment for that of directors, but will determine if directors' decision was, on balance, within range of reasonableness.

78 Cases that cite this headnote

[8] **Corporations and Business Organizations** ⇐ Duties to, rights and remedies of, and actions by, dissenting shareholders

In sale or change of control transaction, enhanced judicial scrutiny is applied, and directors are obligated to seek best value reasonably available for stockholders, regardless of whether there is to be breakup of the corporation.

57 Cases that cite this headnote

[9] **Corporations and Business Organizations** ⇐ Fiduciary Duties as to Management of Corporate Affairs in General

When corporation undertakes transaction which will cause change in corporate control or breakup of corporate entity, directors' obligation is to seek best value reasonably available to stockholders.

48 Cases that cite this headnote

[10] **Corporations and Business Organizations** ⇐ Good faith

Corporations and Business Organizations ⇐ Duty to inquire; knowledge or notice

Corporations and Business Organizations ⇐ Degree of care required and negligence

Having decided to sell control of corporation and faced with two tender offers, directors had obligation: to be diligent and vigilant in critically examining proposed transaction and competing offers; to act in good faith; to obtain, and act with due care on, all material information reasonably available, including information necessary to compare the two offers to determine which of these transactions, or an alternative course of action, would provide best value reasonably available to stockholders; and to negotiate actively and in good faith with both prospective purchasers to that end.

40 Cases that cite this headnote

[11] **Corporations and Business Organizations** ⇐ Duties of directors and officers in general; business judgment rule

Enhanced judicial scrutiny of directors' action was implicated by defensive provisions of merger agreement, coupled with sale of control and subsequent disparate treatment of competing bidders.

7 Cases that cite this headnote

[12] **Corporations and Business Organizations** ⇐ Duties of directors and officers in general; business judgment rule

Having entered merger agreement with one corporation, directors violated their fiduciary duties by failing to modify improper defensive

provisions of agreement or improve economic terms of agreement when faced with competing higher offer.

6 Cases that cite this headnote

[13] **Corporations and Business Organizations** ⇐ Requisites and validity

Provision of merger agreement, whereby board of selling corporation agreed that it would not solicit, encourage, discuss, negotiate or endorse any competing transaction unless certain conditions were met, was unenforceable, to extent provision was inconsistent with directors' fiduciary duties.

18 Cases that cite this headnote

[14] **Corporations and Business Organizations** ⇐ Fiduciary Duties as to Management of Corporate Affairs in General

To extent that contract, or provision thereof, purports to require board to act or not act in such a fashion as to limit exercise of fiduciary duties, it is invalid and unenforceable.

16 Cases that cite this headnote

[15] **Corporations and Business Organizations** ⇐ Construction, operation, and effect

Defensive provision of merger agreement, which granted buyer an option to purchase percentage of seller's outstanding common stock at a fixed price if seller terminated agreement because of competing transaction, if seller's stockholders did not approve merger or if seller's board recommended competing transaction, and which permitted buyer to pay for shares with senior subordinated note of questionable marketability and allowed buyer to elect to require seller to pay seller in cash a sum equal to difference between purchase price and market price of seller's stock, was invalid, insofar as provisions were inconsistent with directors' fiduciary duties.

9 Cases that cite this headnote

[16] **Attorneys and Legal Services** ⇐ Pro hac vice admission

Although there is no clear mechanism for Supreme Court to deal effectively with misconduct by out-of-state lawyers in depositions in proceedings pending in Delaware courts, consideration will be given to whether it is appropriate and fair to take into account attorney's behavior in event application is made by him in the future to appear pro hac vice in any proceeding in the state. Rules of Prof.Conduct, Rule 3.5(c), Del.C.Ann.

14 Cases that cite this headnote

[17] **Attorneys and Legal Services** ⇐ Pro hac vice admission

Out-of-state attorney must be admitted pro hac vice before participating in deposition in proceeding pending in state courts.

7 Cases that cite this headnote

***35** Upon appeal from the Court of Chancery. AFFIRMED.

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Before VEASEY, C.J., MOORE and HOLLAND, JJ.

Opinion

VEASEY, Chief Justice.

In this appeal we review an order of the Court of Chancery dated November 24, 1993 (the "November 24 Order"), preliminarily enjoining certain defensive measures designed to facilitate a so-called strategic alliance between Viacom Inc. ("Viacom") and Paramount Communications Inc. ("Paramount") approved by the board of directors of Paramount (the "Paramount Board" or the "Paramount directors") and to thwart an unsolicited, more valuable, tender offer by QVC Network Inc. ("QVC"). In affirming, we hold that the sale of control in this case, which is at the heart of the proposed strategic alliance, implicates enhanced judicial scrutiny of the conduct of the Paramount Board under *Unocal Corp. v. Mesa Petroleum Co.*, Del.Supr., 493 A.2d 946 (1985), and *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, Del.Supr., 506 A.2d 173 (1986). We further hold that the conduct of the Paramount Board was not reasonable as to process or result.

QVC and certain stockholders of Paramount commenced separate actions (later consolidated) in the Court of Chancery seeking preliminary and permanent injunctive relief against Paramount, certain members of the Paramount Board, and Viacom. This action arises out of a proposed acquisition of Paramount by Viacom through a tender offer followed by a second-step merger (the "Paramount–Viacom transaction"), and a competing unsolicited tender offer by QVC. The Court of Chancery granted a preliminary injunction. *QVC Network, Inc. v. Paramount Communications Inc.*, Del.Ch., 635 A.2d 1245, Jacobs, V.C. (1993), (the "Court of Chancery Opinion"). We affirmed by order dated December 9, 1993. *Paramount Communications Inc. v. QVC Network Inc.*, Del.Supr., Nos. 427 and 428, 1993, 637 A.2d 828, Veasey, C.J. (Dec. 9, 1993) (the "December 9 Order"). [1]

The Court of Chancery found that the Paramount directors violated their fiduciary duties by favoring the Paramount–Viacom transaction over the more valuable unsolicited offer of QVC. The Court of Chancery preliminarily enjoined Paramount and the individual defendants (the "Paramount defendants") from amending or modifying Paramount's stockholder rights agreement (the "Rights Agreement"), including the redemption of the Rights, or taking other action to facilitate the consummation of the pending tender offer by Viacom or any proposed second-step merger, including the Merger Agreement between Paramount and Viacom dated September 12, 1993 (the "Original Merger Agreement"), as amended on October 24, 1993 (the "Amended Merger Agreement"). Viacom and the Paramount defendants were enjoined from taking any action ***37** to exercise any provision of the Stock Option Agreement between Paramount and Viacom dated September 12, 1993 (the "Stock Option Agreement"), as amended on October 24, 1993. The Court of Chancery did not grant preliminary injunctive relief as to the termination fee provided for the benefit of Viacom in Section 8.05 of the Original Merger Agreement and the Amended Merger Agreement (the "Termination Fee").

Under the circumstances of this case, the pending sale of control implicated in the Paramount–Viacom transaction required the Paramount Board to act on an informed basis to secure the best value reasonably available to the stockholders. Since we agree with the Court of Chancery that the Paramount directors violated their fiduciary duties, we have AFFIRMED the entry of the order of the Vice Chancellor granting the preliminary injunction and have REMANDED these proceedings to the Court of Chancery for proceedings consistent herewith.

We also have attached an Addendum to this opinion addressing serious deposition misconduct by counsel who appeared on behalf of a Paramount director at the time that director's deposition was taken by a lawyer representing QVC. [2]

I. FACTS

[1] The Court of Chancery Opinion contains a detailed recitation of its factual findings in this matter. Court of Chancery Opinion, 635 A.2d 1245, 1246–1259. Only a brief summary of the facts is necessary for purposes of this opinion. The following summary is drawn from the findings of fact set

forth in the Court of Chancery Opinion and our independent review of the record. [3]

Paramount is a Delaware corporation with its principal offices in New York City. Approximately 118 million shares of Paramount's common stock are outstanding and traded on the New York Stock Exchange. The majority of Paramount's stock is publicly held by numerous unaffiliated investors. Paramount owns and operates a diverse group of entertainment businesses, including motion picture and television studios, book publishers, professional sports teams, and amusement parks.

There are 15 persons serving on the Paramount Board. Four directors are officer-employees of Paramount: Martin S. Davis ("Davis"), Paramount's Chairman and Chief Executive Officer since 1983; Donald Oresman ("Oresman"), Executive Vice–President, Chief Administrative Officer, and General Counsel; Stanley R. Jaffe, President and Chief Operating Officer; and Ronald L. Nelson, Executive Vice President and Chief Financial Officer. Paramount's 11 outside directors are distinguished and experienced business persons who are present or former senior executives of public corporations or financial institutions. [4]

***38** Viacom is a Delaware corporation with its headquarters in Massachusetts. Viacom is controlled by Sumner M. Redstone ("Redstone"), its Chairman and Chief Executive Officer, who owns indirectly approximately 85.2 percent of Viacom's voting Class A stock and approximately 69.2 percent of Viacom's nonvoting Class B stock through National Amusements, Inc. ("NAI"), an entity 91.7 percent owned by Redstone. Viacom has a wide range of entertainment operations, including a number of well-known cable television channels such as MTV, Nickelodeon, Showtime, and The Movie Channel. Viacom's equity co-investors in the Paramount–Viacom transaction include NYNEX Corporation and Blockbuster Entertainment Corporation.

QVC is a Delaware corporation with its headquarters in West Chester, Pennsylvania. QVC has several large stockholders, including Liberty Media Corporation, Comcast Corporation, Advance Publications, Inc., and Cox Enterprises Inc. Barry Diller ("Diller"), the Chairman and Chief Executive Officer of QVC, is also a substantial stockholder. QVC sells a variety of merchandise through a televised shopping channel. QVC has several equity co-investors in its proposed combination with Paramount including BellSouth Corporation and Comcast Corporation.

Beginning in the late 1980s, Paramount investigated the possibility of acquiring or merging with other companies in the entertainment, media, or communications industry. Paramount considered such transactions to be desirable, and perhaps necessary, in order to keep pace with competitors in the rapidly evolving field of entertainment and communications. Consistent with its goal of strategic expansion, Paramount made a tender offer for Time Inc. in 1989, but was ultimately unsuccessful. *See* *Paramount Communications, Inc. v. Time Inc.*, Del.Supr., 571 A.2d 1140 (1990) ("*Time–Warner*").

Although Paramount had considered a possible combination of Paramount and Viacom as early as 1990, recent efforts to explore such a transaction began at a dinner meeting between Redstone and Davis on April 20, 1993. Robert Greenhill ("Greenhill"), Chairman of Smith Barney Shearson Inc. ("Smith Barney"), attended and helped facilitate this meeting. After several more meetings between Redstone and Davis, serious negotiations began taking place in early July.

It was tentatively agreed that Davis would be the chief executive officer and Redstone would be the controlling stockholder of the combined company, but the parties could not reach agreement on the merger price and the terms of a stock option to be granted to Viacom. With respect to price, Viacom offered a package of cash and stock (primarily Viacom Class B nonvoting stock) with a market value of approximately $61 per share, but Paramount wanted at least $70 per share.

Shortly after negotiations broke down in July 1993, two notable events occurred. First, Davis apparently learned of QVC's potential interest in Paramount, and told Diller over lunch on July 21, 1993, that Paramount was not for sale. Second, the market value of Viacom's Class B nonvoting stock increased from $46.875 on July 6 to $57.25 on August 20. QVC claims (and Viacom disputes) that this price increase was caused by open market purchases of such stock by Redstone or entities controlled by him.

***39** On August 20, 1993, discussions between Paramount and Viacom resumed when Greenhill arranged another meeting between Davis and Redstone. After a short hiatus, the parties negotiated in earnest in early September, and performed due diligence with the assistance of their financial

advisors, Lazard Freres & Co. ("Lazard") for Paramount and Smith Barney for Viacom. On September 9, 1993, the Paramount Board was informed about the status of the negotiations and was provided information by Lazard, including an analysis of the proposed transaction.

On September 12, 1993, the Paramount Board met again and unanimously approved the Original Merger Agreement whereby Paramount would merge with and into Viacom. The terms of the merger provided that each share of Paramount common stock would be converted into 0.10 shares of Viacom Class A voting stock, 0.90 shares of Viacom Class B nonvoting stock, and $9.10 in cash. In addition, the Paramount Board agreed to amend its "poison pill" Rights Agreement to exempt the proposed merger with Viacom. The Original Merger Agreement also contained several provisions designed to make it more difficult for a potential competing bid to succeed. We focus, as did the Court of Chancery, on three of these defensive provisions: a "no-shop" provision (the "No–Shop Provision"), the Termination Fee, and the Stock Option Agreement.

First, under the No–Shop Provision, the Paramount Board agreed that Paramount would not solicit, encourage, discuss, negotiate, or endorse any competing transaction unless: (a) a third party "makes an unsolicited written, bona fide proposal, which is not subject to any material contingencies relating to financing"; and (b) the Paramount Board determines that discussions or negotiations with the third party are necessary for the Paramount Board to comply with its fiduciary duties.

Second, under the Termination Fee provision, Viacom would receive a $100 million termination fee if: (a) Paramount terminated the Original Merger Agreement because of a competing transaction; (b) Paramount's stockholders did not approve the merger; or (c) the Paramount Board recommended a competing transaction.

The third and most significant deterrent device was the Stock Option Agreement, which granted to Viacom an option to purchase approximately 19.9 percent (23,699,000 shares) of Paramount's outstanding common stock at $69.14 per share if any of the triggering events for the Termination Fee occurred. In addition to the customary terms that are normally associated with a stock option, the Stock Option Agreement contained two provisions that were both unusual and highly beneficial to Viacom: (a) Viacom was permitted to pay for the shares with a senior subordinated note of questionable marketability instead of cash, thereby avoiding the need to raise the $1.6 billion purchase price (the "Note Feature"); and (b) Viacom could elect to require Paramount to pay Viacom in cash a sum equal to the difference between the purchase price and the market price of Paramount's stock (the "Put Feature"). Because the Stock Option Agreement was not "capped" to limit its maximum dollar value, it had the potential to reach (and in this case did reach) unreasonable levels.

After the execution of the Original Merger Agreement and the Stock Option Agreement on September 12, 1993, Paramount and Viacom announced their proposed merger. In a number of public statements, the parties indicated that the pending transaction was a virtual certainty. Redstone described it as a "marriage" that would "never be torn asunder" and stated that only a "nuclear attack" could break the deal. Redstone also called Diller and John Malone of Tele–Communications Inc., a major stockholder of QVC, to dissuade them from making a competing bid.

Despite these attempts to discourage a competing bid, Diller sent a letter to Davis on September 20, 1993, proposing a merger in which QVC would acquire Paramount for approximately $80 per share, consisting of 0.893 shares of QVC common stock and $30 in cash. QVC also expressed its eagerness to meet with Paramount to negotiate the details of a transaction. When the Paramount Board met on September 27, it was advised by Davis that the Original Merger ***40** Agreement prohibited Paramount from having discussions with QVC (or anyone else) unless certain conditions were satisfied. In particular, QVC had to supply evidence that its proposal was not subject to financing contingencies. The Paramount Board was also provided information from Lazard describing QVC and its proposal.

On October 5, 1993, QVC provided Paramount with evidence of QVC's financing. The Paramount Board then held another meeting on October 11, and decided to authorize management to meet with QVC. Davis also informed the Paramount Board that Booz–Allen & Hamilton ("Booz–Allen"), a management consulting firm, had been retained to assess, *inter alia,* the incremental earnings potential from a Paramount–Viacom merger and a Paramount–QVC merger. Discussions proceeded slowly, however, due to a delay in Paramount signing a confidentiality agreement. In response to Paramount's request for information, QVC provided two binders of documents to Paramount on October 20.

On October 21, 1993, QVC filed this action and publicly announced an $80 cash tender offer for 51 percent of

Paramount's outstanding shares (the "QVC tender offer"). Each remaining share of Paramount common stock would be converted into 1.42857 shares of QVC common stock in a second-step merger. The tender offer was conditioned on, among other things, the invalidation of the Stock Option Agreement, which was worth over $200 million by that point. [5] QVC contends that it had to commence a tender offer because of the slow pace of the merger discussions and the need to begin seeking clearance under federal antitrust laws.

Confronted by QVC's hostile bid, which on its face offered over $10 per share more than the consideration provided by the Original Merger Agreement, Viacom realized that it would need to raise its bid in order to remain competitive. Within hours after QVC's tender offer was announced, Viacom entered into discussions with Paramount concerning a revised transaction. These discussions led to serious negotiations concerning a comprehensive amendment to the original Paramount–Viacom transaction. In effect, the opportunity for a "new deal" with Viacom was at hand for the Paramount Board. With the QVC hostile bid offering greater value to the Paramount stockholders, the Paramount Board had considerable leverage with Viacom.

At a special meeting on October 24, 1993, the Paramount Board approved the Amended Merger Agreement and an amendment to the Stock Option Agreement. The Amended Merger Agreement was, however, essentially the same as the Original Merger Agreement, except that it included a few new provisions. One provision related to an $80 per share cash tender offer by Viacom for 51 percent of Paramount's stock, and another changed the merger consideration so that each share of Paramount would be converted into 0.20408 shares of Viacom Class A voting stock, 1.08317 shares of Viacom Class B nonvoting stock, and 0.20408 shares of a new series of Viacom convertible preferred stock. The Amended Merger Agreement also added a provision giving Paramount the right not to amend its Rights Agreement to exempt Viacom if the Paramount Board determined that such an amendment would be inconsistent with its fiduciary duties because another offer constituted a "better alternative." [6] Finally, the Paramount Board was given the power to terminate the Amended Merger Agreement if it withdrew its recommendation of the Viacom transaction or recommended a competing transaction.

Although the Amended Merger Agreement offered more consideration to the Paramount stockholders and somewhat more flexibility to the Paramount Board than did the Original Merger Agreement, the defensive measures designed to make a competing bid more difficult were not removed or modified. ***41** In particular, there is no evidence in the record that Paramount sought to use its newly-acquired leverage to eliminate or modify the No–Shop Provision, the Termination Fee, or the Stock Option Agreement when the subject of amending the Original Merger Agreement was on the table.

Viacom's tender offer commenced on October 25, 1993, and QVC's tender offer was formally launched on October 27, 1993. Diller sent a letter to the Paramount Board on October 28 requesting an opportunity to negotiate with Paramount, and Oresman responded the following day by agreeing to meet. The meeting, held on November 1, was not very fruitful, however, after QVC's proposed guidelines for a "fair bidding process" were rejected by Paramount on the ground that "auction procedures" were inappropriate and contrary to Paramount's contractual obligations to Viacom.

On November 6, 1993, Viacom unilaterally raised its tender offer price to $85 per share in cash and offered a comparable increase in the value of the securities being proposed in the second-step merger. At a telephonic meeting held later that day, the Paramount Board agreed to recommend Viacom's higher bid to Paramount's stockholders.

QVC responded to Viacom's higher bid on November 12 by increasing its tender offer to $90 per share and by increasing the securities for its second-step merger by a similar amount. In response to QVC's latest offer, the Paramount Board scheduled a meeting for November 15, 1993. Prior to the meeting, Oresman sent the members of the Paramount Board a document summarizing the "conditions and uncertainties" of QVC's offer. One director testified that this document gave him a very negative impression of the QVC bid.

At its meeting on November 15, 1993, the Paramount Board determined that the new QVC offer was not in the best interests of the stockholders. The purported basis for this conclusion was that QVC's bid was excessively conditional. The Paramount Board did not communicate with QVC regarding the status of the conditions because it believed that the No–Shop Provision prevented such communication in the absence of firm financing. Several Paramount directors also testified that they believed the Viacom transaction would be more advantageous to Paramount's future business prospects than a QVC transaction. [7] Although a number of materials were distributed to the Paramount Board describing the Viacom and QVC transactions, the only quantitative analysis of the consideration to be received by the stockholders under

each proposal was based on then-current market prices of the securities involved, not on the anticipated value of such securities at the time when the stockholders would receive them. [8]

The preliminary injunction hearing in this case took place on November 16, 1993. On November 19, Diller wrote to the Paramount Board to inform it that QVC had obtained financing commitments for its tender offer and that there was no antitrust obstacle to the offer. On November 24, 1993, the Court of Chancery issued its decision granting a preliminary injunction in favor of QVC and the plaintiff stockholders. This appeal followed.

II. APPLICABLE PRINCIPLES OF ESTABLISHED DELAWARE LAW

The General Corporation Law of the State of Delaware (the "General Corporation Law") and the decisions of this Court have repeatedly recognized the fundamental principle that the management of the business and affairs of a Delaware corporation is entrusted to its directors, who are the duly elected and authorized representatives of the ***42** stockholders. 8 *Del.C.* § 141(a); *Aronson v. Lewis*, Del.Supr., 473 A.2d 805, 811–12 (1984); *Pogostin v. Rice*, Del.Supr., 480 A.2d 619, 624 (1984). Under normal circumstances, neither the courts nor the stockholders should interfere with the managerial decisions of the directors. The business judgment rule embodies the deference to which such decisions are entitled. *Aronson*, 473 A.2d at 812.

[2] Nevertheless, there are rare situations which mandate that a court take a more direct and active role in overseeing the decisions made and actions taken by directors. In these situations, a court subjects the directors' conduct to enhanced scrutiny to ensure that it is reasonable. [9] The decisions of this Court have clearly established the circumstances where such enhanced scrutiny will be applied. *E.g.*, *Unocal*, 493 A.2d 946; *Moran v. Household Int'l, Inc.*, Del.Supr., 500 A.2d 1346 (1985); *Revlon*, 506 A.2d 173; *Mills Acquisition Co. v. Macmillan, Inc.*, Del.Supr., 559 A.2d 1261 (1989); *Gilbert v. El Paso Co.*, Del.Supr., 575 A.2d 1131 (1990). The case at bar implicates two such circumstances: (1) the approval of a transaction resulting in a sale of control, and (2) the adoption of defensive measures in response to a threat to corporate control.

A. The Significance of a Sale or Change [10] of Control

When a majority of a corporation's voting shares are acquired by a single person or entity, or by a cohesive group acting together, there is a significant diminution in the voting power of those who thereby become minority stockholders. Under the statutory framework of the General Corporation Law, many of the most fundamental corporate changes can be implemented only if they are approved by a majority vote of the stockholders. Such actions include elections of directors, amendments to the certificate of incorporation, mergers, consolidations, sales of all or substantially all of the assets of the corporation, and dissolution. 8 *Del.C.* §§ 211, 242, 251–258, 263, 271, 275. Because of the overriding importance of voting rights, this Court and the Court of Chancery have consistently acted to protect stockholders from unwarranted interference with such rights. [11]

In the absence of devices protecting the minority stockholders, [12] stockholder votes are likely to become mere formalities where there is a majority stockholder. For example, minority stockholders can be deprived of a continuing equity interest in their corporation by means of a cash-out merger. *Weinberger*; ***43** 457 A.2d at 703. Absent effective protective provisions, minority stockholders must rely for protection solely on the fiduciary duties owed to them by the directors and the majority stockholder, since the minority stockholders have lost the power to influence corporate direction through the ballot. The acquisition of majority status and the consequent privilege of exerting the powers of majority ownership come at a price. That price is usually a control premium which recognizes not only the value of a control block of shares, but also compensates the minority stockholders for their resulting loss of voting power.

In the case before us, the public stockholders (in the aggregate) currently own a majority of Paramount's voting stock. Control of the corporation is not vested in a single person, entity, or group, but vested in the fluid aggregation of unaffiliated stockholders. In the event the Paramount–Viacom transaction is consummated, the public stockholders will receive cash and a minority equity voting position in the surviving corporation. Following such consummation, there will be a controlling stockholder who will have the voting power to: (a) elect directors; (b) cause a break-up of the corporation; (c) merge it with another company; (d) cash-out the public stockholders; (e) amend the certificate of

incorporation; (f) sell all or substantially all of the corporate assets; or (g) otherwise alter materially the nature of the corporation and the public stockholders' interests. Irrespective of the present Paramount Board's vision of a long-term strategic alliance with Viacom, the proposed sale of control would provide the new controlling stockholder with the power to alter that vision.

Because of the intended sale of control, the Paramount–Viacom transaction has economic consequences of considerable significance to the Paramount stockholders. Once control has shifted, the current Paramount stockholders will have no leverage in the future to demand another control premium. As a result, the Paramount stockholders are entitled to receive, and should receive, a control premium and/or protective devices of significant value. There being no such protective provisions in the Viacom–Paramount transaction, the Paramount directors had an obligation to take the maximum advantage of the current opportunity to realize for the stockholders the best value reasonably available.

B. The Obligations of Directors in a Sale or Change of Control Transaction

The consequences of a sale of control impose special obligations on the directors of a corporation. [13] In particular, they have the obligation of acting reasonably to seek the transaction offering the best value reasonably available to the stockholders. The courts will apply enhanced scrutiny to ensure that the directors have acted reasonably. The obligations of the directors and the enhanced scrutiny of the courts are well-established by the decisions of this Court. The directors' fiduciary duties in a sale of control context are those which generally attach. In short, "the directors must act in accordance with their fundamental duties of care and loyalty." *Barkan v. Amsted Indus., Inc.*, Del.Supr., 567 A.2d 1279, 1286 (1989). As we held in *Macmillan:*

> It is basic to our law that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation. In discharging this function, the directors owe fiduciary duties of care and loyalty to the corporation and its shareholders. **This unremitting obligation extends equally to board conduct in a sale of corporate control.**
>
> ***44** 559 A.2d at 1280 (emphasis supplied) (citations omitted).

In the sale of control context, the directors must focus on one primary objective—to secure the transaction offering the best value reasonably available for the stockholders—and they must exercise their fiduciary duties to further that end. The decisions of this Court have consistently emphasized this goal. *Revlon*, 506 A.2d at 182 ("The duty of the board ... [is] the maximization of the company's value at a sale for the stockholders' benefit."); *Macmillan*, 559 A.2d at 1288 ("[I]n a sale of corporate control the responsibility of the directors is to get the highest value reasonably attainable for the shareholders."); *Barkan*, 567 A.2d at 1286 ("[T]he board must act in a neutral manner to encourage the highest possible price for shareholders."). *See also Wilmington Trust Co. v. Coulter*, Del.Supr., 200 A.2d 441, 448 (1964) (in the context of the duty of a trustee, "[w]hen all is equal ... it is plain that the Trustee is bound to obtain the best price obtainable").

In pursuing this objective, the directors must be especially diligent. *See Citron v. Fairchild Camera and Instrument Corp.*, Del.Supr., 569 A.2d 53, 66 (1989) (discussing "a board's active and direct role in the sale process"). In particular, this Court has stressed the importance of the board being adequately informed in negotiating a sale of control: "The need for adequate information is central to the enlightened evaluation of a transaction that a board must make." *Barkan*, 567 A.2d at 1287. This requirement is consistent with the general principle that "directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them." *Aronson*, 473 A.2d at 812. *See also Cede & Co. v. Technicolor, Inc.*, Del.Supr., 634 A.2d 345, 367 (1993); *Smith v. Van Gorkom*, Del.Supr., 488 A.2d 858, 872 (1985). Moreover, the role of outside, independent directors becomes particularly important because of the magnitude of a sale of control transaction and the possibility, in certain cases, that management may not necessarily be impartial. *See Macmillan*, 559 A.2d at 1285 (requiring "the intense scrutiny and participation of the independent directors").

Barkan teaches some of the methods by which a board can fulfill its obligation to seek the best value reasonably available to the stockholders. 567 A.2d at 1286–87. These methods are designed to determine the existence and viability of possible alternatives. They include conducting an auction,

canvassing the market, etc. Delaware law recognizes that there is "no single blueprint" that directors must follow. *Id.* at 1286–87; *Citron* 569 A.2d at 68; *Macmillan,* 559 A.2d at 1287.

In determining which alternative provides the best value for the stockholders, a board of directors is not limited to considering only the amount of cash involved, and is not required to ignore totally its view of the future value of a strategic alliance. *See Macmillan,* 559 A.2d at 1282 n. 29. Instead, the directors should analyze the entire situation and evaluate in a disciplined manner the consideration being offered. Where stock or other non-cash consideration is involved, the board should try to quantify its value, if feasible, to achieve an objective comparison of the alternatives. [14] In addition, the board may assess a variety of practical considerations relating to each alternative, including:

> [an offer's] fairness and feasibility; the proposed or actual financing for the offer, and the consequences of that financing; questions of illegality; ... the risk of non-consum[m]ation; ... the bidder's identity, prior background and other business venture experiences; and the bidder's business plans for the corporation and their effects on stockholder interests.
>
> *Macmillan,* 559 A.2d at 1282 n. 29. These considerations are important because the selection of one alternative may permanently foreclose other opportunities. While the assessment of these factors may be complex, ***45** the board's goal is straightforward: Having informed themselves of all material information reasonably available, the directors must decide which alternative is most likely to offer the best value reasonably available to the stockholders.

C. Enhanced Judicial Scrutiny of a Sale or Change of Control Transaction

[3] Board action in the circumstances presented here is subject to enhanced scrutiny. Such scrutiny is mandated by: (a) the threatened diminution of the current stockholders' voting power; (b) the fact that an asset belonging to public stockholders (a control premium) is being sold and may never be available again; and (c) the traditional concern of Delaware courts for actions which impair or impede stockholder voting rights (see *supra* note 11). In *Macmillan,* this Court held:

> When *Revlon* duties devolve upon directors, this Court will continue to exact an enhanced judicial scrutiny at the threshold, as in *Unocal,* before the normal presumptions of the business judgment rule will apply. [15]

559 A.2d at 1288. The *Macmillan* decision articulates a specific two-part test for analyzing board action where competing bidders are not treated equally: [16]

> In the face of disparate treatment, the trial court must first examine whether the directors properly perceived that shareholder interests were enhanced. In any event the board's action must be reasonable in relation to the advantage sought to be achieved, or conversely, to the threat which a particular bid allegedly poses to stockholder interests.
>
> *Id. See also Roberts v. General Instrument Corp.,* Del.Ch., C.A. No. 11639, 1990 WL 118356, Allen, C. (Aug. 13, 1990), reprinted at 16 Del.J.Corp.L. 1540, 1554 ("This enhanced test requires a judicial judgment of reasonableness in the circumstances.").

[4] [5] The key features of an enhanced scrutiny test are: (a) a judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing. The directors have the burden of proving that they were adequately informed and acted reasonably.

[6] [7] Although an enhanced scrutiny test involves a review of the reasonableness of the substantive merits of a board's actions, [17] a court should not ignore the complexity of the directors' task in a sale of control. There are many business and financial considerations implicated in investigating and selecting the best value reasonably available. The board of directors is the corporate decisionmaking body best equipped to make these judgments. Accordingly, a court applying enhanced judicial scrutiny should be deciding whether the directors made **a reasonable** decision, not **a perfect** decision.

If a board selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may have cast doubt on the board's determination. Thus, courts will not substitute their business judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness. ***46** *See* *Unocal*, 493 A.2d at 955–56; *Macmillan*, 559 A.2d at 1288; *Nixon*, 626 A.2d at 1378.

D. *Revlon* and *Time–Warner* Distinguished

The Paramount defendants and Viacom assert that the fiduciary obligations and the enhanced judicial scrutiny discussed above are not implicated in this case in the absence of a "break-up" of the corporation, and that the order granting the preliminary injunction should be reversed. This argument is based on their erroneous interpretation of our decisions in *Revlon* and *Time–Warner*.

In *Revlon*, we reviewed the actions of the board of directors of Revlon, Inc. ("Revlon"), which had rebuffed the overtures of Pantry Pride, Inc. and had instead entered into an agreement with Forstmann Little & Co. ("Forstmann") providing for the acquisition of 100 percent of Revlon's outstanding stock by Forstmann and the subsequent break-up of Revlon. Based on the facts and circumstances present in *Revlon*, we held that "[t]he directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company." 506 A.2d at 182. We further held that "when a board ends an intense bidding contest on an insubstantial basis, ... [that] action cannot withstand the enhanced scrutiny which *Unocal* requires of director conduct." *Id.* at 184.

It is true that one of the circumstances bearing on these holdings was the fact that "the break-up of the company ... had become a reality which even the directors embraced." *Id.* at 182. It does not follow, however, that a "break-up" must be present and "inevitable" before directors are subject to enhanced judicial scrutiny and are required to pursue a transaction that is calculated to produce the best value reasonably available to the stockholders. In fact, we stated in *Revlon* that "when bidders make relatively similar offers, or dissolution of the company becomes inevitable, the directors cannot fulfill their enhanced *Unocal* duties by playing favorites with the contending factions." *Id.* at 184 (emphasis added). *Revlon* thus does not hold that an inevitable dissolution or "break-up" is necessary.

[8] The decisions of this Court following *Revlon* reinforced the applicability of enhanced scrutiny and the directors' obligation to seek the best value reasonably available for the stockholders where there is a pending sale of control, regardless of whether or not there is to be a break-up of the corporation. In *Macmillan*, this Court held:

> We stated in *Revlon*, and again here, that **in a sale of corporate control** the responsibility of the directors is to get the highest value reasonably attainable for the shareholders.

559 A.2d at 1288 (emphasis added). In *Barkan*, we observed further:

> We believe that the general principles announced in *Revlon*, in *Unocal Corp. v. Mesa Petroleum Co.*, Del.Supr., 493 A.2d 946 (1985), and in *Moran v. Household International, Inc.*, Del.Supr., 500 A.2d 1346 (1985) govern this case and every case in which a **fundamental change of corporate control** occurs or is contemplated.

567 A.2d at 1286 (emphasis added).

Although *Macmillan* and *Barkan* are clear in holding that a change of control imposes on directors the obligation to obtain the best value reasonably available to the stockholders, the Paramount defendants have interpreted our decision in *Time–Warner* as requiring a corporate break-up in order for that obligation to apply. The facts in *Time–Warner*, however, were quite different from the facts of this case, and refute Paramount's position here. In *Time–Warner*, the Chancellor held that there was no change of control in the original stock-for-stock merger between Time and Warner because

Time would be owned by a fluid aggregation of unaffiliated stockholders both before and after the merger:

> If the appropriate inquiry is whether a change in control is contemplated, the answer must be sought in the specific circumstances surrounding the transaction. Surely under some circumstances a stock for stock merger could reflect a transfer of corporate control. That would, for example, plainly be the case here if Warner were a private company. But where, as *47 here, the shares of both constituent corporations are widely held, corporate control can be expected to remain unaffected by a stock for stock merger. This in my judgment was the situation with respect to the original merger agreement. When the specifics of that situation are reviewed, it is seen that, aside from legal technicalities and aside from arrangements thought to enhance the prospect for the ultimate succession of [Nicholas J. Nicholas, Jr., president of Time], neither corporation could be said to be acquiring the other. **Control of both remained in a large, fluid, changeable and changing market.**
>
> The existence of a control block of stock in the hands of a single shareholder or a group with loyalty to each other does have real consequences to the financial value of "minority" stock. The law offers some protection to such shares through the imposition of a fiduciary duty upon controlling shareholders. **But here, effectuation of the merger would not have subjected Time shareholders to the risks and consequences of holders of minority shares. This is a reflection of the fact that no control passed to anyone in the transaction contemplated.** The shareholders of Time would have "suffered" dilution, of course, but they would suffer the same type of dilution upon the public distribution of new stock.

Paramount Communications Inc. v. Time Inc., Del.Ch., No. 10866, 1989 WL 79880, Allen, C. (July 17, 1989), reprinted at 15 Del.J.Corp.L. 700, 739 (emphasis added). Moreover, the transaction actually consummated in *Time–Warner* was not a merger, as originally planned, but a sale of Warner's stock to Time.

In our affirmance of the Court of Chancery's well-reasoned decision, this Court held that "The Chancellor's findings of fact are supported by the record and **his conclusion is correct as a matter of law.**" 571 A.2d at 1150 (emphasis added). Nevertheless, the Paramount defendants here have argued that a break-up is a requirement and have focused on the following language in our *Time–Warner* decision:

> However, we premise our rejection of plaintiffs' *Revlon* claim on different grounds, namely, the absence of any substantial evidence to conclude that Time's board, in negotiating with Warner, made the dissolution or break-up of the corporate entity inevitable, as was the case in *Revlon.*
>
> Under Delaware law there are, generally speaking and **without excluding other possibilities,** two circumstances which may implicate *Revlon* duties. The first, and clearer one, is when a corporation **initiates an active bidding process seeking to sell itself** or to effect a business reorganization involving a clear break-up of the company. However, *Revlon* duties may also be triggered where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the breakup of the company.

Id. at 1150 (emphasis added) (citation and footnote omitted).

The Paramount defendants have misread the holding of *Time–Warner.* Contrary to their argument, our decision in *Time–Warner* expressly states that the two general scenarios discussed in the above-quoted paragraph are not the **only** instances where "*Revlon* duties" may be implicated. The Paramount defendants' argument totally ignores the phrase "without excluding other possibilities." Moreover, the instant case is clearly within the first general scenario set forth in *Time–Warner.* The Paramount Board, albeit unintentionally, had "initiate[d] an active bidding process seeking to sell itself" by agreeing to sell control of the corporation to Viacom in circumstances where another potential acquiror (QVC) was equally interested in being a bidder.

The Paramount defendants' position that **both** a change of control **and** a break-up are **required** must be rejected. Such a holding would unduly restrict the application of *Revlon,* is inconsistent with this Court's decisions in *Barkan* and *Macmillan,* and has no basis in policy. There are few events that have a more significant impact on the stockholders than a sale of control or a corporate break-up. Each event represents a fundamental *48 (and perhaps irrevocable) change in the nature of the corporate enterprise from a practical standpoint. It is the significance of **each** of these events that justifies: (a) focusing on the directors' obligation to seek the best value reasonably available to the stockholders; and (b) requiring a close scrutiny of board action which could be contrary to the stockholders' interests.

[9] Accordingly, when a corporation undertakes a transaction which will cause: (a) a change in corporate control; **or** (b) a break-up of the corporate entity, the directors' obligation is to seek the best value reasonably available to the stockholders. This obligation arises because the effect of the Viacom–Paramount transaction, if consummated, is to shift control of Paramount from the public stockholders to a controlling stockholder, Viacom. Neither *Time–Warner* nor any other decision of this Court holds that a "break-up" of the company is essential to give rise to this obligation where there is a sale of control.

III. BREACH OF FIDUCIARY DUTIES BY PARAMOUNT BOARD

We now turn to duties of the Paramount Board under the facts of this case and our conclusions as to the breaches of those duties which warrant injunctive relief.

A. The Specific Obligations of the Paramount Board

[10] Under the facts of this case, the Paramount directors had the obligation: (a) to be diligent and vigilant in examining critically the Paramount–Viacom transaction and the QVC tender offers; (b) to act in good faith; (c) to obtain, and act with due care on, all material information reasonably available, including information necessary to compare the two offers to determine which of these transactions, or an alternative course of action, would provide the best value reasonably available to the stockholders; and (d) to negotiate actively and in good faith with both Viacom and QVC to that end.

Having decided to sell control of the corporation, the Paramount directors were required to evaluate critically whether or not all material aspects of the Paramount–Viacom transaction (separately and in the aggregate) were reasonable and in the best interests of the Paramount stockholders in light of current circumstances, including: the change of control premium, the Stock Option Agreement, the Termination Fee, the coercive nature of both the Viacom and QVC tender offers, [18] the No–Shop Provision, and the proposed disparate use of the Rights Agreement as to the Viacom and QVC tender offers, respectively.

These obligations necessarily implicated various issues, including the questions of whether or not those provisions and other aspects of the Paramount–Viacom transaction (separately and in the aggregate): (a) adversely affected the value provided to the Paramount stockholders; (b) inhibited or encouraged alternative bids; (c) were enforceable contractual obligations in light of the directors' fiduciary duties; and (d) in the end would advance or retard the Paramount directors' obligation to secure for the Paramount stockholders the best value reasonably available under the circumstances.

The Paramount defendants contend that they were precluded by certain contractual provisions, including the No–Shop Provision, from negotiating with QVC or seeking alternatives. Such provisions, whether or not they are presumptively valid in the abstract, may not validly define or limit the directors' fiduciary duties under Delaware law or prevent the Paramount directors from carrying out their fiduciary duties under Delaware law. To the extent such provisions are inconsistent with those duties, they are invalid and unenforceable. *See* *Revlon*, 506 A.2d at 184–85.

Since the Paramount directors had already decided to sell control, they had an obligation ***49** to continue their search for the best value reasonably available to the stockholders. This continuing obligation included the responsibility, at the October 24 board meeting and thereafter, to evaluate critically both the QVC tender offers and the Paramount–Viacom transaction to determine if: (a) the QVC tender offer was, or would continue to be, conditional; (b) the QVC tender offer could be improved; (c) the Viacom tender offer or other aspects of the Paramount–Viacom transaction could be improved; (d) each of the respective offers would be reasonably likely to come to closure, and under what circumstances; (e) other material information was reasonably available for consideration by the Paramount directors; (f) there were viable and realistic alternative courses of action; and (g) the timing constraints could be managed so the directors could consider these matters carefully and deliberately.

B. The Breaches of Fiduciary Duty by the Paramount Board

[11] [12] The Paramount directors made the decision on September 12, 1993, that, in their judgment, a strategic merger with Viacom on the economic terms of the Original Merger Agreement was in the best interests of Paramount and its stockholders. Those terms provided a modest change of control premium to the stockholders. The directors also decided at that time that it was appropriate to agree to certain defensive measures (the Stock Option Agreement, the Termination Fee, and the No–Shop Provision) insisted upon by Viacom as part of that economic transaction. Those defensive measures, coupled

with the sale of control and subsequent disparate treatment of competing bidders, implicated the judicial scrutiny of *Unocal, Revlon, Macmillan,* and their progeny. We conclude that the Paramount directors' process was not reasonable, and the result achieved for the stockholders was not reasonable under the circumstances.

When entering into the Original Merger Agreement, and thereafter, the Paramount Board clearly gave insufficient attention to the potential consequences of the defensive measures demanded by Viacom. The Stock Option Agreement had a number of unusual and potentially "draconian" [19] provisions, including the Note Feature and the Put Feature. Furthermore, the Termination Fee, whether or not unreasonable by itself, clearly made Paramount less attractive to other bidders, when coupled with the Stock Option Agreement. Finally, the No–Shop Provision inhibited the Paramount Board's ability to negotiate with other potential bidders, particularly QVC which had already expressed an interest in Paramount. [20]

Throughout the applicable time period, and especially from the first QVC merger proposal on September 20 through the Paramount Board meeting on November 15, QVC's interest in Paramount provided the **opportunity** for the Paramount Board to seek significantly higher value for the Paramount stockholders than that being offered by Viacom. QVC persistently demonstrated its intention to meet and exceed the Viacom offers, and ***50** frequently expressed its willingness to negotiate possible further increases.

The Paramount directors had the opportunity in the October 23–24 time frame, when the Original Merger Agreement was renegotiated, to take appropriate action to modify the improper defensive measures as well as to improve the economic terms of the Paramount–Viacom transaction. Under the circumstances existing at that time, it should have been clear to the Paramount Board that the Stock Option Agreement, coupled with the Termination Fee and the No–Shop Clause, were impeding the realization of the best value reasonably available to the Paramount stockholders. Nevertheless, the Paramount Board made no effort to eliminate or modify these counterproductive devices, and instead continued to cling to its vision of a strategic alliance with Viacom. Moreover, based on advice from the Paramount management, the Paramount directors considered the QVC offer to be "conditional" and asserted that they were precluded by the No–Shop Provision from seeking more information from, or negotiating with, QVC.

By November 12, 1993, the value of the revised QVC offer on its face exceeded that of the Viacom offer by over $1 billion at then current values. This significant disparity of value cannot be justified on the basis of the directors' vision of future strategy, primarily because the change of control would supplant the authority of the current Paramount Board to continue to hold and implement their strategic vision in any meaningful way. Moreover, their uninformed process had deprived their strategic vision of much of its credibility. *See* *Van Gorkom,* 488 A.2d at 872; *Cede v. Technicolor,* 634 A.2d at 367; *Hanson Trust PLC v. ML SCM Acquisition Inc.,* 2d Cir., 781 F.2d 264, 274 (1986).

When the Paramount directors met on November 15 to consider QVC's increased tender offer, they remained prisoners of their own misconceptions and missed opportunities to eliminate the restrictions they had imposed on themselves. Yet, it was not "too late" to reconsider negotiating with QVC. The circumstances existing on November 15 made it clear that the defensive measures, taken as a whole, were problematic: (a) the No–Shop Provision could not define or limit their fiduciary duties; (b) the Stock Option Agreement had become "draconian"; and (c) the Termination Fee, in context with all the circumstances, was similarly deterring the realization of possibly higher bids. Nevertheless, the Paramount directors remained paralyzed by their uninformed belief that the QVC offer was "illusory." This final opportunity to negotiate on the stockholders' behalf and to fulfill their obligation to seek the best value reasonably available was thereby squandered. [21]

IV. VIACOM'S CLAIM OF VESTED CONTRACT RIGHTS

Viacom argues that it had certain "vested" contract rights with respect to the No–Shop Provision and the Stock Option Agreement. [22] In effect, Viacom's argument is that the Paramount directors could enter into an agreement in violation of their fiduciary duties and then render Paramount, and ultimately its stockholders, liable for failing to carry out an agreement in violation of those duties. Viacom's protestations about vested rights are without merit. This Court has found that those defensive measures were improperly designed to deter potential bidders, and that ***51** such measures do not meet the reasonableness test to which they must be subjected. They are consequently invalid and unenforceable under the facts of this case.

[13] [14] The No–Shop Provision could not validly define or limit the fiduciary duties of the Paramount directors. To the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable. *Cf.* *Wilmington Trust v. Coulter,* 200 A.2d at 452–54. Despite the arguments of Paramount and Viacom to the contrary, the Paramount directors could not contract away their fiduciary obligations. Since the No–Shop Provision was invalid, Viacom never had any vested contract rights in the provision.

[15] As discussed previously, the Stock Option Agreement contained several "draconian" aspects, including the Note Feature and the Put Feature. While we have held that lock-up options are not *per se* illegal, *see* *Revlon,* 506 A.2d at 183, no options with similar features have ever been upheld by this Court. Under the circumstances of this case, the Stock Option Agreement clearly is invalid. Accordingly, Viacom never had any vested contract rights in that Agreement.

Viacom, a sophisticated party with experienced legal and financial advisors, knew of (and in fact demanded) the unreasonable features of the Stock Option Agreement. It cannot be now heard to argue that it obtained vested contract rights by negotiating and obtaining contractual provisions from a board acting in violation of its fiduciary duties. As the Nebraska Supreme Court said in rejecting a similar argument in *ConAgra, Inc. v. Cargill, Inc.,* 222 Neb. 136, 382 N.W.2d 576, 587–88 (1986), "To so hold, it would seem, would be to get the shareholders coming and going." Likewise, we reject Viacom's arguments and hold that its fate must rise or fall, and in this instance fall, with the determination that the actions of the Paramount Board were invalid.

V. CONCLUSION

The realization of the best value reasonably available to the stockholders became the Paramount directors' primary obligation under these facts in light of the change of control. That obligation was not satisfied, and the Paramount Board's process was deficient. The directors' initial hope and expectation for a strategic alliance with Viacom was allowed to dominate their decisionmaking process to the point where the arsenal of defensive measures established at the outset was perpetuated (not modified or eliminated) when the situation was dramatically altered. QVC's unsolicited bid presented the opportunity for significantly greater value for the stockholders and enhanced negotiating leverage for the directors. Rather than seizing those opportunities, the Paramount directors chose to wall themselves off from material information which was reasonably available and to hide behind the defensive measures as a rationalization for refusing to negotiate with QVC or seeking other alternatives. Their view of the strategic alliance likewise became an empty rationalization as the opportunities for higher value for the stockholders continued to develop.

It is the nature of the judicial process that we decide only the case before us—a case which, on its facts, is clearly controlled by established Delaware law. Here, the proposed change of control and the implications thereof were crystal clear. In other cases they may be less clear. The holding of this case on its facts, coupled with the holdings of the principal cases discussed herein where the issue of sale of control is implicated, should provide a workable precedent against which to measure future cases.

For the reasons set forth herein, the November 24, 1993, Order of the Court of Chancery has been AFFIRMED, and this matter has been REMANDED for proceedings consistent herewith, as set forth in the December 9, 1993, Order of this Court.

ADDENDUM

The record in this case is extensive. The appendix filed in this Court comprises 15 volumes, totalling some 7251 pages. It includes ***52** substantial deposition testimony which forms part of the factual record before the Court of Chancery and before this Court. The members of this Court have read and considered the appendix, including the deposition testimony, in reaching its decision, preparing the Order of December 9, 1993, and this opinion. Likewise, the Vice Chancellor's opinion revealed that he was thoroughly familiar with the entire record, including the deposition testimony. As noted, *supra* p. 37 note 2, the Court has commended the parties for their professionalism in conducting expedited discovery, assembling and organizing the record, and preparing and presenting very helpful briefs, a joint appendix, and oral argument.

The Court is constrained, however, to add this Addendum. Although this Addendum has no bearing on the outcome of the case, it relates to a serious issue of professionalism

involving deposition practice in proceedings in Delaware trial courts. [23]

[16] The issue of discovery abuse, including lack of civility and professional misconduct during depositions, is a matter of considerable concern to Delaware courts and courts around the nation. [24] One particular instance of misconduct during a deposition in this case demonstrates such an astonishing lack of professionalism and civility that it is worthy of special note here as a lesson for the future—a lesson of conduct not to be tolerated or repeated.

On November 10, 1993, an expedited deposition of Paramount, through one of its directors, J. Hugh Liedtke, [25] was taken in the state of Texas. The deposition was taken by Delaware counsel for QVC. Mr. Liedtke was individually represented at this deposition by Joseph D. Jamail, Esquire, of the Texas Bar. Peter C. Thomas, Esquire, of the New York Bar appeared and defended on behalf of the Paramount defendants. It does not appear that any member of the Delaware bar was present at the deposition representing any of the defendants or the stockholder plaintiffs.

Mr. Jamail did not otherwise appear in this Delaware proceeding representing any party, and he was not admitted *pro hac vice*. [26] ***53** Under the rules of the Court of Chancery and this Court, [27] lawyers who are admitted *pro hac vice* to represent a party in Delaware proceedings are subject to Delaware Disciplinary Rules, [28] and are required to review the Delaware State Bar Association Statement of Principles of Lawyer Conduct (the "Statement of Principles"). [29] During the Liedtke deposition, Mr. Jamail abused the privilege of representing a witness in a Delaware proceeding, in that he: (a) improperly directed the witness not to answer certain questions; (b) was extraordinarily rude, uncivil, and vulgar; and (c) obstructed the ability of the questioner to elicit testimony to assist the Court in this matter.

To illustrate, a few excerpts from the latter stages of the Liedtke deposition follow:

> A. [Mr. Liedtke] I vaguely recall [Mr. Oresman's letter].... I think I did read it, probably.
>
> ....
>
> Q. (By Mr. Johnston [Delaware counsel for QVC]) Okay. Do you have any idea why Mr. Oresman was calling that material to your attention?
>
> MR. JAMAIL: Don't answer that.
>
> How would he know what was going on in Mr. Oresman's mind?
>
> Don't answer it.
>
> Go on to your next question.
>
> MR. JOHNSTON: No, Joe—
>
> MR. JAMAIL: He's not going to answer that. Certify it. I'm going to shut it down if you don't go to your next question.
>
> ***54** MR. JOHNSTON: No. Joe, Joe—
>
> MR. JAMAIL: Don't "Joe" me, asshole. You can ask some questions, but get off of that. I'm tired of you. You could gag a maggot off a meat wagon. Now, we've helped you every way we can.
>
> MR. JOHNSTON: Let's just take it easy.
>
> MR. JAMAIL: No, we're not going to take it easy. Get done with this.
>
> MR. JOHNSTON: We will go on to the next question.
>
> MR. JAMAIL: Do it now.
>
> MR. JOHNSTON: We will go on to the next question. We're not trying to excite anyone.
>
> MR. JAMAIL: Come on. Quit talking. Ask the question. Nobody wants to socialize with you.
>
> MR. JOHNSTON: I'm not trying to socialize. We'll go on to another question. We're continuing the deposition.
>
> MR. JAMAIL: Well, go on and shut up.
>
> MR. JOHNSTON: Are you finished?
>
> MR. JAMAIL: Yeah, you—
>
> MR. JOHNSTON: Are you finished?
>
> MR. JAMAIL: I may be and you may be. Now, you want to sit here and talk to me, fine. This deposition is going to be over with. You don't know what you're doing. Obviously

someone wrote out a long outline of stuff for you to ask. You have no concept of what you're doing.

Now, I've tolerated you for three hours. If you've got another question, get on with it. This is going to stop one hour from now, period. Go.

MR. JOHNSTON: Are you finished?

MR. THOMAS: Come on, Mr. Johnston, move it.

MR. JOHNSTON: I don't need this kind of abuse.

MR. THOMAS: Then just ask the next question.

Q. (By Mr. Johnston) All right. To try to move forward, Mr. Liedtke, ... I'll show you what's been marked as Liedtke 14 and it is a covering letter dated October 29 from Steven Cohen of Wachtell, Lipton, Rosen & Katz including QVC's Amendment Number 1 to its Schedule 14D–1, and my question—

A. No.

Q. —to you, sir, is whether you've seen that?

A. No. Look, I don't know what your intent in asking all these questions is, but, my God, I am not going to play boy lawyer.

Q. Mr. Liedtke—

A. Okay. Go ahead and ask your question.

Q. —I'm trying to move forward in this deposition that we are entitled to take. I'm trying to streamline it.

MR. JAMAIL: Come on with your next question. Don't even talk with this witness.

MR. JOHNSTON: I'm trying to move forward with it.

MR. JAMAIL: You understand me? Don't talk to this witness except by question. Did you hear me?

MR. JOHNSTON: I heard you fine.

MR. JAMAIL: You fee makers think you can come here and sit in somebody's office, get your meter running, get your full day's fee by asking stupid questions. Let's go with it.

(JA 6002–06). [30]

Staunch advocacy on behalf of a client is proper and fully consistent with the finest effectuation of skill and professionalism. Indeed, it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client's legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process. A lawyer who engages in the type of behavior exemplified by Mr. Jamail on the record of the Liedtke deposition is not properly representing his client, and the client's cause is not advanced by a lawyer who engages in unprofessional conduct of this nature. It happens that in this case there was no application to the Court, and the parties and the witness do not ***55** appear to have been prejudiced by this misconduct. [31]

Nevertheless, the Court finds this unprofessional behavior to be outrageous and unacceptable. If a Delaware lawyer had engaged in the kind of misconduct committed by Mr. Jamail on this record, that lawyer would have been subject to censure or more serious sanctions. [32] While the specter of disciplinary proceedings should not be used by the parties as a litigation tactic, [33] conduct such as that involved here goes to the heart of the trial court proceedings themselves. As such, it cries out for relief under the trial court's rules, including Ch. Ct. R. 37. Under some circumstances, the use of the trial court's inherent summary contempt powers may be appropriate. *See In re Butler,* Del.Supr., 609 A.2d 1080, 1082 (1992).

Although busy and overburdened, Delaware trial courts are "but a phone call away" and would be responsive to the plight of a party and its counsel bearing the brunt of such misconduct. [34] It is not appropriate for this Court to prescribe in the abstract any particular remedy or to provide an exclusive list of remedies under such circumstances. We assume that the trial courts of this State would consider protective orders and the sanctions permitted by the discovery rules. Sanctions could include exclusion of obstreperous counsel from attending the deposition (whether or not he or she has been admitted *pro hac vice*), ordering the deposition recessed and reconvened promptly in Delaware, or the appointment of a master to preside at the deposition. Costs and counsel fees should follow.

[17] As noted, this was a deposition of Paramount through one of its directors. Mr. Liedtke was a Paramount witness in every respect. He was not there either as an individual defendant or as a third party witness. Pursuant to Ch. Ct. R. 170(d), the Paramount defendants should have been

represented at the deposition by a Delaware lawyer or a lawyer admitted *pro hac vice.* A Delaware lawyer who moves the admission *pro hac vice* of an out-of-state lawyer is not relieved of responsibility, is required to appear at all court proceedings (except depositions when a lawyer admitted *pro hac vice* is present), shall certify that the lawyer appearing ***56** *pro hac vice* is reputable and competent, and that the Delaware lawyer is in a position to recommend the out-of-state lawyer.[35] Thus, one of the principal purposes of the *pro hac vice* rules is to assure that, if a Delaware lawyer is not to be present at a deposition, the lawyer admitted *pro hac vice* will be there. As such, he is an officer of the Delaware Court, subject to control of the Court to ensure the integrity of the proceeding.

Counsel attending the Liedtke deposition on behalf of the Paramount defendants had an obligation to ensure the integrity of that proceeding. The record of the deposition as a whole (JA 5916–6054) demonstrates that, not only Mr. Jamail, but also Mr. Thomas (representing the Paramount defendants), continually interrupted the questioning, engaged in colloquies and objections which sometimes suggested answers to questions,[36] and constantly pressed the questioner for time throughout the deposition.[37] As to Mr. Jamail's tactics quoted above, Mr. Thomas passively let matters proceed as they did, and at times even added his own voice to support the behavior of Mr. Jamail. A Delaware lawyer or a lawyer admitted *pro hac vice* would have been expected to put an end to the misconduct in the Liedtke deposition.

This kind of misconduct is not to be tolerated in any Delaware court proceeding, including depositions taken in other states in which witnesses appear represented by their own counsel other than counsel for a party in the proceeding. Yet, there is no clear mechanism for this Court to deal with this matter in terms of sanctions or disciplinary remedies at this time in the context of this case. Nevertheless, consideration will be given to the following issues for the future: (a) whether or not it is appropriate and fair to take into account the behavior of Mr. Jamail in this case in the event application is made by him in the future to appear *pro hac vice* in any Delaware proceeding;[38] and (b) what rules or standards should be adopted to deal effectively with misconduct by out-of-state lawyers in depositions in proceedings pending in Delaware courts.

As to (a), this Court will welcome a voluntary appearance by Mr. Jamail if a request is received from him by the Clerk of this Court within thirty days of the date of this Opinion and Addendum. The purpose of such voluntary appearance will be to explain the questioned conduct and to show cause why such conduct should not be considered as a bar to any future appearance by Mr. Jamail in a Delaware proceeding. As to (b), this Court and the trial courts of this State will undertake to strengthen the existing mechanisms for dealing with the type of misconduct referred ***57** to in this Addendum and the practices relating to admissions *pro hac vice.*

All Citations

637 A.2d 34, 62 USLW 2530, Fed. Sec. L. Rep. P 98,063

Footnotes

1 We accepted this expedited interlocutory appeal on November 29, 1993. After briefing and oral argument in this Court held on December 9, 1993, we issued our December 9 Order affirming the November 24 Order of the Court of Chancery. In our December 9 Order, we stated, "It is not feasible, because of the exigencies of time, for this Court to complete an opinion setting forth more comprehensively the rationale of the Court's decision. Unless otherwise ordered by the Court, such an opinion will follow in due course." December 9 Order at 3. This is the opinion referred to therein.

2 It is important to put the Addendum in perspective. This Court notes and has noted its appreciation of the outstanding judicial workmanship of the Vice Chancellor and the professionalism of counsel in this matter in handling this expedited litigation with the expertise and skill which characterize Delaware proceedings of this nature. The misconduct noted in the Addendum is an aberration which is not to be tolerated in any Delaware proceeding.

3 This Court's standard and scope of review as to facts on appeal from a preliminary injunction is whether, after independently reviewing the entire record, we can conclude that the findings of the Court of Chancery are sufficiently supported by the record and are the product of an orderly and logical deductive process. *Ivanhoe Partners v. Newmont Mining Corp.*, Del.Supr., 535 A.2d 1334, 1342–41 (1987).

4 Grace J. Fippinger, a former Vice President, Secretary and Treasurer of NYNEX Corporation, and director of Pfizer, Inc., Connecticut Mutual Life Insurance Company, and The Bear Stearns Companies, Inc.

Irving R. Fischer, Chairman and Chief Executive Officer of HRH Construction Corporation, Vice Chairman of the New York City Chapter of the National Multiple Sclerosis Society, a member of the New York City Holocaust Memorial Commission, and an Adjunct Professor of Urban Planning at Columbia University

Benjamin L. Hooks, Senior Vice President of the Chapman Company and director of Maxima Corporation

J. Hugh Liedtke, Chairman of Pennzoil Company

Franz J. Lutolf, former General Manager and a member of the Executive Board of Swiss Bank Corporation, and director of Grapha Holding AG, Hergiswil (Switzerland), Banco Santander (Suisse) S.A., Geneva, Diawa Securities Bank (Switzerland), Zurich, Cheak Coast Helarb European Acquisitions S.A., Luxembourg Internationale Nederlanden Bank (Switzerland), Zurich

James A. Pattison, Chairman and Chief Executive Officer of the Jim Pattison Group, and director of the Toronto–Dominion Bank, Canadian Pacific Ltd., and Toyota's Canadian subsidiary

Lester Pollack, General Partner of Lazard Freres & Co., Chief Executive Officer of Center Partners, and Senior Managing Director of Corporate Partners, investment affiliates of Lazard Freres, director of Loews Corp., CNA Financial Corp., Sunamerica Corp., Kaufman & Broad Home Corp., Parlex Corp., Transco Energy Company, Polaroid Corp., Continental Cablevision, Inc., and Tidewater Inc., and Trustee of New York University

Irwin Schloss, Senior Advisor, Marcus Schloss & Company, Inc.

Samuel J. Silberman, Retired Chairman of Consolidated Cigar Corporation

Lawrence M. Small, President and Chief Operating Officer of the Federal National Mortgage Association, director of Fannie Mae and the Chubb Corporation, and trustee of Morehouse College and New York University Medical Center

George Weissman, retired Chairman and Consultant of Philip Morris Companies, Inc., director of Avnet, Incorporated, and Chairman of Lincoln Center for the Performing Arts, Inc.

5 By November 15, 1993, the value of the Stock Option Agreement had increased to nearly $500 million based on the $90 QVC bid. *See* Court of Chancery Opinion, 635 A.2d 1245, 1271.

6 Under the Amended Merger Agreement and the Paramount Board's resolutions approving it, no further action of the Paramount Board would be required in order for Paramount's Rights Agreement to be amended. As a result, the proper officers of the company were authorized to implement the amendment unless they were instructed otherwise by the Paramount Board.

7 This belief may have been based on a report prepared by Booz–Allen and distributed to the Paramount Board at its October 24 meeting. The report, which relied on public information regarding QVC, concluded that the

synergies of a Paramount–Viacom merger were significantly superior to those of a Paramount–QVC merger. QVC has labelled the Booz–Allen report as a "joke."

8 The market prices of Viacom's and QVC's stock were poor measures of their actual values because such prices constantly fluctuated depending upon which company was perceived to be the more likely to acquire Paramount.

9 Where actual self-interest is present and affects a majority of the directors approving a transaction, a court will apply even more exacting scrutiny to determine whether the transaction is entirely fair to the stockholders. *E.g.*, *Weinberger v. UOP, Inc.*, Del.Supr., 457 A.2d 701, 710–11 (1983); *Nixon v. Blackwell*, Del.Supr., 626 A.2d 1366, 1376 (1993).

10 For purposes of our December 9 Order and this Opinion, we have used the terms "sale of control" and "change of control" interchangeably without intending any doctrinal distinction.

11 *See* *Schnell v. Chris–Craft Indus., Inc.*, Del.Supr., 285 A.2d 437, 439 (1971) (holding that actions taken by management to manipulate corporate machinery "for the purpose of obstructing the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest against management" were "contrary to established principles of corporate democracy" and therefore invalid); *Giuricich v. Emtrol Corp.*, Del.Supr., 449 A.2d 232, 239 (1982) (holding that "careful judicial scrutiny will be given a situation in which the right to vote for the election of successor directors has been effectively frustrated"); *Centaur Partners, IV v. Nat'l Intergroup*, Del.Supr., 582 A.2d 923 (1990) (holding that supermajority voting provisions must be clear and unambiguous because they have the effect of disenfranchising the majority); *Stroud v. Grace*, Del.Supr., 606 A.2d 75, 84 (1992) (directors' duty of disclosure is premised on the importance of stockholders being fully informed when voting on a specific matter); *Blasius Indus., Inc. v. Atlas Corp.*, Del.Ch., 564 A.2d 651, 659 n. 2 (1988) ("Delaware courts have long exercised a most sensitive and protective regard for the free and effective exercise of voting rights.").

12 Examples of such protective provisions are supermajority voting provisions, majority of the minority requirements, etc. Although we express no opinion on what effect the inclusion of any such stockholder protective devices would have had in this case, we note that this Court has upheld, under different circumstances, the reasonableness of a standstill agreement which limited a 49.9 percent stockholder to 40 percent board representation. *Ivanhoe*, 535 A.2d at 1343.

13 We express no opinion on any scenario except the actual facts before the Court, and our precise holding herein. Unsolicited tender offers in other contexts may be governed by different precedent. For example, where a potential sale of control by a corporation is not the consequence of a board's action, this Court has recognized the prerogative of a board of directors to resist a third party's unsolicited acquisition proposal or offer. *See* *Pogostin*, 480 A.2d at 627; *Time–Warner*, 571 A.2d at 1152; *Bershad v. Curtiss–Wright Corp.*, Del.Supr., 535 A.2d 840, 845 (1987); *Macmillan*, 559 A.2d at 1285 n. 35. The decision of a board to resist such an acquisition, like all decisions of a properly-functioning board, must be informed, *Unocal*, 493 A.2d at 954–55, and the circumstances of each particular case will determine the steps that a board must take to inform itself, and what other action, if any, is required as a matter of fiduciary duty.

14 When assessing the value of non-cash consideration, a board should focus on its value as of the date it will be received by the stockholders. Normally, such value will be determined with the assistance of experts using

generally accepted methods of valuation. *See* *In re RJR Nabisco, Inc. Shareholders Litig.*, Del.Ch., C.A. No. 10389, 1989 WL 7036, Allen, C. (Jan. 31, 1989), reprinted at 14 Del.J.Corp.L. 1132, 1161.

15 Because the Paramount Board acted unreasonably as to process and result in this sale of control situation, the business judgment rule did not become operative.

16 Before this test is invoked, "the plaintiff must show, and the trial court must find, that the directors of the target company treated one or more of the respective bidders on unequal terms." *Macmillan,* 559 A.2d at 1288.

17 It is to be remembered that, in cases where the traditional business judgment rule is applicable and the board acted with due care, in good faith, and in the honest belief that they are acting in the best interests of the stockholders (which is not this case), the Court gives great deference to the substance of the directors' decision and will not invalidate the decision, will not examine its reasonableness, and "will not substitute our views for those of the board if the latter's decision can be 'attributed to any rational business purpose.' " *Unocal,* 493 A.2d at 949 (*quoting* *Sinclair Oil Corp. v. Levien,* Del.Supr., 280 A.2d 717, 720 (1971)). *See* *Aronson,* 473 A.2d at 812.

18 Both the Viacom and the QVC tender offers were for 51 percent cash and a "back-end" of various securities, the value of each of which depended on the fluctuating value of Viacom and QVC stock at any given time. Thus, both tender offers were two-tiered, front-end loaded, and coercive. Such coercive offers are inherently problematic and should be expected to receive particularly careful analysis by a target board. *See* *Unocal,* 493 A.2d at 956.

19 The Vice Chancellor so characterized the Stock Option Agreement. Court of Chancery Opinion, 635 A.2d 1245, 1272. We express no opinion whether a stock option agreement of essentially this magnitude, but with a reasonable "cap" and without the Note and Put Features, would be valid or invalid under other circumstances. *See Hecco Ventures v. Sea–Land Corp.,* Del.Ch., C.A. No. 8486, 1986 WL 5840, Jacobs, V.C. (May 19, 1986) (21.7 percent stock option); *In re Vitalink Communications Corp. Shareholders Litig.,* Del.Ch., C.A. No. 12085, Chandler, V.C. (May 16, 1990) (19.9 percent stock option).

20 We express no opinion whether certain aspects of the No–Shop Provision here could be valid in another context. Whether or not it could validly have operated here at an early stage solely to prevent Paramount from actively "shopping" the company, it could not prevent the Paramount directors from carrying out their fiduciary duties in considering unsolicited bids or in negotiating for the best value reasonably available to the stockholders. *Macmillan,* 559 A.2d at 1287. As we said in *Barkan:* "Where a board has no reasonable basis upon which to judge the adequacy of a contemplated transaction, a no-shop restriction gives rise to the inference that the board seeks to forestall competing bids." 567 A.2d at 1288. *See also* *Revlon,* 506 A.2d at 184 (holding that "[t]he no-shop provision, like the lock-up option, while not *per se* illegal, is impermissible under the *Unocal* standards when a board's primary duty becomes that of an auctioneer responsible for selling the company to the highest bidder").

21 The Paramount defendants argue that the Court of Chancery erred by assuming that the Rights Agreement was "pulled" at the November 15 meeting of the Paramount Board. The problem with this argument is that, under the Amended Merger Agreement and the resolutions of the Paramount Board related thereto, Viacom would be exempted from the Rights Agreement in the absence of further action of the Paramount Board and no further meeting had been scheduled or even contemplated prior to the closing of the Viacom tender offer. This failure to schedule and hold a meeting shortly before the closing date in order to make a final decision, based on all of the information and circumstances then existing, whether to exempt Viacom from the Rights

Agreement was inconsistent with the Paramount Board's responsibilities and does not provide a basis to challenge the Court of Chancery's decision.

22 Presumably this argument would have included the Termination Fee had the Vice Chancellor invalidated that provision or if appellees had cross-appealed from the Vice Chancellor's refusal to invalidate that provision.

23 We raise this matter *sua sponte* as part of our exclusive supervisory responsibility to regulate and enforce appropriate conduct of lawyers appearing in Delaware proceedings. *See In re Infotechnology, Inc. Shareholder Litig.*, Del.Supr., 582 A.2d 215 (1990); *In re Nenno*, Del.Supr., 472 A.2d 815, 819 (1983); *In re Green*, Del.Supr., 464 A.2d 881, 885 (1983); *Delaware Optometric Corp. v. Sherwood*, 36 Del.Ch. 223, 128 A.2d 812 (1957); *Darling Apartment Co. v. Springer*, 25 Del.Ch. 420, 22 A.2d 397 (1941). Normally our supervision relates to the conduct of members of the Delaware Bar and those admitted *pro hac vice*. Our responsibility for supervision is not confined to lawyers who are members of the Delaware Bar and those admitted *pro hac vice*, however. *See In re Metviner*, Del.Supr., Misc. No. 256, 1989 WL 226135, Christie, C.J. (July 7, 1989 and Aug. 22, 1989) (ORDERS). Our concern, and our duty to insist on appropriate conduct in any Delaware proceeding, including out-of-state depositions taken in Delaware litigation, extends to all lawyers, litigants, witnesses, and others.

24 Justice Sandra Day O'Connor recently highlighted the national concern about the deterioration in civility in a speech delivered on December 14, 1993, to an American Bar Association group on "Civil Justice Improvements."

> I believe that the justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another. Stress and frustration drive down productivity and make the process more time-consuming and expensive. Many of the best people get driven away from the field. The profession and the system itself lose esteem in the public's eyes.
>
> ....
>
> ... In my view, incivility disserves the client because it wastes time and energy—time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent.

The Honorable Sandra Day O'Connor, "Civil Justice System Improvements," ABA at 5 (Dec. 14, 1993) (footnotes omitted).

25 The docket entries in the Court of Chancery show a November 2, 1993, "Notice of Deposition of Paramount Board" (Dkt 65). Presumably, this included Mr. Liedtke, a director of Paramount. Under Ch. Ct. R. 32(a)(2), a deposition is admissible against a party if the deposition is of an officer, director, or managing agent. From the docket entries, it appears that depositions of third party witnesses (persons who were not directors or officers) were taken pursuant to the issuance of commissions.

26 It does not appear from the docket entries that Mr. Thomas was admitted *pro hac vice* in the Court of Chancery. In fact, no member of his firm appears from the docket entries to have been so admitted until Barry R. Ostrager, Esquire, who presented the oral argument on behalf of the Paramount defendants, was admitted on the day of the argument before the Vice Chancellor, November 16, 1993.

27 Ch.Ct.R. 170; Supr.Ct.R. 71. There was no Delaware lawyer and no lawyer admitted *pro hac vice* present at the deposition representing any party, except that Mr. Johnston, a Delaware lawyer, took the deposition on behalf of QVC. The Court is aware that the general practice has not been to view as a requirement that a

Delaware lawyer or a lawyer already admitted *pro hac vice* must be present at all depositions. Although it is not as explicit as perhaps it should be, we believe that Ch.Ct.R. 170(d), fairly read, requires such presence:

> (d) Delaware counsel for any party shall appear in the action in which the motion for admission pro hac vice is filed and shall sign or receive service of all notices, orders, pleadings or other papers filed in the action, and shall attend all proceedings before the Court, Clerk of the Court, or other officers of the Court, unless excused by the Court. Attendance of Delaware Counsel at depositions shall not be required unless ordered by the Court.

See also Hoechst Celanese Corp. v. National Union Fire Ins. Co., Del.Super., 623 A.2d 1099, 1114 (1991). (Super.Ct.Civ.R. 90.1, which corresponds to Ch.Ct.R. 170, "merely excuses attendance of local counsel at depositions, but does not excuse non-Delaware counsel from compliance with the *pro hac vice* requirement.... A deposition conducted pursuant to Court rules is a proceeding."). We believe that these shortcomings in the enforcement of proper lawyer conduct can and should be remedied consistent with the nature of expedited proceedings.

28 It appears that at least Rule 3.5(c) of the Delaware Lawyer's Rules of Professional Conduct is implicated here. It provides: "A lawyer shall not ... (c) engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct which is degrading to a tribunal."

29 The following are a few pertinent excerpts from the Statement of Principles:

> The Delaware State Bar Association, for the Guidance of Delaware lawyers, **and those lawyers from other jurisdictions who may be associated with them,** adopted the following Statement of Principles of Lawyer Conduct on [November 15, 1991].... The purpose of adopting these Principles is to promote and foster the ideals of **professional courtesy, conduct and cooperation....** A lawyer should develop and maintain the qualities of integrity, compassion, learning, civility, diligence and public service that mark the most admired members of our profession.... [A] lawyer ... **should treat** all persons, including **adverse lawyers** and parties, **fairly and equitably.... Professional civility is conduct that shows respect not only for the courts and colleagues, but also for all people encountered in practice....** Respect for the court requires ... emotional self-control; [and] the absence of scorn and superiority in words of demeanor.... A lawyer should use pre-trial procedures, including discovery, solely to develop a case for settlement or trial. **No pre-trial procedure should be used to harass an opponent or delay a case.... Questions and objections at deposition should be restricted to conduct appropriate in the presence of a judge....** Before moving the admission of a lawyer from another jurisdiction, a Delaware lawyer should make such investigation as is required to form an informed conviction that the lawyer to be admitted is ethical and competent, and should furnish the candidate for admission with a copy of this Statement.

(Emphasis supplied.)

30 Joint Appendix of the parties on appeal.

31 We recognize the practicalities of litigation practice in our trial courts, particularly in expedited proceedings such as this preliminary injunction motion, where simultaneous depositions are often taken in far-flung locations, and counsel have only a few hours to question each witness. Understandably, counsel may be reluctant to take the time to stop a deposition and call the trial judge for relief. Trial courts are extremely busy and overburdened. Avoidance of this kind of misconduct is essential. If such misconduct should occur, the aggrieved party should recess the deposition and engage in a dialogue with the offending lawyer to obviate the need to call the trial judge. If all else fails and it is necessary to call the trial judge, sanctions may be appropriate against the offending lawyer or party, or against the complaining lawyer or party if the request for court relief is unjustified. *See* Ch.Ct.R. 37. It should also be noted that discovery abuse sometimes is

the fault of the questioner, not the lawyer defending the deposition. These admonitions should be read as applying to both sides.

32 *See* *In re Ramunno*, Del.Supr., 625 A.2d 248, 250 (1993) (Delaware lawyer held to have violated Rule 3.5 of the Rules of Professional Conduct, and therefore subject to public reprimand and warning for use of profanity similar to that involved here and "insulting conduct toward opposing counsel [found] ... unacceptable by any standard").

33 *See Infotechnology*, 582 A.2d at 220 ("In Delaware there is the fundamental constitutional principle that [the Supreme] Court, alone, has the sole and exclusive responsibility over all matters affecting governance of the Bar.... The Rules are to be enforced by a disciplinary agency, and are not to be subverted as procedural weapons.").

34 *See* *Hall v. Clifton Precision*, E.D.Pa., 150 F.R.D. 525 (1993) (ruling on "coaching," conferences between deposed witnesses and their lawyers, and obstructive tactics):

> Depositions are the factual battleground where the vast majority of litigation actually takes place.... Thus, it is particularly important that this discovery device not be abused. Counsel should never forget that even though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the caption of this court and proceeding under the authority of the rules of this court, counsel are operating as officers of this court. They should comport themselves accordingly; should they be tempted to stray, they should remember that this judge is but a phone call away.

150 F.R.D. at 531.

35 *See, e.g.*, Ch.Ct.R. 170(b), (d), and (h).

36 Rule 30(d)(1) of the revised Federal Rules of Civil Procedure, which became effective on December 1, 1993, requires objections during depositions to be "stated concisely and in a non-argumentative and non-suggestive manner." *See* *Hall*, 150 F.R.D. at 530. *See also Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp.*, D.Del., C.A. No. 79–182, Steel, J. (Dec. 12, 1980); *Cascella v. GDV, Inc.*, Del.Ch., C.A. No. 5899, 1981 WL 15129, Brown, V.C. (Jan. 15, 1981); *In re Asbestos Litig.*, Del.Super., 492 A.2d 256 (1985); *Deutschman v. Beneficial Corp.*, D.Del., C.A. No. 86–595 MMS, Schwartz, J. (Feb. 20, 1990). The Delaware trial courts and this Court are evaluating the desirability of adopting certain of the new Federal Rules, or modifications thereof, and other possible rule changes.

37 While we do not necessarily endorse everything set forth in the *Hall* case, we share Judge Gawthrop's view not only of the impropriety of coaching witnesses on and off the record of the deposition (*see supra* note 34), but also the impropriety of objections and colloquy which "tend to disrupt the question-and-answer rhythm of a deposition and obstruct the witness's testimony." *See* 150 F.R.D. at 530. To be sure, there are also occasions when the questioner is abusive or otherwise acts improperly and should be sanctioned. *See supra* note 31. Although the questioning in the Liedtke deposition could have proceeded more crisply, this was not a case where it was the questioner who abused the process.

38 The Court does not condone the conduct of Mr. Thomas in this deposition. Although the Court does not view his conduct with the gravity and revulsion with which it views Mr. Jamail's conduct, in the future the Court expects that counsel in Mr. Thomas's position will have been admitted *pro hac vice* before participating in a

deposition. As an officer of the Delaware Court, counsel admitted *pro hac vice* are now clearly on notice that they are expected to put an end to conduct such as that perpetrated by Mr. Jamail on this record.

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KeyCite Yellow Flag - Negative Treatment
Called into Doubt by Westar Energy, Inc. v. Wittig, Kan.App., July 9, 2010

884 A.2d 500
Supreme Court of Delaware.

Thomas T.S. KAUNG, Plaintiff–Below, Appellant,
v.
COLE NATIONAL CORPORATION. A Delaware Corporation Defendant–Below, Appellee.

No. 480, 2004.
|
Submitted March 30, 2005.
|
Decided July 5, 2005.

Synopsis

Background: Chief financial officer (CFO) brought advancement action against corporation seeking advancement of his attorney fees related to time spent with a non-lawyer consultant in regards to a Securities and Exchange Commission (SEC) investigation of corporation that implicated CFO. The Court of Chancery, New Castle County, ruled that CFO was not entitled to advancement of fees related to consultant, ordered reimbursement of such fees that were already advanced, and awarded corporation attorney fees. CFO appealed.

Holdings: The Supreme Court, Ridgely, J., held that:

[1] corporation was entitled to a fee shifting award based on CFO's representatives' bad faith in bringing action, and

[2] chancery court's determination regarding reimbursement of already advanced fees was premature.

Affirmed in part and reversed in part.

Procedural Posture(s): On Appeal.

West Headnotes (14)

[1] **Costs, Fees, and Sanctions** ⇐ Particular Litigation Conduct

Chief financial officer's representatives acted in bad faith in advancement action against corporation pursuant to indemnity agreement for fees related to non-lawyer consultant in regards to Securities and Exchange Commission (SEC) investigation that implicated officer, and thus, corporation was entitled to a fee shifting award that awarded corporation its attorney fees and costs associated with the litigation; record suggested that advancement action was brought in the hope that corporation would advance sums that were not reasonably incurred in connection with officer's representation, and officer's representatives made excessive and duplicative deposition requests while ignoring their own discovery obligations.

12 Cases that cite this headnote

[2] **Costs, Fees, and Sanctions** ⇐ Discretion of court

The Court of Chancery's discretion is broad in fixing the amount of attorneys' fees to be awarded.

13 Cases that cite this headnote

[3] **Appeal and Error** ⇐ Attorney Fees

Absent a clear abuse of discretion, Court of Chancery's award of attorney fees will not be reversed.

8 Cases that cite this headnote

[4] **Costs, Fees, and Sanctions** ⇐ Necessity of Authorization for Award; "American Rule"

Under "American Rule," courts do not award attorney fees to prevailing parties in litigation.

28 Cases that cite this headnote

[5] **Costs, Fees, and Sanctions** ⇐ Meritless or Bad-Faith Litigation

There is exception to the American Rule, permitting award of attorney fees to prevailing party where losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

29 Cases that cite this headnote

[6] **Costs, Fees, and Sanctions** ⇐ Meritless or Bad-Faith Litigation

Purpose of the "bad faith" exception to the American Rule, permitting award of attorney fees to prevailing party where losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, is to deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the judicial process.

47 Cases that cite this headnote

[7] **Pretrial Procedure** ⇐ Failure to Appear or Testify; Sanctions

Unprofessional behavior obstructing a deposition is just as outrageous and unacceptable when accomplished by a non-lawyer consultant or a witness at a deposition as it is when accomplished by an attorney.

1 Cases that cite this headnote

[8] **Corporations and Business Organizations** ⇐ Actions or proceedings to enforce or deny

The narrow scope of the advancement proceeding, in which chief financial officer sought reimbursement for additional costs incurred in underlying litigation, prohibited the ultimate determination of officer's entitlement to indemnity or corporation's entitlement to recoupment of litigation costs previously advanced. 8 Del.C. § 145.

6 Cases that cite this headnote

[9] **Appeal and Error** ⇐ Proceedings in Equity

Court of Chancery's factual findings are reviewed for clear error.

[10] **Appeal and Error** ⇐ De novo review

Once the Court of Chancery's factual findings are established, appellate court will review the ultimate determination of the legal issue presented under a de novo standard of review.

[11] **Corporations and Business Organizations** ⇐ Advancement of expenses

Rights of corporate officials to indemnification and advancement for expenses incurred in connection with litigation and other legal proceedings are deeply rooted in the public policy of Delaware corporate law in that they are viewed less as an individual benefit arising from a person's employment and more as a desirable mechanism to manage risk in return for greater corporate benefits. 8 Del.C. § 145.

15 Cases that cite this headnote

[12] **Corporations and Business Organizations** ⇐ Discretionary or mandatory

Whether a corporate officer has a right to indemnification for expenses incurred in litigation is a decision that must necessarily await the outcome of the investigation or litigation. 8 Del.C. § 145.

7 Cases that cite this headnote

[13] **Corporations and Business Organizations** ⇐ Actions or proceedings to enforce or deny

Scope of an advancement proceeding by corporate official against corporation, to obtain advancement for expenses incurred in connection with litigation and other legal proceedings, is limited to determining issue of entitlement according to corporation's advancement provisions and not to issues regarding the official's alleged conduct in the underlying litigation. 8 Del.C. § 145(k).

18 Cases that cite this headnote

[14] **Corporations and Business Organizations** Actions or proceedings to enforce or deny

Corporate official's right to advancement of litigation costs is a subsidiary element of the right to ultimate indemnification, but the narrow scope of advancement proceeding prohibits an ultimate determination of indemnification and liability owed by a corporate official for sums already advanced; while the rights to indemnification and advancement are correlative, they are still discrete and independent rights, with the latter having a much narrower scope. 8 Del.C. § 145.

18 Cases that cite this headnote

***502** Court Below: Court of Chancery of the State of Delaware, in and for New Castle County, No. 163–N.
Upon appeal from the Court of Chancery. **AFFIRMED IN PART; REVERSED IN PART.**

Attorneys and Law Firms

John L. Reed (argued), Thomas P. McGonigle Matt Neiderman, of Duane Morris, L.L.P., New Castle, DE, for appellant.

Donald J. Wolf, Jr., Arthur L. Dent, Joseph B. Cicero, of Potter, Anderson & Carroon, L.L.P. and Robert P. Duvin, Robert M. Wolff (argued), Barry Y. Freeman, of Duvin, Cahn & Hutton, Cleveland, OH, for appellee.

Before STEELE, Chief Justice, HOLLAND and RIDGELY, Justices.

Opinion

RIDGELY, Justice:

This appeal challenges rulings of the Court of Chancery made in the context of an advancement proceeding for litigation expenses. The case was brought by the plaintiff-appellant, Thomas T.S. Kaung ("Kaung"), as a corporate officer under 8 *Del. C.* § 145 ("Section 145"), against the defendant-appellee, Cole National Corporation ("Cole"). The Court of Chancery ruled that Kaung was not entitled to receive advancement of any part of his attorneys' fees and expenses related to time spent with a non-lawyer consultant. The Court of Chancery next ruled that Cole was entitled to recoup sums previously advanced with respect to the non-lawyer consultant's fees and attorneys' fees related to time spent with the non-lawyer consultant. The Court of Chancery finally awarded Cole its attorneys' fees and expenses, together with court costs, incurred in connection with this case. Kaung appeals the latter two rulings.

We find no abuse of discretion by the Court of Chancery in its award to Cole of fees and other legal expenses related to this action. We reverse, however, the recoupment award because it is beyond the scope of a summary proceeding for interim advancement of litigation expenses under Section 145.

I. FACTUAL BACKGROUND

Kaung was employed by Cole on two separate occasions.[1] Kaung began his career with Cole in 1979 as a Corporate Controller and he ultimately rose to the positions of Executive Vice President and Chief Administrative Officer. In 1990, Kaung and Cole parted ways. In the interim, Kaung pursued other opportunities, including starting his own financial consulting firm called River International, Inc. ("River"), which provided consulting services in the area of financial controls. In fact, Cole was one of River's clients.

***503** During this relationship, River assisted Cole in restoring its financial viability and searching for high level management to fill the positions of Chief Operating Officer ("COO") and Chief Financial Officer ("CFO"). While Cole was successful in filling the COO position, it struggled to find a new CFO. Cole's Chief Executive Officer ("CEO"), Jeffrey Cole, then approached Kaung about taking the CFO position. Kaung was reluctant at first, because he was preparing to retire, but Jeffrey Cole ultimately persuaded Kaung to sign a three-year contract with Cole as its CFO. The parties had an understanding that during that period, Jeffrey Cole and Kaung would work towards turning around the company financially, while at the same time actively recruiting Kaung's replacement.

At the time Kaung became CFO, Cole insured Kaung and others with a Directors and Officers ("D & O") insurance policy. Kaung also entered into an indemnification agreement with Cole. This agreement provided that if Kaung was the subject of litigation related to his employment, Cole would

advance Kaung reasonable litigation costs to the extent that the D & O policy was insufficient. Section 2(a) of the agreement provides that the company shall indemnify the Indemnitee "against any and all costs, charges and expenses (including, without limitation, attorneys' and others' fees and expenses), judgments, fines and amounts paid in settlement actually or reasonably incurred...."[2] Pursuant to Section 2(e) of the agreement, attorneys' and others' fees and expenses "shall be paid by the Company in advance of the final disposition of such action, suit or proceeding as authorized in accordance with Section 4(b) hereof."[3] Section 4(b), in relevant part, states:

> For purposes of determining whether to authorize advancement of expenses pursuant to Section 2(e) hereof, the Indemnitee shall submit to the Board a sworn statement of request for advancement of expenses ... averring that (i) the Indemnitee has reasonably incurred or will reasonably incur actual expenses in defending an actual, civil, criminal, administrative or investigative action, suit, proceeding or claim and (ii) the Indemnitee undertakes to repay such amount if it shall ultimately be determined that the Indemnitee is not entitled to be indemnified by the Company, under this Agreement or otherwise.[4]

Kaung returned to Cole as CFO in March 2000, and as agreed, Jeffrey Cole hired Kaung's replacement, Larry Hyatt, in 2002. Following a short transition period, Kaung retired in July 2002. In the fall of 2002, however, questions arose regarding Cole's accounting practices. Those questions specifically addressed the revenues Cole recorded in its financials received from warranties sold on its optical products. Cole's former auditor, Arthur Andersen LLP, had maintained that recognizing warranty revenues at the time of sale was appropriate. Following the Enron and WorldCom scandals that implicated Arthur Anderson, Cole hired Deloitte & Touche LLP, which advised that the warranty revenue methodology that Arthur Anderson advocated was inappropriate. As a result, Cole publicly announced that it would restate its financials for fiscal years 1998 through 2001 as well as the first two quarters of 2002.

***504** In response to Cole's announcement, certain shareholders of Cole filed a class action suit on December 6, 2002. That suit, which contained allegations of securities fraud against Cole and its various corporate officers, included Kaung as a defendant. In addition, on December 24, 2002, the Securities and Exchange Commission (the "SEC") launched an investigation into Cole's accounting and financial reporting for the period during which Kaung was the CFO.

Cole then retained the Jones Day law firm to represent the corporate and individual defendants. Cole also hired the law firm of Venable LLP to perform an internal investigation. A determination was later made, however, that certain indemnitees, including Kaung, should seek separate representation. The Cole board of directors passed a resolution approving the separate representation.

Kaung hired Malcolm Kelso ("Kelso"), the sole member of the Irontree Group, Inc., as a non-lawyer consultant.[5] Kelso then introduced Kaung to Steven D. Cundra, Esquire ("Cundra"), of the O'Rourke & Cundra law firm, with whom Kelso had a prior relationship.[6] Kaung later retained the O'Rourke & Cundra law firm as his separate counsel in connection with the SEC investigation and the class action suit. The Court of Chancery inferred that Kelso recommended these lawyers and urged Kaung to hire them, as evidenced by the fact that Kelso engaged in profitable joint representation with this firm in the past.[7] This inference is supported by the record.

Initially, Cole advanced all of Kelso's and Cundra's bills.[8] However, Cole then began to question the advancement of Kaung's legal expenses, specifically inquiring into Kelso's qualifications and his role in the litigation. On May 2, 2003, counsel for Cole sent a letter to O'Rourke & Cundra concerning the advancement of their bills and inquiring about Kelso's qualifications. In addition, on May 9, 2003, Cole's general counsel, Leslie D. Dunn, Esquire ("Dunn"), wrote to Kaung directly, expressing concern about the reasonableness of Kelso's fees.

Dunn testified that despite these repeated requests she never received information regarding Kelso's education or professional background, the scope of his work at Cole, the number of hours he worked on this matter or even his billing rate. Kaung claimed that he responded to Dunn's reservations about Kelso by pointing out that Kelso provided litigation consulting services to both Cole and Jones Day in the past. Kaung also emphasized that AIG, the D & O insurance carrier, had ***505** reviewed and approved payment for Kelso's work.

Cole advanced approximately $150,000 with respect to Kelso's bills for time spent through May 15, 2003. Cole also advanced all of O'Rourke & Cundra's fees through

January 2004. In December 2003, out of the concern that the fees requested by Kaung were becoming excessive, Cole hired the law firm of Duvin, Cahn & Hutton to evaluate all advancement requests from Kaung related to the SEC investigation.

On January 7, 2004, Kaung sent Cole a notice of default for its failure to pay the balance of Kelso's bills for the period of mid-May until August 2003 and the November and December 2003 bills of O'Rourke & Cundra. Cole responded to Kaung on January 12, 2004, advising him that it was investigating the reasonableness of his litigation expenses, emphasizing that the shareholders' class action suit had concluded.[9] The same day, Kaung filed suit in the Court of Chancery to compel Cole to advance Kelso's and Cundra's fees for the SEC investigation and related class action litigation. The next day Cole authorized full payment of O'Rourke & Cundra's outstanding bills, but again notified Kaung that it had retained special outside counsel to review the reasonableness of all the bills. Despite the fact that Cole paid O'Rourke & Cundra's outstanding bills and continued to advance its fees, Kaung persisted in prosecuting this case in the Court of Chancery.

The course of discovery in this case was marked by conflict. The most egregious conduct came from Kelso. The Court of Chancery found that there were "emails from Kelso to Dunn and outside counsel to Cole that are at best bizarre and at worst threatening ... [and] Kelso's behavior in connection with his own deposition was highly inappropriate in that he repeatedly postponed his appearance and then refused to answer questions when he finally appeared."[10] In addition, Cundra's conduct during discovery was suspicious in that he did not respond to any of Cole's interrogatories or requests for production of documents regarding Kelso.[11]

The Court of Chancery held a one day trial on June 18, 2004. At a pretrial conference, Kaung's new Delaware counsel withdrew Kaung's request for payment of Kelso's fees. The Court of Chancery, therefore, only considered Kelso's role as a litigation advisor for the purpose of evaluating O'Rourke & Cundra's fees related to consultations with Kelso. It determined that the time billed by O'Rourke & Cundra relating to its dealing with Kelso was not reasonably incurred in connection with its representation of Kaung pursuant to the indemnification agreement.[12] As a result, the Court of Chancery concluded that O'Rourke & Cundra was not entitled to advancement of its unpaid legal fees.[13] The Court of Chancery also held that Cole would be entitled to offset any additional amount of those disallowed time charges against any future request by Kaung for advancement, and that at the conclusion of the SEC matter Cole would be entitled to sue Kaung for recovery of amounts it has already advanced that it believes were not properly subject to a claim for indemnification. ***506**[14]

In its final order and judgment following its written opinion, the Court of Chancery ordered Kaung to pay Cole $150,606.85 for the amount already advanced for Kelso's fees. It also determined that $81,760 of O'Rourke & Cundra's bill related to its interactions with Kelso and that Cole had no obligation to pay Kaung the $65,226.86 billed for the time that O'Rourke & Cundra spent consulting with Kelso. Kaung was ordered to pay Cole $16,533.14 as the portion of O'Rourke & Cundra's fees that had already been advanced pertaining to its dealings with Kelso. Kaung was also ordered to pay Cole $300,000 for attorneys' fees and expenses due to the bad faith conduct of his representatives in this action.

II. THE COURT OF CHANCERY'S FEE SHIFTING AWARD

[1] [2] [3] We first address whether the Court of Chancery improperly shifted the costs of this advancement action to Kaung by awarding Cole its attorneys' fees and expenses, together with court costs, incurred in connection with this advancement action. At issue is whether the misconduct in this case satisfies the bad faith standard required for fee shifting. The Court of Chancery's discretion is broad in fixing the amount of attorneys' fees to be awarded.[15] Absent a clear abuse of discretion, we will not reverse the Court of Chancery's award.[16] After carefully reviewing the record, we find no abuse of discretion with respect to the Court of Chancery's fee shifting award.

[4] [5] [6] It is a general rule that courts in the United States do not award attorney's fees to prevailing parties in litigation.[17] This practice, commonly referred to as the "American Rule,"[18] is followed by the Delaware courts.[19] However, there are recognized exceptions to the American Rule, which invoke equitable principles that have been recognized as a matter of common law.[20] One well-recognized exception to the American Rule is where the "losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' "[21] The purpose of this so-

called "bad faith" exception is to " 'deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the judicial process.' " [22] Delaware courts have awarded attorney's fees for bad faith when "parties have unnecessarily prolonged or delayed litigation, falsified records or knowingly asserted frivolous claims." [23] In the present case, the record fully supports the Court of Chancery's conclusion that Kaung's "actions in the course of this litigation constitute bad faith conduct sufficient to justify an award of attorneys' fees." [24]

***507** At the time the suit was filed, Cole had already advanced more than $150,000 with respect to Kelso's fees and was withholding further payment after Kaung failed to provide further information regarding the reasonableness of Kelso's bills. Cole was not delinquent in paying O'Rourke & Cundra's bills and actually authorized the payment of them the day after Kaung filed suit. The record suggests that the decision to file suit was made in the hope of Cole advancing sums that were not reasonably incurred in connection with the representation of Kaung. [25]

In addition, the record shows that throughout the litigation Kaung's representatives made excessive and duplicative deposition requests while ignoring their own discovery obligations. They refused to facilitate the schedule of Kelso's deposition, and when he finally appeared for deposition, he refused to answer questions and instead peppered Cole's attorneys with questions and accusations. Cundra, who accompanied Kelso to the deposition, aggravated the situation by supporting Kelso's behavior and failing to provide any substantive answers to Cole's discovery requests regarding Kelso.

We therefore have no difficulty in upholding the Court of Chancery's conclusion that the conduct of Kaung's representatives in this case rose to the level of bad faith. Thus, the Court of Chancery did not abuse its discretion in awarding Cole its attorneys' fees and expenses incurred in connection with this advancement action.

We take this opportunity to comment further on the unseemly conduct of Kelso and Cundra. We do so under our "exclusive supervisory responsibility to regulate and enforce appropriate conduct of ... all lawyers, litigants, witnesses, and others" participating in a Delaware proceeding. [26]

For the past several years, professionalism and legal ethics has been the subject of much discussion among judges, practitioners, scholars and the general public. [27] One component of this dialogue concerns professional responsibility in the discovery practice, which implicates the "basic and fundamental" concept of civility, [28] the flip side of the coin being incivility. [29] Civility plays an important role in the administration of civil and criminal justice. Without it, litigation becomes even more expensive and public trust and confidence in the administration of justice is undermined. Alexander Hamilton put it best that "the ordinary administration of criminal and civil justice ... contributes ... more than any other circumstance, to impressing upon the minds of the people affection, esteem, and reverence toward the government." [30] Litigation tainted with incivility ***508** and its resulting expense has the opposite effect. Justice Sandra Day O'Connor has commented:

> I believe that the justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another. Stress and frustration drive down productivity and make the process more time-consuming and expensive. Many of the best people get driven away from the field. The profession and the system itself lose esteem in the public's eyes.
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> In my view, incivility disserves the client because it wastes time and energy—time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent. [31]

We could not agree more with Justice O'Connor's insightful comments.

In *Paramount,* this Court addressed in an addendum to its opinion the "issue of professionalism involving deposition practice in proceedings in Delaware trial courts." [32] The focus of the addendum in *Paramount* was a lawyer, who represented a Paramount director in his deposition in an unprofessional way. [33] The lawyer did not otherwise appear for a party in this case and was not admitted *pro hac vice.* [34] During the deposition, he instructed the Paramount director not to answer questions, "was extraordinarily rude, uncivil and vulgar," obstructed the deposing lawyer from eliciting testimony from the Paramount director, and disparaged the deposing lawyer with personal insults.

[7] This Court found that lawyer's "unprofessional behavior to be outrageous and unacceptable."[35] It is just as outrageous and unacceptable when accomplished by a non-lawyer consultant or a witness at a deposition. We join the Court of Chancery in its strong disapproval of it. For future guidance and deterrence, we emphasize that sanctions may be imposed upon anyone participating in a Delaware proceeding who engages in abusive litigation tactics.[36]

III. THE COURT OF CHANCERY'S RECOUPMENT AWARD

[8] [9] [10] We now turn to whether the Court of Chancery erred, as a matter of law, by determining Kaung's liability to Cole for fees previously advanced in this summary proceeding. We review the Court of Chancery's factual findings for clear error.[37] Once the Court of Chancery's factual findings are established, we will review the ultimate determination of the legal issue presented under a *de novo* standard of review.[38]

***509** [11] Section 145 of the DGCL vests Delaware corporations with the capacity to protect their present and former corporate officials from expenses incurred in connection with litigation and other legal proceedings.[39] Rights to indemnification and advancement are deeply rooted in the public policy of Delaware corporate law in that they are viewed less as an individual benefit arising from a person's employment and more as a desirable mechanism to manage risk in return for greater corporate benefits.[40] Section 145 of the DGCL expressly contemplates protection for corporate officials from the risks of legal proceedings not only by way of reimbursement (i.e., indemnification) but also by the pre-indemnification advancement of certain litigation-related expenses.[41]

[12] [13] An advancement action is a summary proceeding.[42] The statutory authorization for interim advancement of litigation expenses is distinct from the right to receive final indemnification under Section 145(a) and (b) of the DGCL.[43] Whether a corporate officer has a right to indemnification is a decision that must necessarily await the outcome of the investigation or litigation.[44] Section 145(e) of the DGCL fills the gap by permitting advancement, so the corporation may shoulder these interim costs.[45] However, the scope of an advancement proceeding under Section 145(k) of the DGCL is limited to determining "the issue of entitlement according to the corporation's advancement provisions and not to issues regarding the movant's alleged conduct in the underlying litigation."[46]

[14] We recognize, as the Court of Chancery has, that the right to advancement "is a subsidiary element of the right to ultimate indemnification"[47] and these legally distinct rights "are commonly addressed in neighboring statutory provisions."[48] However, the narrow scope of an advancement proceeding prohibits an ultimate determination of indemnification and liability owed by a corporate official for sums already advanced.[49] While the ***510** rights to indemnification and advancement are correlative, they are still discrete and independent rights, with the latter having a much narrower scope.[50]

In the present case, it was appropriate for the Court of Chancery to determine that the time billed by O'Rourke & Cundra relating to its dealings with Kelso was not reasonably incurred in connection with its representation of Kaung pursuant to the indemnification agreement, and that O'Rourke & Cundra was not entitled to advancement of its unpaid legal fees. However, we conclude that the Court of Chancery prematurely decided Kaung's liability for sums previously advanced voluntarily by Cole. The Court of Chancery's determination was premature, just as a direct recoupment claim would have been by Cole for fees it advanced. We hold that an advancement proceeding is summary in nature and not appropriate for litigating indemnification or recoupment. The detailed analysis required of such claims is both premature and inconsistent with the purpose of a summary proceeding.[51]

IV. CONCLUSION

We affirm the Court of Chancery's award of attorneys' fees and expenses in favor of Cole. We reverse as premature the judgment of the Court of Chancery to the extent it ordered Kaung to repay sums already advanced.

All Citations

884 A.2d 500

Footnotes

1 Cole is a publicly traded company incorporated in Delaware with its principal place of business in Ohio. Cole is primarily engaged in the optical industry. Its business includes retail stores operating under the names "Things Remembered," Sears Optical, Target Optical, Pearle Vision and BJ's Optical. Cole also operates a managed vision care provider called Cole Managed Vision.

2 *Kaung v. Cole Nat'l. Corp.*, 2004 WL 1921249, at *4, 2004 Del. Ch. Lexis 126, at *17–*18.

3 *Id.* at *4, 2004 Del. Ch. Lexis 126, at *18.

4 *Id.*

5 Kaung testified that he and Kelso have known each other for over twenty years, and that they have worked on unrelated matters involving Cole in the past. In fact, Kelso is the ex-brother-in-law of Jeffrey Cole, the company's former CEO. Kelso has a very colorful background, including being serially sanctioned, found liable for civil theft in securities fraud and incarcerated for contempt of court. One judge has described Kelso as using "litigation to harass opponents and disrupt the judicial process." *Legal Econometrics, Inc. v. Abramson*, 1997 WL 786249, at *2 n. 2, 1997 U.S. Dist. Lexis 20354, at *5 (N.D.Tex.) (citation omitted).

6 The parties disputed the extent of Kelso's prior relationship with the O'Rourke & Cundra law firm, but the record is clear that the two have worked together on prior occasions. *Kaung*, 2004 WL 1921249, at *2 n. 5, 2004 Del. Ch. Lexis 126, at *6 n. 5.

7 *Id.* at *2, 2004 Del. Ch. Lexis 126, at *5.

8 The Cole board of directors authorized advancement of Kaung's legal expenses on January 23 and 24, 2003, and again, on March 27, 2003.

9 The shareholders class action suit was settled in May 2003. However, the SEC investigation was ongoing.

10 *Id.* at *2 n. 10, 2004 Del. Lexis 126 at *8 n. 10.

11 *Id.*

12 *Kaung*, 2004 WL 1921249, at *5–*6, 2004 Del. Ch. Lexis 126, at *26–*27.

13 *Id.* at *6, 2004 Del. Ch. Lexis 126, at *27.

14 *Id.*

15 *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 547 (Del.1998).

16 *Id.* (citing *Chavin v. Cope*, 243 A.2d 694 (Del.1968)).

17 *Id.* at 545.

18 *Id.*

19 *Brice v. State*, 704 A.2d 1176, 1178 (Del.1998).

20 *Id.* (citing *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1043–44 (Del.1996)).

21 *Id.* at 1179 (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258–59, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)).

22 *Id.* (quoting *Schlank v. Williams*, 572 A.2d 101, 108 (D.C.1990)).

23 *Johnston*, 720 A.2d at 546 (footnotes and citations omitted).

24 *Kaung*, 2004 WL 1921249, at *6, 2004 Del. Ch. Lexis 126, at *28.

25 An email from Kelso to Cundra strongly suggests an improper motive. The email reads as follows: "This looks good to me—file suit as soon as possible—they will pay—DUNN is a fool." *See* Transcript of Trial Proceeding on June 18, 2004 at Defense Exhibit 77.

26 *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 52 n. 23 (Del.1994) (citations omitted).

27 *See generally* Paula L. Hannaford, *The National Action Plan on Lawyer Conduct: A Role for the Judge in Improving Professionalism in the Legal System*, 36 CT. REV. 36 (1999) (addressing he increasing role of the judicial system in improving attorney professionalism).

28 *Kohlmayer v. Nat'l R.R. Passenger Corp.*, 124 F.Supp.2d 877, 879 (D.N.J.2000).

29 *See* Douglas R. Richmond, *The Ethics of Zealous Advocacy: Civility Candor and Parlor Tricks*, 34 TEX. TECH. L. REV. 3, 7 (2002).

30 The Federalist No. 78, at 103 (Alexander Hamilton) (1st Modern Library ed., 1941).

31 *Paramount*, 637 A.2d at 52 n. 24 (quoting Justice Sandra Day O'Connor, Remarks to an American Bar Association Group on "Civil Justice Improvements" (Dec. 14, 1993)).

32 *Id.* at 52.

33 *Id.*

34 *Id.*

35 *Paramount*, 637 A.2d at 54–55.

36 *See Link v. Wabash R.R.*, 370 U.S. 626, 631–32, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (providing that courts have inherent power to levy sanctions in response to abusive litigation tactics); *Roadway Express v. Piper*, 447 U.S. 752, 764–67, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (recognizing that courts have inherent power to assess attorney's fees against counsel for abusive litigation practices); *In re Miller*, 81 B.R. 669, 676 (Bankr.M.D.Fla.1988) (noting that all courts have inherent civil contempt power).

37 *Scharf v. Edgcomb Corp.*, 864 A.2d 909, 916 (Del.2004) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)).

38 *Id.* (citing *Pullman–Standard, Div. of Pullman, Inc. v. Swint,* 456 U.S. 273, 289 n. 19, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982); *Ornelas v. United States,* 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Lopez v. State,* 861 A.2d 1245 (Del.2004)).

39 *See* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery,* § 8–2.

40 *Id.*

41 *Id.*

42 *Homestore, Inc. v. Tafeen,* 2005 WL 1383348, at *1, 2005 Del. Lexis 217, at *2; *Fasciana v. Elec. Data Sys. Corp.,* 829 A.2d 160, 167 (Del.Ch.2003).

43 *See Advanced Mining Sys., Inc. v. Fricke,* 623 A.2d 82, 84 (Del.Ch.1992) (finding that "indemnification rights and rights to advancement of possibly indemnifiable expenses ... [are] distinct types of legal rights."); *Citadel Holding Corp. v. Roven,* 603 A.2d 818 (Del.1992) (holding that the right to advancement of expenses was not dependent on the right to indemnification).

44 *See* Wolfe & Pittenger, *supra* note 39, at § 8–2.

45 *Id.*

46 *Homestore,* 2005 WL 1383348, at *1, 2005 Del. Lexis 217, at *2.

47 *Weinstock v. Lazard Debt Recovery GP, LLC,* 2003 WL 21843254, at *4, 2003 Del. Ch. Lexis 83, at *12–*13.

48 *Nakahara v. NS 1991 Am. Trust,* 739 A.2d 770, 779 n. 52 (Del.Ch.1998).

49 *See, e.g., Reddy v. Elec. Data Sys. Corp.,* 2002 Del. Ch. Lexis 69, at *29 ("Section 145 of the DGCL is an explicit rejection of this approach, because the clear authorization of advancement rights presupposes that the corporation will front expenses before any determination is made of the corporate official's ultimate right to indemnification,") (citing *Greco v. Columbia/HCA Healthcare Corp.,* 1999 WL 1261446, at *4, 1999 Del. Ch. Lexis 24, at *12; *Ridder v. CityFed Fin. Corp.,* 47 F.3d 85, 87 (3d Cir.1995)).

50 *See* Wolfe & Pittenger, *supra* note 39, at § 8–2.

51 *See Bergonzi v. Rite Aid Corp.,* 2003 WL 22407303, at *3–*4, 2003 Del. Ch. Lexis 117, at *11–*12 (holding that the corporation could not assert as a defense to a claim for advancement or as a ground for recouping amounts previously advanced that the former CFO had not satisfied statutory standards of conduct for indemnification, notwithstanding a guilty plea by the former CFO in a criminal proceeding for which advances were sought, and that it would be premature to decide whether the former CFO was entitled to indemnification because he had not been sentenced and therefore the criminal proceeding had not reached final judgment). *Cf. Rales v. Blasband,* 634 A.2d 927, 931 n. 4 (Del.1993) (indicating that a statutory books and records action is a summary proceeding); *Khanna v. Covad Comm'n Group, Inc.,* 2004 WL 187274, at *6, 2004 Del. Ch. Lexis 11, at *22 (providing that a statutory books and records action is not the proper forum for

litigating a breach of fiduciary duty case because the detailed analysis required for a fiduciary duty action would defeat the purpose of that summary proceeding).

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GUIDELINES TO HELP LAWYERS PRACTICE IN THE COURT OF CHANCERY

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Updated: August 2021

GUIDELINES TO HELP LAWYERS PRACTICE IN THE COURT OF CHANCERY

These Guidelines are intended to ensure that all attorneys are aware of the expectations of the Court and to provide helpful guidance. These Guidelines are not binding Court rules. They are intended as a practice aid that will allow parties to litigate cases smoothly and to minimize disputes over procedural issues.

These Guidelines do not establish a "standard of conduct" or a "standard of care" by which the performance of parties in a given case can or should be measured. They are intended to reduce conflicts over non-merits issues. A particular situation may call for the parties to proceed in a different manner. Likewise, a judicial officer may prefer in the context of a given case that the parties proceed in a different manner.

These Guidelines are subject to change. Please check the Court of Chancery website to make sure you have the most recent version. The Court maintains a separate set of guidelines regarding best practices for e-Filing, which are also available on the Court's website.

Sample forms are attached to these Guidelines as exhibits. Downloadable and editable rich-text-file versions are available on the Court of Chancery website.

A. EXPECTATIONS FOR COURTROOM HEARINGS AND TRIALS

1. Hearing Protocols

   a. Court of Chancery proceedings are important to the parties. The judges of this Court and all of its staff take their duties seriously. A court proceeding is a dignified occasion. Please act accordingly and with the respect that our system of justice deserves.

   b. The Court may decide a motion without holding argument. The parties should contact chambers to advise whether any party requests argument or whether the parties agree to submit the motion for decision without argument.

   c. Because the judicial officers share courtrooms, court reporters, and other critical resources, most hearings will last no more than ninety minutes. In advance of the hearing, counsel shall confer regarding the allocation of time and shall organize their presentations accordingly. Counsel should not feel compelled to use all of the available time. Any party believing that the issues to be addressed at the hearing warrant more than ninety minutes must seek more time when scheduling the hearing. Before requesting additional time for any hearing, the requesting party shall confer with the other parties in the action to determine their position and report that position to the Court. If counsel agree on the amount of time, then the request can be made to the judicial assistant when scheduling the hearing. If counsel disagree, then the request should be made in a single, joint letter that sets forth each side's position. The Court will be receptive to reasonable requests for extra time when the situation warrants, such as a post-trial argument involving a

large record. If the Court asks the parties to circulate a letter confirming the date and time of the hearing, then the letter should document the amount of time scheduled for the hearing.

d. Arrive early. The Court strives to start on time. You need time to set up. Before the hearing, the Court clerks and reporters need to obtain information from and provide information to counsel.

e. Everyone should stand whenever the judge enters or leaves the Courtroom. Individuals should stand when introduced to the Court. Individuals should stand at the podium when making an argument. Individuals should stand when making an evidentiary objection.

f. During a hearing or trial, side conversations, reactive facial expressions or outbursts, or other disturbances will not be tolerated.

g. If you must exit for any reason while Court is in session, please do so quietly and discreetly.

h. If a lawyer or participant has a personal or medical situation that may require leaving a proceeding, consider having counsel advise the Court in advance. The Court seeks to be understanding and will strive to make accommodations.

2. Respect for the Court and Court Staff

a. Throughout the litigation process, you will deal regularly with court staff and reporters. The Court expects them to treat you with courtesy and respect and to make the process as easy for you as possible while complying with the Court's rules and schedule. Please show them the same courtesy as you show the judges of the Court. Please realize that when you do not, the judges are likely to hear about it.

b. Clerks of the Court of Chancery have a key role in helping ensure that hearings and trials run smoothly and in a dignified fashion. Part of their job is to review with you some of the judges' basic expectations for how the case will proceed. If you believe that any of the expectations are unfair or inappropriate, you should make a motion to the judge. Until your motion is granted, you are expected to comply.

3. Respect for the Courthouse Facility

a. When you leave the Courtroom, clean up and straighten your area. Remove or throw away your trash. Replace any chairs that were moved and slide them under the tables.

b. You may bring bottled water for personal use into the courtroom but no other food or refreshments.

c. In the Leonard L. Williams Justice Center in New Castle County, each court room has two small anterooms, one on each side of the entrance. Generally, the plaintiffs' lawyers use the room on the left side as you enter and the defendants' lawyers use the room on the right side as you enter. The Court asks that you not have conversations in the rooms during trial or a hearing, because the noise can be heard in the Courtroom. You are permitted to have food and refreshments delivered to the anterooms, and you may eat lunch there while preparing for the next part of a hearing.

d. There are other conference rooms in the Leonard L. Williams Justice Center in New Castle County that are available for rent, including rooms in the Court of Chancery Mediation Center, the large conference room at the north end of the 12th Floor, and rooms on other floors of the Courthouse. Arrangements for the Mediation Center can be made by contacting the Chancellor's judicial assistant. Arrangements for other conference rooms can be made with the Administrative Office of the Courts. Additional information and a copy of the application for reserving a room can be found online at http://courts.Delaware.gov/AOC/RoomRequest.stm.

e. In the Kent County Courthouse, there are two small anterooms across from the Courtroom near the Register in Chancery. The plaintiffs generally use one room, and the defendants use the other. You are permitted to have food and refreshments delivered to these rooms, and you can eat lunch there while preparing for the next part of a hearing. There is also one other conference room that can be rented by contacting the Register in Chancery in Kent County.

f. In the Court of Chancery Courthouse in Sussex County, there is a single anteroom outside of the Courtroom. This area is suitable for witnesses who are waiting to testify, but not for attorney preparation. You are not permitted to have food or refreshments delivered to this area or to eat in this area. Other space is not available for rent.

g. Use of these facilities is a privilege. When you are finished, remove or throw away all trash and straighten up the room. The room should look as neat at the end of the day as at the beginning.

h. The Courtroom staff has been instructed to inform the judges about any litigation teams or lawyers that fail to clean up their areas.

4. Cell Phones, Tablets, and Other Handheld Devices

a. Hand-held electronic devices of any kind, including cell phones and tablets, are prohibited in the Courtroom. Their use in court is disruptive, demeaning to the dignity of the proceeding, and unfair to those actually concentrating on the proceeding. Also, the signals from these devices can interfere with the Courtroom reporting systems. Therefore, these devices must be turned off or put in "airplane" mode. In New Castle County and Kent County, they should be left in your side's

conference room in the vestibule of the Courtroom. In Sussex County, they should be left at the front desk with Capitol Police.

b. If you fail to comply and it becomes apparent that you have a device in your possession—typically because it makes noise—the device may be confiscated or you may be sanctioned. If you fail to comply twice, the possible consequences will be more unpleasant, and, at a minimum, you should not expect to participate in the remainder of the proceeding.

c. The Court recognizes that counsel and litigants often maintain their calendars on a handheld device. If it becomes necessary to discuss scheduling, the Court likely will permit you to retrieve your device for purposes of the discussion.

d. Recording devices are prohibited.

5. Laptops

a. Attorneys may bring laptops into the Courtroom to use for purposes related to the trial or hearing. If they create noise, cause interference, or become a distraction, counsel may be asked to remove them.

b. If an attorney wishes to receive a real-time rough draft transcript of the proceedings, they should provide their own laptop. The court reporters use Bridge Mobile software to provide real-time. The real-time stream is viewed by going to the website connect.eclipsecat.com. The court reporters will provide login credentials to those parties authorized to receive the real-time transcript on the day of the proceedings. Real-time is provided to the parties via a wireless LAN for in-person hearings and via the internet for remote hearings. Requests for real-time and questions regarding the real-time setup and connection should be addressed to the Court of Chancery court reporters before the day of the proceedings.

c. Authorized media representatives may bring laptops into the Courtroom for professional use. Media use is governed by a separate policy that is available on the Court's website. https://courts.delaware.gov/chancery/laptops.aspx.

6. Arranging for Technology

a. The Court of Chancery has two types of courtrooms: (i) standard courtrooms and (ii) "high tech" courtrooms that are set up with monitors, a projector, and audio-visual connections.

i. Standard Courtrooms

(A) Courtrooms 12C and 12D in the Leonard J. Williams Justice Center in New Castle County

(B) The First Floor Courtroom in Sussex County

ii. High Tech Courtrooms

(A) Courtrooms 12A and 12B in the Leonard J. Williams Justice Center in New Castle County

(B) Courtroom 2 in Kent County

(C) The Second Floor Courtroom in Sussex County

b. The high tech courtrooms are in high demand for trials that use technology. When scheduling a trial, counsel should confer and make a responsible decision as to whether they will use technology so they can advise the judicial assistant.

c. A limited number of portable technology carts are available for use in standard courtrooms. The technology cart includes a projector, document viewer, and DVD player. Do not ask for a technology cart if you do not intend to use it. If you have reserved a cart and then do not use it, you are potentially preventing someone else from using the equipment.

d. If you intend to use technology, contact the Register in Chancery and the Court of Chancery court reporters approximately one week before to make arrangements to set up and check your equipment.

e. Parties can arrange to bring in their own technology to outfit other courtrooms temporarily at the parties' expense. If parties wish to pursue this option, contact the Register in Chancery and the Court of Chancery court reporters approximately one month before trial to begin the process of coordinating setup.

7. Proper Attire

a. Counsel should wear formal business attire. Counsel is not restricted to, nor does the Court have any preference for, a shirt or blouse of any particular color. The Court likewise does not have any preference regarding skirts or dresses versus pantsuits.

B. EXPECTATIONS FOR REMOTE HEARINGS AND TRIALS

1. Hearing Protocols

a. The Court of Chancery frequently handles hearings by means of remote communication. The Court of Chancery has begun conducting evidentiary hearings and trials by means of remote communication.

b. The right of access applies to remote hearings and trials. Unless the court closes the hearing or trial, members of the public and the press are entitled to attend.

c. As with in-person hearings, recording remote hearings and trials is strictly

prohibited.

d. Join the call or videoconference early. You need to make sure your technology works, and you need to be ready when the judicial officer joins the hearing at the appointed time.

e. The standard time allocations for in-person hearings apply. Unless parties request more time, a hearing will not be allocated more than ninety minutes.

f. Provide courtesy copies just as you would for an in-person hearing. Submit exhibits and documents for the Court's use as you would for an in-person hearing: three flash drives and three paper sets. Demonstratives are also welcome in advance.

g. For videoconferences, courtroom attire is required, and the same rules of decorum for an in-person hearing apply. Side conversations are not permitted and reactive facial expressions are inappropriate. Parties may choose whether to stand to present argument or question a witness. Parties need not stand when the Court joins the videoconference.

h. At the beginning of a remote hearing or trial, a Delaware lawyer for each party shall introduce themselves, identify other participants with them, and state who will be making the presentation for their side. As with in-person hearings, if a case has had multiple hearings and the judicial officer has become familiar with forwarding counsel, then it may be possible to dispense with introductions.

2. Technology Platforms

The Court of Chancery generally uses four platforms for remote hearings and trials. From time to time, the Court may experiment with other solutions. Counsel is free to suggest a platform. For each option, RealTime transcriptions by Court of Chancery court reporters are available; counsel should contact the court reporters before the day of the proceedings to arrange for RealTime.

a. Conference Call Using A Standard Conference Bridge

i. The Court of Chancery frequently conducts hearings by conference call using a standard conference bridge. This platform is well suited for shorter hearings with a limited record and a relatively low number of attendees. Examples include status conferences, scheduling conferences, limited discovery disputes, and nondispositive motions.

ii. When scheduling a call using a standard conference bridge, Chambers will typically ask counsel to generate and circulate a dial-in number, to be posted on the docket. A failure to ask counsel to post the hearing conference number does not mean that the hearing is intended to be closed to the public. Counsel may distribute the number upon request unless instructed otherwise. If counsel distributes the number, the Court will expect that counsel alert the judicial assistant for purposes of taking roll.

Attendees should join the call at least five minutes before the designated time, which is when the judicial officer will dial in. Attendees shall mute their lines unless speaking.

b. Conference Call Using CourtSolutions

i. For larger teleconferences, the Court of Chancery often conducts hearings by conference call using CourtSolutions. This platform is well suited to motions with a large number of attendees, like leadership disputes and settlement hearings, and cases that have drawn significant press attention.

ii. When scheduling a call using CourtSolutions, Chambers will specify that this platform is being used and place a letter to that effect on the docket. Anyone who wishes to attend must visit www.Court-Solutions.com to request to participate. Attendees without an account can create one by clicking "Sign Up." Attendees with an account should log in and submit a reservation request. Attendees approved by Chambers will be able to participate. Forwarding counsel should register and join separately from Delaware counsel. Members of the public or the press can sign up and participate on a listen-only basis. CourtSolutions charges each registered user a fee for this service.

iii. Participants should join the call at least five minutes before the designated time, which is when the judicial officer will dial in. Attendees shall mute their lines unless speaking, and the Court may mute lines as necessary.

c. Video Conference Using Zoom

i. The Court of Chancery frequently conducts hearings by videoconference using the Zoom platform. This platform often will be used when a remote hearing is warranted for a type of hearing that traditionally would be conducted in person. Examples include significant discovery disputes, arguments on dispositive motions, and trials based on a paper record. The platform also may be used in lieu of CourtSolutions.

ii. When scheduling a hearing using Zoom, Chambers will specify that this platform is being used and place a letter to that effect on the docket. The Court hosts and administers the meeting. Counsel and interested parties must submit the names, email addresses, and phone numbers of all participants they expect to be on the call; the Court will provide attendees with a confidential invitation.

iii. Participants should join the call at least ten minutes before the designated time, which is when the judicial officer will dial-in. A judicial clerk will admit each approved attendee. Attendees shall mute their lines unless speaking, and the Court may mute lines as necessary. Only counsel planning to speak may use video. Counsel responsible for presentations should consider using a phone line for audio, rather than their computer, as

this improves the quality of both sound and video.

iv. Documents and videos may be offered by screensharing.

d. Video Conference Hosted By CourtScribes

i. The Court of Chancery has begun conducting evidentiary hearings and trials using the Zoom platform hosted by CourtScribes.

ii. When scheduling an evidentiary hearing or trial using the Zoom platform hosted by CourtScribes, Chambers will specify that this platform is being used and place a letter to that effect on the docket. CourtScribes hosts and administers the meeting, including approving participants and authorizing entry.

iii. After confirming the hearing date and time with chambers, counsel must contact CourtScribes at least three business days before the hearing by emailing scheduling@courtscribes.com, or calling (833) SCRIBES (727-4237). Counsel must provide the party being represented, the names of all counsel appearing remotely on behalf of that party, contact information, the Court and judicial officer, appearance date and time, case name and number, and the nature of the proceeding. To be clear, counsel for each party is responsible for arranging their own appearance and those of their witnesses. The platform allows members of the public or press access on a "view/listen only" basis; the Court will refer any such inquiries to CourtScribes. CourtScribes will work with counsel in advance of the argument to identify attendees and provide the necessary protocols. CourtScribes charges users a fee for this service.

iv. Exhibits may be offered by screensharing or using CourtScribes' platform. Exhibits should also be provided to the Court as if the hearing or trial were being conducted in person.

v. Counsel who conduct remote depositions frequently should remember that a remote evidentiary hearing or trial is not a deposition. Even if you are not standing up to conduct your examination or to make objections, you should approach your interactions with witnesses, your adversaries, and the court with the same degree of preparation, judgment, and professionalism that you would exhibit during an in-person hearing.

C. BEST PRACTICES FOR LITIGATING CASES

1. Role of Delaware Counsel

a. Concept of "local counsel"

i. The concept of "local counsel" whose role is limited to administrative or

ministerial matters has no place in the Court of Chancery. The Delaware lawyers who appear in a case are responsible to the Court for the case and its presentation.

b. Signing documents

i. If a Delaware lawyer signs a pleading, submits a brief, or signs a discovery request or response, it is the Delaware lawyer who is taking the positions set forth therein and making the representations to the Court. It does not matter whether the paper was initially or substantially drafted by a firm serving as "Of Counsel."

c. Responsibilities

i. The judicial officers recognize that Delaware counsel and forwarding counsel frequently allocate responsibility for work and that, in some cases, the allocation will be heavily weighted to forwarding counsel. The judicial officers recognize that forwarding counsel may have primary responsibility for a matter from the client's perspective. This does not alter the Delaware lawyer's responsibility for the positions taken and the presentation of the case.

d. Non-Delaware counsel contact with Chambers

i. Non-Delaware counsel shall not directly make filings or initiate contact with the Court, absent extraordinary circumstances. Such contact must be conducted by Delaware counsel, absent extraordinary circumstances.

ii. It is not acceptable for a Delaware lawyer to submit a letter from forwarding counsel under a cover letter saying, in substance, "here is a letter from my forwarding counsel."

iii. At the outset of a teleconference, hearing, or trial, Delaware counsel should introduce forwarding counsel to the Court and explain who will be making the presentation. If there have been multiple hearings in a case involving the same forwarding counsel, the Court may dispense with this formality. In cases where the litigation teams are particularly large, Delaware counsel may prefer only to introduce the principal lawyers and the client representative.

2. Courtesy Copies

a. Counsel should provide Chambers with two courtesy copies of any filing that they want the judge to read or that otherwise requires judicial action, such as letters, motions, and briefs. Counsel need not provide copies of routine filings, such as short motions that do not contain argument (because a supporting brief will be filed separately), motions for admission pro hac vice, motions for commission, or Rule 4(dc) certifications. As discussed below, moving counsel should investigate

and promptly determine and advise the Court whether a motion for admission pro hac vice or for commission is opposed.

b. Courtesy copies of motions and briefs should be submitted with a transmittal letter devoid of argument. In addition to listing what is being transmitted, the transmittal letter should (i) recite the briefing schedule if the parties have agreed on one, or otherwise state that no agreement on scheduling has been reached, and (ii) note the date and time at which a hearing has been scheduled, or otherwise that no argument date has yet been set. Once that information has been provided in a letter, subsequent transmittal letters need not recite the information unless it has changed.

c. Counsel sometimes combines the motion or brief with the exhibits and authorities to create a single, massive, hardcopy filing that is difficult to use and falls apart easily. If you are only attaching a few short exhibits or authorities, feel free to attach them to the motion or brief. Otherwise, the compendium and appendix should be separate hardcopy submissions. Witness affidavits can be included in the appendix with other exhibits.

d. In expedited matters, courtesy copies of motions and briefs should be delivered to Chambers promptly. It is not necessary to await acceptance of an electronic filing before delivering a copy to the Court.

e. In expedited matters, it may be necessary to deliver papers to a judge's home. Please deliver only one copy and do not serve compendia of unreported cases unless requested. *Two* Chambers copies of all papers, including compendia and appendices, should still be delivered to the Courthouse immediately when it next opens.

3. Contacting Chambers

a. Calls to Chambers

i. A lawyer who calls Chambers and asks a judicial assistant to schedule a matter has a special responsibility to the Court and to other parties to the case. The Court expects that a lawyer who seeks a date is doing so on behalf of all parties and with their authority, absent an explicit indication to the contrary.

ii. When calling Chambers, absent extraordinary circumstances, counsel for all parties should be on the call, or counsel should have obtained authority from all parties to seek a list of available dates from the Court.

iii. If counsel calls without other parties on the line, make clear to the judicial assistant that not all parties are on the line and be clear as to why and who knows what.

iv. Before calling Chambers, counsel must make a reasonable effort to confer

regarding scheduling so that the parties' request can be conveyed fairly to the judicial assistant. Disputes between counsel involving scheduling should be presented directly to the Court for resolution, not to judicial assistants. If it becomes apparent during a call that the parties have disputes about issues relevant to the call, counsel should alert the judicial assistant and opponent, diplomatically terminate the call, and meet and confer offline.

v. If a judicial assistant gives a lawyer possible dates for a hearing, the lawyer must share all such dates with all relevant counsel and be fair in finding a date acceptable to all concerned. Unless a judicial assistant has expressly indicated that the Court prefers a specific date, do not give other counsel the impression that the Court has a preference.

vi. The judicial assistants work hard to be fair to all concerned and to accommodate the needs of counsel. Please do what you can to make their lives easier by being fair to your adversaries in the scheduling process.

b. Emailing Chambers

i. Avoid emailing the Court or its staff.

ii. Emails should not be sent to judicial officers directly except in the case of a true emergency that arises outside of regular business hours.

iii. Substantive communications must be docketed. Any meaningful substantive or procedural disputes must be presented in a procedurally appropriate filing.

iv. Email to Court staff should be used only to address routine and non-controversial matters, such as confirming a date of a hearing or confirming that a courtesy copy will be provided.

v. Email should not be used to present disputes to the Court or request action.

c. Letters

i. Rule 171(f)(1)(C) establishes specific requirements for letters to the Court, including word limitations.

ii. Parties may use letters to provide updates to the Court or to address logistical or scheduling issues. Unless requested by the Court, letters should not be used to request substantive relief.

iii. Contested scheduling requests are frequently presented by letter. Except for motions to expedite, a formal motion generally is not necessary.

iv. Forms of order should be submitted by letter.

v. The judicial officers do not want ongoing exchanges of letters. After a letter response and perhaps a letter reply, it is time to schedule a conference. It even may be prudent to forgo the response and reply and go straight to the conference.

4. Settlements

a. If parties resolve a matter before a pending hearing, they should advise the Court promptly. Because the judicial officers share resources, including courtroom space, it is important to free up this space if possible. It is also important that judicial resources be devoted to live matters.

b. Resolutions may occur over the weekend before a hearing or during non-business hours. If circumstances arise that require postponing or cancelling an imminent hearing or which affect the disposition of an expedited case, counsel should advise the judicial officer's legal assistant or law clerk by telephone or email as soon as possible.

5. Scheduling Guidelines

a. The judicial officers expect counsel to work together to manage the case and prepare it for the Court's consideration. In carrying out this task, counsel have a dual role both as officers of the Court and as client representatives.

i. The Court of Chancery Rules do not have default briefing schedules for motions or default case tracks. This system only functions when counsel work together responsibly. The judicial officers expect counsel to work together to reach agreement on a fair schedule given the requirements of the case.

ii. Before a scheduling dispute is brought to the Court, the senior Delaware lawyers are expected to make a good-faith direct effort, whether in person or by telephone, to resolve the matter and agree on a schedule.

iii. Working together includes responding in a timely fashion to opposing counsel's requests regarding scheduling. Sometimes, one side fails to respond to the other side's legitimate requests to discuss scheduling, resulting in a letter or call to the Court that could have been avoided.

iv. Working together also includes conferring and responding in a timely fashion to the Court's calls about scheduling. When a judicial assistant provides possible hearing dates, those dates cannot be offered to other parties until counsel respond. Please respond promptly.

a. Non-expedited cases

i. In a non-expedited case, the general expectation for a motion falling within the scope of Rule 171(f)(1)(A) ("Merits-Related Motions") is for

the opening brief to be due 30 days after the motion is filed, the answering brief to be due 30 days later, and the reply 15 days after that.

ii. In a non-expedited case, the general expectation for a motion falling within the scope of Rule 171(f)(1)(B) ("Other Motions") is for the opposition to be due fourteen calendar days after the motion is filed and the reply seven calendar days after that.

iii. In non-expedited cases, counsel should be considerate and respectful of each other's legitimate professional and personal commitments. There may be good cause for a schedule that departs from these Guidelines. Parties generally should accommodate minor adjustments in the schedule to avoid deadlines that fall on Mondays or after holidays and to accommodate appropriate work-life balance concerns.

b. Expedited cases

i. The Court gives expedited cases priority. Counsel should give them similar priority.

ii. To assist with the process of case assignment and evaluation, counsel should note in the comment section on the supplemental information sheet any critical date by which judicial relief is needed.

iii. Briefing schedules should reflect the priority given to expedited cases. For non-case-dispositive motions, the time for responses and replies should generally be measured in days.

iv. An expedited schedule should be requested by motion. This is true even for summary proceedings, where a motion to expedite historically was viewed as superfluous. In these proceedings, the motion to expedite assists the Register in Chancery and serves as an efficient vehicle for presenting the scheduling issue to the Court. Because summary proceedings must be held promptly, the motion should be short, provide the Court with factual context, and explain the requested schedule.

v. The response to a motion to expedite should be in the form of an opposition to a motion. In a summary proceeding, the opposition should focus on what is a reasonable schedule given the circumstances facing the parties.

vi. Parties should outline their preferred schedules in the motion to expedite and opposition. The Court should not be left in the dark until the teleconference. To the extent parties can agree on all or a portion of an expedited schedule, they should do so.

vii. Absent extraordinary circumstances, the party seeking expedited proceedings should make a good faith effort to provide informal courtesy

copies of all relevant papers to the other side, ascertain whether expedition is contested, and promptly inform the Court by letter as to those efforts and any response.

viii. The fact that the default date to respond to the complaint has not passed will not prevent the Court from holding a scheduling conference.

ix. The need for a defendant to obtain Delaware counsel will not prevent the Court from holding a scheduling conference. The Court generally will permit non-Delaware counsel, including in-house counsel, to appear for purposes of the initial scheduling conference. Regardless, there is a sufficient pool of qualified Delaware lawyers available that a delay in securing Delaware counsel should be rare.

c. Summary proceedings

i. Summary proceedings generally can be completed in 45-90 days. A faster or slower schedule may be warranted based on external events or the complexity of the case. Director information cases and stock list cases will move faster.

ii. Because summary proceedings are by statute "summary," dispositive motion practice is often wasteful and delays final resolution. The Court will therefore typically enter a schedule culminating in a prompt trial at which all arguments, factual and legal, can be presented summarily. When discussing scheduling, parties should keep this in mind.

iii. Because many summary proceedings can be decided on a short, largely undisputed record, parties should consider ways to present summary proceedings on a paper record, such as by a trial with oral argument on a stipulated paper record. Certain types of summary proceedings, such as entitlement issues in advancement disputes, may be suitable for disposition on summary judgment.

d. Scheduling stipulations

i. Scheduling stipulations are helpful because they inform the Court that a motion is being addressed or that the case is moving forward.

(A) As a general rule, parties should propose a case schedule within 30 days after the closing of the pleadings. Before crafting a scheduling order, counsel should consider the sections in these guidelines on recurring scheduling issues, including the scheduling of motions for summary judgment.

(B) If a motion is not governed by an existing case schedule, then as a general rule, parties should agree on a briefing schedule within a matter of days after the motion is filed. Delays over scheduling

should not be used to create an extended schedule. Counsel should not wait for a call from the Court asking about the briefing schedule.

ii. Minor modifications to a schedule that do not affect the date of the last brief or the hearing date do not require a stipulation. Counsel may agree in a letter or email, which will have the same import as a formal stipulation.

iii. The following exhibits provide sample scheduling stipulations:

(A) Exhibit 1 – A sample scheduling stipulation for a Rule 12(b)(6) motion.

(B) Exhibit 2 – A sample scheduling stipulation for cross-motions on summary judgment.

(C) Exhibit 3 – A sample case scheduling stipulation for a summary proceeding.

(D) Exhibit 4 – A sample scheduling stipulation for a preliminary injunction.

(E) Exhibit 5 – A sample case scheduling stipulation for a plenary action.

e. Recurring scheduling issues

i. Witnesses that were not identified and deposed during discovery: Parties should generally use their reasonable best efforts to ensure that parties have an opportunity to depose before trial all witnesses who will testify at trial. But sometimes a trial witness will be identified after discovery closes.

(A) A party can avoid this problem by serving the standard interrogatory—early in the case—asking the other side to identify prospective trial witnesses. The party responding to that interrogatory should make a good faith effort to identify those persons under serious consideration to be trial witnesses, update the answer when required, and avoid unnecessary depositions late in the discovery phase or after the discovery cutoff.

(B) A party who has asked the standard interrogatory generally will be permitted to depose a witness who was identified late or can obtain an order precluding the identifying party from using the witness. Parties who fail to ask the standard interrogatory run the risk of not being able to depose a witness before trial. That said, it is inefficient for counsel to question a witness for the first time on the stand, so the Court may still allow a short deposition of an unidentified witness so that trial time can be used effectively. Consequently, even if an opponent failed to serve the standard interrogatory, counsel

should use reasonable best efforts to ensure that parties have an opportunity to depose before trial all witnesses who will testify at trial.

ii. Expert reports

(A) Parties should build into the scheduling order a procedure for identifying experts, serving expert reports, and conducting expert discovery.

(B) It is usually more efficient and less controversial for the parties to have their experts exchange all of their reports before taking expert depositions. The goal is for all experts to have completed their reports and analysis before they are deposed. Absent extraordinary circumstances, no new expert analysis should be presented at trial. Rather, all expert analysis should be subject to fair testing through pre-trial rebuttal reports and at deposition.

(C) The Court prefers that parties stipulate to limit expert written discovery to the final report and materials relied on or considered by the expert. The Court understands the degree of involvement counsel typically has in preparing expert reports. Cross-examination based on changes in drafts is usually an uninformative exercise.

(1) A sample expert discovery stipulation can be found at Exhibit 6.

iii. The timing of summary judgment motions

(A) Parties sometimes provide for summary judgment motions to be filed at the end of discovery with briefing to be completed on the motions shortly before the pre-trial briefs and the pre-trial stipulation are due, and trial is to commence. This creates inefficiency and a false exigency.

(B) Counsel should evaluate whether a case is better suited for summary judgment or trial. If the case is more suited for summary judgment, then the parties should craft a schedule that leads up to a summary judgment hearing without also providing for a trial date. Once the Court has ruled on the summary judgment motion, the parties can craft a schedule to address any remaining issues, including the possibility of trial.

(C) By contrast, if the case is more suited for trial, then the parties should craft a schedule that proceeds to trial. Summary judgment is unlikely to be an efficient or appropriate alternative to trial if the "undisputed" facts arrive in boxes from each side containing

hundreds of exhibits and the briefs argue different versions of events.

(D) If the parties genuinely believe that a set of *undisputed* facts may exist on which a dispositive legal ruling may be made, then they should raise the issue sufficiently early in the proceedings so that resolving the motion will result in efficiencies for the Court and the litigants.

f. Prolonged lack of docket activity

i. The judicial officers receive regular reports on the status of their dockets which highlight cases where there has been a lack of docket activity. When a case has had a prolonged period of inactivity, the Court may require a status report or contemplate dismissal for failure to prosecute.

ii. Counsel shall confer with their respective clients prior to submitting the status report to the Court. Parties should submit reports jointly in a single filing. If the parties have different views on a particular issue, the filing can make that clear.

iii. It is possible that parties may be working diligently on their cases despite a lack of docket activity. If this is the case, consider submitting a joint letter updating the Court on the status of the case and what is going on. If your case has not had any docket activity in six months, then sending a letter would be a good idea.

g. Pleadings

i. Answers

(A) As contemplated by Rule 10(b), an answer should repeat the allegations of the complaint and then set forth the response below each allegation.

(B) Parties should take seriously the provisions of Rule 8(b) and not aggressively deny basic facts without a good faith basis for doing so.

(C) Parties must have a Rule 11 basis for affirmative defenses, and it is typical practice for each affirmative defense asserted to include a concise, good faith basis for asserting the defense. Parties should not recite any affirmative defense without carefully considering the applicability of each defense to the facts of the case.

ii. Amendments to pleadings

(A) If a party intends to oppose an amended pleading because the

amendment would be futile, the Court prefers for the parties to stipulate to the amendment while reserving the right to challenge the sufficiency of the amended pleading at the time a response is due or through an appropriate motion. Although it is not improper to oppose a motion to amend because the amendment would be futile, it is cumbersome because it results in briefing that is to some extent duplicative of a motion to dismiss, but with the party who would normally bear the burden on such a motion filing only one brief.

(B) An amended pleading should be filed as a separate docket entry. Do not simply refer back to the version that was attached to the motion to amend. That version is hard to find. It is also often unsigned and unverified and therefore does not comply with Rules 3(aa) and 11.

6. Motions

Rule 171(f)(1) establishes different requirements for Merits-Related Motions, such as those brought pursuant to Rules 12, 23, 23.1, 56 or 65, and Other Motions, such as discovery motions. Consult Rule 171(f)(1) to determine how to proceed.

a. Pro hac vice motions

i. Moving counsel should investigate and promptly determine and advise the Court whether a motion for admission pro hac vice or for commission is opposed. Otherwise, the motion will be deemed unopposed. Any objection to a pro hac vice motion or motion for commission must be filed promptly.

b. Motions for commission

i. Moving counsel should advise Chambers whether a motion is opposed or unopposed. Opposing counsel should respond promptly when asked by moving counsel if a motion for commission is opposed.

c. 12(b)(6) or 12(c) motions

i. Parties should submit two properly bound copies of the operative pleadings and their exhibits in connection with Rule 12(b)(6) or 12(c) motions. These are pleading-stage motions, so the pleadings and the exhibits are the key documents. The Court does not have the resources to recreate the pleadings and exhibits from the docket, particularly when they are voluminous.

ii. Consider whether a Rule 12(b)(6) or 12(c) motion is adhering to the requirement that the movant accept the well-pled facts as true and rely only on the unambiguous terms of essential documents. A Rule 12(b)(6) or 12(c) motion may not be appropriate if a large appendix is required. More typically, the need for an appendix signals a desire to argue a different set of facts, implicating at best Rule 56 and usually opening the door to

discovery before the motion can be considered.

d. Rule 56 motions

i. Because trials in the Court of Chancery are bench trials, it is often unhelpful to seek summary judgment unless there is a clear legal issue to be decided.

ii. To screen whether summary judgment will be helpful, parties may include in a scheduling order (or the Court may adopt) provisions requiring that parties seek leave before moving for summary judgment. Under one possible procedure, a party wishing to file a motion for summary judgment must file a letter no longer than 1,250 words setting forth the undisputed facts and legal theories that warrant granting summary judgment. Within 10 calendar days of the filing of such a letter, the party against whom summary judgment would be sought may submit a letter response no longer than 2,500 words setting forth the factual disputes (including record citations) and legal bases for opposing such a motion. The Court then determines whether to grant leave to file a motion for summary judgment. If the Court determines to grant leave, the Court may consider whether to remove any trial date from the calendar to permit the Court time to resolve the motion.

e. Complex briefing sequences

i. If substantive cross-motions are contemplated, such as for judgment on the pleadings or for summary judgment, the parties shall work to reduce the number of briefs. A four-brief sequence is preferred over a six-brief sequence.

ii. In cases with multiple parties, the parties should consider the commonality of issues and attempt to coordinate and reduce the number of briefs. Similarly situated parties, such as multiple defendants, should not file separate briefs on the same issue. It is preferable to file a single, joint brief. If one party wishes to raise an additional issue, the brief can make clear that the issue only relates to a particular party. The Court is receptive to approving an increased word limit to facilitate the filing of a common brief.

iii. In cases with large numbers of parties who each intend to file motions, the parties should consider filing briefs with colored covers like those used in the Supreme Court to help all concerned collate and use the briefs efficiently.

7. Discovery

a. General Guidelines

i. The goose and gander rule is typically a good starting point for constructive discovery solutions.

ii. All counsel (including Delaware counsel) must be mindful of their common law duty to their clients and the Court to preserve all potentially relevant information, including electronically stored information ("ESI"). Accordingly, a party to litigation must take reasonable steps to preserve potentially relevant information, including ESI, that is potentially relevant to the litigation and that is within the party's possession, custody or control. Because ESI takes many forms and may be lost or deleted absent affirmative steps to preserve it, special care is needed. At a minimum, parties and their counsel must develop and oversee a preservation process, including the dissemination of written litigation hold notices to custodians of potentially relevant ESI.

iii. Counsel's oversight of identification and preservation processes is important, and the adequacy of each process will be evaluated on a case-by-case basis. Once litigation has commenced, if a litigation hold notice has not already been disseminated, counsel should instruct their clients to take reasonable steps to act in good faith and with a sense of urgency to avoid the loss, corruption, or deletion of potentially relevant information, including ESI. Failing to take reasonable steps to preserve may result in serious consequences for a party or its counsel.

iv. Reasonable steps will vary from litigation to litigation. In most cases, however, a party and its counsel (in-house and outside) should:

(A) Take a collaborative approach to the identification, location and preservation of potentially relevant information, including ESI, by specifically including in the discussion regarding the preservation processes an appropriate representative from the party's information technology function (if applicable);

(B) Develop written instructions for the preservation of potentially relevant information, including ESI, and distribute those instructions (as well as any updated, amended or modified instructions) in the form of a litigation hold notice to the custodians of potentially relevant information; and

(C) Document the steps taken to prevent the destruction of potentially relevant information.

v. Potential problem areas for preservation of ESI include business laptop computers, home computers (desktops, laptops, and tablets), handheld mobile devices, and external or portable storage devices such as USB flash drives (also known as "thumb drives or key drives"). Other frequent problem areas include personal email accounts, text messages, and other

forms of messaging. This list is not exhaustive and should be a starting point for parties and their counsel in considering how and where their clients and their employees might store or retain potentially relevant ESI. Counsel and their clients should discuss the need to identify how custodians store their information, including document retention policies and procedures as well as the processes administrative or other personnel might use to create, edit, send, receive, store and destroy information for the custodians. Counsel also should take reasonable steps to verify information they receive about how ESI is created, modified, stored or destroyed.

vi. While the development and implementation of a preservation process after litigation has commenced may not be sufficient by itself to avoid the imposition of sanctions by the Court if potentially relevant information is lost or destroyed, the Court will consider the good-faith preservation efforts of a party and its counsel. Counsel are reminded, however, that the duty to preserve potentially relevant information is triggered when litigation is commenced or when litigation is "reasonably anticipated," which could occur before litigation is filed.

b. Collection and review of hard copy documents and ESI

i. All counsel (including Delaware counsel) must be mindful of the importance of the careful collection and review of documents and ESI. The Court has been, and remains, reluctant to adopt a "one-size-fits-all" approach to the collection and review of documents, especially given the variety of cases that come before the Court. The Court also is mindful of the considerable burdens of collecting documents for review and production, and the potential leverage that these obligations can create in litigation. Thus, it seeks to remain flexible, reasonable and efficient in resolving discovery disputes.

ii. The Court expects counsel to meet and confer promptly after the start of discovery to develop a discovery plan. The Court recommends each party disclose the process and parameters used to collect documents (*e.g.*, identify persons with knowledge, potential custodians, electronic search terms and other ESI protocols, cutoff dates, and non-custodial data sources). To the extent that the collection process and parameters are disclosed to the other parties and those parties do not object, that fact may be relevant to the Court when addressing later discovery disputes.

iii. As a general matter, custodians and parties should not collect or review their own documents. The Court prefers that outside counsel or professionals acting under their direction perform these tasks. This may not be possible in all cases, with the most obvious example being *pro se* parties. If a compelling case-specific reason exists for departing from the preferred approach, counsel nevertheless should be actively involved in establishing and monitoring the procedures used to collect and review

documents to determine that reasonable, good faith efforts are undertaken and to ensure that responsive, non-privileged documents are timely produced.

iv. Among other things, the procedures used to collect and review documents generally should include interviews of custodians who may possess responsive documents to identify how the custodians maintain their documents and the potential locations of responsive documents, including the files and computers of administrative or other personnel who prepare, send, receive or store documents on behalf of the custodians.

v. Unlike paper documents, ESI is susceptible to modification or deletion during collection. Therefore, counsel should exercise care in developing appropriate collection procedures.

vi. The Court is aware that in order for litigation to produce justice, the costs of the litigation must be proportionate to what is at stake. *See* Rule 26(b)(1). That awareness applies with special force to the subject of electronic discovery. Precisely because the extent of electronic discovery that is appropriate depends on case-specific factors, the Court has been reluctant to adopt mandatory requirements. But because the Court has eschewed a mandatory approach, it is essential that parties discuss this subject early in the discovery process and address it directly. The resulting process should take into account the needs of the case, information each side already has, the costs of employing various electronic discovery techniques, the amount in controversy, limitations on the parties' resources, and the relative importance of the various issues at stake in the litigation.

vii. The Court expects Delaware counsel to play an active role in the discovery process, including in the collection, review and production of documents, and in the assertion of privilege. If Delaware counsel does not directly participate in the collection, review and production of documents, Delaware counsel should, at a minimum, discuss with co-counsel the Court's expectations. In addition, Delaware counsel should be involved in making important decisions about the collection and review of documents and should receive regular updates, preferably in writing, regarding the decisions that are made on key issues, such as the selection of custodians and search terms. The Court expects Delaware counsel to be able to answer questions regarding the manner in which the document collection and review was conducted. It is therefore recommended that Delaware counsel and co-counsel collectively maintain a written description of the discovery process, including detailed information regarding efforts to preserve documents, custodians identified, search terms used, and what files were searched. A document can be found at Exhibit 10 that is intended to assist counsel in developing a sound document collection process. Exhibit 10 is not intended to mandate issues to consider in every

case, nor is it intended to be an exhaustive list of all issues that should be considered in any particular case.

viii. If a responding party requests Word versions of discovery requests, the proponent should provide them.

c. Privilege logs

i. A difficult part of the discovery process involves reviewing documents for privilege and preparing the resulting privilege log. In the first instance, more junior lawyers typically make the initial judgment calls about which documents might be subject to a claim of privilege. Understandably, lawyers are concerned about making a mistake and producing a privileged document. This often leads to a tendency to overdesignate documents as privileged, including by designating as privileged every document received or sent by anyone who is an attorney or any document that refers to an attorney, even though the attorney may not have been acting as an attorney and the communication may not have been for the purpose of facilitating the provision of legal advice. Preparing a privilege log is a similarly difficult task, because it requires the lawyer to provide a description of the basis for asserting privilege that is sufficient for the opposing party to evaluate the claim.

ii. Because disputes about the improper assertion of privilege are common, the senior lawyers in the case, especially senior Delaware lawyers, must provide guidance about how the privilege assertion process should unfold. That includes guidance about: 1) the Delaware standards for asserting any privileges the client wishes to assert; 2) protocols for identifying the initial cut of documents that warrant a closer review for privilege; 3) protocols for ensuring that the Delaware standards are applied with fidelity when determining that specific documents are exempt from production on privilege grounds; and 4) the Delaware requirements for providing sufficient information about the document to enable the opposing party and the Court to assess whether privilege has been asserted properly. Senior lawyers, including senior Delaware lawyers, should make the final decisions on difficult privilege questions.

iii. Senior lawyers, including senior Delaware lawyers, must ensure that the guidance provided was actually followed. Although this does not mean that senior lawyers must personally conduct the privilege review or prepare the privilege log, they must take reasonable steps to ensure that privilege only has been asserted in accordance with a good faith reading of Delaware law, that there has not been systematic overdesignation, and that the privilege log contains sufficient descriptions of the documents. One possible approach to fulfilling this duty would be for a senior Delaware lawyer to review a representative sample of the entries on the privilege log and associated documents in order to assess compliance with Delaware

law and practice. By this or other means, the senior Delaware lawyers must personally assure themselves that the privilege assertion process has been conducted with integrity. That means that when there is a hearing in Court, a senior Delaware lawyer must be able to take the podium, explain the basis for the assertion of a disputed claim of privilege, and be knowledgeable about the privilege assertion process.

iv. Parties may reach agreement on aspects of the privilege-log process. Here are some topics to consider:

(A) The Court generally does not expect parties to log post-litigation communications. Although there may be exceptions, particularly in an injunction proceeding in a still-developing situation, frequently parties should be able to use the date on which suit was filed as a cutoff for privilege review.

(B) It may be possible for parties to agree to log certain types of documents by category instead of on a document-by-document basis. Categories of documents that might warrant such treatment include internal communications between lawyer and client regarding drafts of an agreement, or internal communications solely among in-house counsel about a transaction at issue. These kinds of documents are often privileged and, in many cases, logging them on a document-by-document basis is unlikely to be beneficial.

(C) There are different approaches to logging email chains and email attachments. Some lawyers typically log only the top email in the chain. Others log every email in the chain. Some lawyers describe the attachment separately. Others allow the logging of the e-mail to suffice. Parties should attempt to agree on the procedures that both sides will use.

(D) Different cases may warrant different approaches to redactions. Often redacted copies are produced and a redaction log provided. Parties may agree to dispense with a log for partially redacted emails or other communications where the face of the document provides the factual information that otherwise would appear on a log.

(E) When logging documents on a document-by-document basis, parties should bear in mind that a privilege log must describe the document being withheld so that the opposing party and the Court can assess the propriety of the asserted basis for withholding the document. It is the exceedingly rare, perhaps apocryphal, description that actually reveals the substance of underlying legal advice. It would be inconsistent with the purpose of a privilege log for the receiving party to claim that the descriptions themselves waived privilege. The Court discourages using a short list of

repetitive descriptions. Descriptions should be document-specific and provide context so that the reader can understand the basis for the claim of privilege. If the privilege in question is the attorney-client privilege, the log should explain the basis for the assertion of privilege and provide a brief identification of the issue involved. If the individuals drafting and reviewing the log have difficulty describing the role of the lawyer or why the issue is primarily a legal one on which legal advice was sought or given, that may be an indication that the communication is not privileged. It may instead be a general business discussion on which a lawyer was included, a factual update, a cover email attaching documents, or an effort to schedule a conference call or a meeting, which are types of documents that should be produced. The requirement of a meaningful description thus not only provides necessary information to the other side, but also serves as a check on over-designation.

(F) The parties should provide information about the individuals identified on the log, including whether they are attorneys, their titles, and their affiliations. If non-parties are recipients or authors of a document, the privilege assertion should address how their relationship with the client or counsel justifies maintaining the privilege (*e.g.*, is there a common interest exception or is the third-party a qualified advisor whose access to privileged communications is permissible). Additional detail and context will be necessary in other situations, such as, if someone is acting both as a business person and lawyer. In many situations where lawyers have mixed roles, counsel will have to segregate the privileged portions of communications from those that are non-privileged.

(G) Preparing a privilege log with integrity requires the involvement of senior lawyers who know the applicable standards, understand the precise roles played by the client representatives, and have the relationship and stature with the client to discuss documents frankly and make principled assertions of privilege. This is particularly true of the *many* common situations when a document is only partially subject to a claim of privilege (such as a portion of corporate minutes) and where the bulk of the document should be produced if responsive.

d. Non-party discovery

i. Litigation in the Court of Chancery often involves obtaining documents from non-parties. Sometimes the non-parties will be Delaware businesses or entities who can be subpoenaed directly. Other times counsel will need to use the commission process or the Delaware Uniform Interstate Deposition and Discovery Act.

ii. Many of the non-parties who are involved in Delaware litigation are not true non-parties, but rather have affiliations with named parties. They may be controlled or controlling affiliates, or service providers like investment banks, accountants, or law firms.

iii. Parties should attempt to facilitate third-party discovery involving their non-party agents and affiliates.

(A) Forcing a party to obtain a commission or out-of-state subpoena adds unnecessary complexity and cost to the litigation. Parties also often choose to involve themselves in the productions of their agents and affiliates to address issues such as privilege. If a party intends to involve itself in the production, then the party should play a role in facilitating the production rather than pretending that the non-party is unrelated.

(B) Facilitating third-party discovery also recognizes that the parties to a case often could be required to obtain and produce documents over which they have control, even if an agent or affiliate has custody of the documents.

e. Discovery disputes

i. Parties should meet and confer before bringing discovery disputes to the Court's attention. The Court will not be inclined to consider arguments or authorities that have not previously been presented to the other side. If the argument or authority had been presented, perhaps the dispute would have been resolved. At the same time, the meet-and-confer process should not be used to prolong a dispute and prevent an opposing party from presenting it to the Court.

ii. If one party moved to compel or seeks a protective order, the responding party should not cross-move on the identical issue just to get the last (and fourth) brief. In ruling on a motion to compel, the Court can grant any relief that would be sought by way of protective order. *See* Rules 26(c) & 37(a)(4)(B) & (C). Likewise, in ruling on a motion for protective order, the Court can grant any relief that would be sought by way of a motion to compel. *See* Rule 26(c).

iii. When presenting discovery disputes, parties should not include the entire history of the dispute. They should instead focus on the current scope of the request and the current dispute.

f. Confidentiality Stipulations and Orders

i. Confidentiality stipulations and orders should recognize that proceedings in open court are generally public and that materials used in open court become part of the public record. A stipulation may not provide that

confidentiality restrictions would "continue to be binding throughout and after the conclusion of the Litigation, including without limitation, any appeals therefrom" without making any exception for information that becomes part of the public record. Such a restriction as drafted is overbroad and an invalid prior restraint.

ii. If counsel believes that certain limited and highly confidential information requires that the Courtroom be closed, then counsel should make an application well in advance of the hearing in question. In some circumstances, it may be appropriate for counsel to agree on a more limited procedure to protect confidentiality (for example, agreeing to use aliases to refer to certain non-parties in court), and inform the Court of that agreement.

iii. When litigants and their counsel and advisors obtain access to confidential information, they must strictly abide by the terms of the confidentiality order. Troubling situations have arisen where litigants gained access to confidential, non-public information about the value of a public corporation and traded in its securities. A litigant or advisor who engages in trading should expect to have their conduct scrutinized, be required to report themselves to the Securities and Exchange Commission, possibly face sanctions including the mandatory disgorgement of any trading profits and a potential bar to acting as a class representative in future class or derivative actions. To avoid these situations, counsel for litigants and their advisors who receive access to confidential, non-public information should discuss these principles with them and advise them that procedures need to be in place to avoid violations of the order and trading in securities on the basis of confidential, non-public information. More generally, litigants and non-litigants who access confidential discovery material should be reminded that its use may be subject to other laws and regulations of the State of Delaware and other jurisdictions.

iv. Two sample confidentiality stipulations are attached as Exhibits 7 and 8, and available on the Court's website.

(A) If the parties depart from these forms, then they shall submit a marked/redlined version to the Court reflecting the changes.

(B) If a change is material, the parties shall advise the Court in a letter and explain why the change is being made.

g. Expedited discovery

i. The time constraints inherent in expedited litigation necessarily limit both the scope and timing of discovery and can impose considerable burdens on the parties. Accordingly, the Court expects the parties to work together in good faith to facilitate the timely completion of the discovery necessary

for a fair presentation of the issues. The Court encourages the parties and counsel to consider the practices described below, while recognizing that it may be appropriate for the parties to proceed in a different manner in a particular situation, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake.

ii. **Written discovery:** Although all types of written discovery may be used in the appropriate circumstances, written discovery in expedited cases typically is limited to document requests and narrowly tailored interrogatories intended primarily to identify persons with relevant knowledge. The parties' initial written discovery requests should be focused on the key issues relevant to the expedited portion of the case. If further proceedings are necessary after the expedited portion, there will be the opportunity for additional, non-duplicative discovery. To facilitate prompt responses to written discovery requests and the production of documents (including ESI), the plaintiff should serve its initial written discovery requests with the complaint or a motion to expedite (or if not feasible, as soon as possible thereafter), and the defendant should propound any requests it may have promptly.

iii. In all expedited matters, the parties should agree on a schedule so that initial written discovery and document production is completed before the start of depositions. The parties might agree at the outset of discovery to limit the number of discovery requests. An expedited schedule usually will require the parties to respond to written discovery more quickly than the default period set forth in the Court of Chancery Rules. In some cases, the parties may decide to forgo formal responses in favor of informal communications. To avoid misunderstandings or delays, the responses and objections to document requests, whether formal or informal, should make clear what categories of documents will be produced. The parties should meet and confer promptly to attempt to resolve any disputes regarding the scope of document production. The Court encourages documents to be produced on a "rolling basis" and for the parties to agree that certain significant documents (as discussed more below in "Document collection") will be produced as soon as feasible after the start of discovery (typically subject to an agreement that they will be treated as "attorneys eyes only" until a confidentiality order is entered).

iv. **Document collection:** When responding to written discovery requests, the parties are obligated to conduct a reasonable search for relevant and responsive documents. The speed at which a case is litigated affects what is reasonable. Although each party ultimately is responsible for its own document collection and production, the Court expects that early in the process the parties discuss limitations on expedited discovery. The Court expects the parties to freely exchange information concerning the scope of their respective document collections (*e.g.*, what documents are being

collected, how they are being collected, what computers or other electronic devices are being searched, and any search terms or other restrictions being utilized to collect documents).

v. In an expedited proceeding, the parties should collect and produce the "core documents" promptly. Although every dispute is unique, attorneys can generally identify the documents that are most likely to contain relevant information. For example, where a corporate transaction (*e.g.*, a merger) is being challenged, the "core documents" typically include, at least, (i) the minutes of the relevant meetings of the board of directors and any board committees, (ii) the materials provided to the directors related to the transaction, (iii) the working group lists associated with the transaction, and (iv) the engagement agreements and fee arrangements with advisors.

vi. Parties should identify the key custodians and focus their document collection efforts on those custodians. Typically, parties agree to limit the number of custodians from which each party collects documents. Each party should make a good faith, reasonable attempt to identify the custodians who are reasonably likely to possess relevant documents. Notwithstanding any agreement to limit the number of custodians, unless otherwise agreed, parties should collect from any centralized document repository or system that is likely to contain relevant documents (*e.g.*, document management systems, SharePoint sites, central files).

vii. Parties typically agree to limit the computer devices and systems from which they collect, the date range associated with various document requests, and the file types collected (*e.g.*, excluding ".exe" files). Parties also typically agree that they will not produce documents created after the date that the complaint was filed, unless post-complaint events are or become relevant to the dispute.

viii. Even in expedited discovery, counsel should interview the custodians to understand, among other things, any potential sources of relevant documents (*e.g.*, centralized document repositories or systems, smartphones, work and home computers), determine the records that are kept in the ordinary course, and identify any relevant jargon, acronyms or code names.

ix. Even in expedited discovery, counsel should inquire concerning the existence of responsive hard copy documents, such as handwritten notes.

x. Outside litigation counsel should actively oversee the collection of documents. As in any other case, the Court expects Delaware counsel to play an active role in the collection, review and production of documents in expedited litigation. The role of Delaware counsel become more important in expedited litigation because of the absence of any room in the

schedule to redress discovery shortcomings.

xi. If search terms are used to identify potentially relevant documents, the parties should make a good-faith, reasonable attempt to negotiate those terms with the opposing parties. The responding party remains responsible for crafting an appropriate method of collecting documents; the negotiation process is not an opportunity to shift that burden to a less-knowledgeable adversary. To facilitate discussions, the responding party should disclose case- or transaction-specific terms, such as codenames and acronyms. The Court also expects parties to exchange relevant information about search results, such as statistics concerning the number of documents or "hits" associated with particular search terms and examples of documents that are responsive to particular search terms but are not relevant to the case.

xii. **Document review and production:** The Court expects outside counsel to actively oversee document collection, review and production as part of a reasoned process designed to result in the prompt production of the documents necessary for a fair presentation of the dispute to the Court.

xiii. The Court does not require documents to be produced in a particular format. The parties are expected to cooperate to produce documents in a format that is usable to the parties. Typically, the parties agree to produce most documents as single- or multiple-page image files, and to produce spreadsheets, audio and video files, etc., in their native format. The parties also typically agree to provide standard load files (*e.g.*, a data file for metadata and an image file for images), certain objective metadata (if reasonably available) and text-searchable documents.

xiv. Parties should eliminate duplicate documents (both within and across custodians). Parties should nevertheless record the custodians possessing duplicate copies and provide that information as a separate field in the production load files.

xv. The Court encourages parties to produce core documents as soon as possible and to produce other documents on a rolling basis.

xvi. **Privilege and redaction logs:** In expedited litigation, the Court encourages the parties to make agreements that reduce the time, expense and burden associated with conducting a document-by-document privilege review and preparing privilege and redaction logs so that the merits of the application may be developed in the limited time available and fairly presented to the Court.

xvii. Parties may agree to limit the types of documents that will be logged (*e.g.*, to include only documents from a certain time frame or relating to certain subjects, or to exclude communications post-dating the filing of the

complaint or solely between attorneys). The parties also may agree to defer a privilege log until later stages of the litigation.

xviii. Parties are encouraged to forgo a redaction log if the logged information would be redundant of information provided in the redacted documents—for example, if the redacted document identifies the sender and recipients of the communication, the general subject matter (*e.g.*, through a "subject" line on an email), and the basis for the redaction (*e.g.*, the redacted material is stamped "Redacted—attorney-client privilege").

xix. Parties are encouraged to forgo a full document-by-document privilege review by entering into a "quick peek" agreement that permits the requesting party to review responsive documents without the producing party waiving privilege. Whether a quick peek agreement is appropriate depends on the facts and circumstances of the case. A sample quick peek agreement is attached as Exhibit 11. A "quick peek" agreement may not ensure that documents produced pursuant to the agreement will not be considered a waiver of privilege in other jurisdictions.

xx. It is incumbent upon the parties to reach agreement as to these or other alternative approaches to asserting claims of privilege. A party who unilaterally implements a cost-savings approach to privilege and redaction logs may face arguments that the party failed to properly assert a claim of privilege. This could result in a finding of waiver.

h. The Discovery Facilitator

i. The Court may appoint a Discovery Facilitator to assist the parties in navigating the discovery process. The fees and expenses incurred in connection with a discovery facilitator shall be borne by the parties as directed by the Court.

ii. The role of the Discovery Facilitator is to promote transparency, act as an honest broker, mediate compromises, and document agreements and disagreements. The Discovery Facilitator typically will have the power to convene meet-and-confer sessions, to request information from a party, and to communicate *ex parte* with a party or the court. The Discovery Facilitator typically will be directed to document the results of meet-and-confer sessions so that parties do not exchange lengthy letters about who said what.

iii. Unless granted additional authority, the Discovery Facilitator does not have the power to decide discovery disputes. The Discovery Facilitator is thus not a Discovery Master charged with deciding particular discovery issues. The Court nevertheless may seek input from the Discovery Facilitator if a dispute is presented to the Court.

iv. The Court has historically appointed a Discovery Facilitator in cases

exhibiting some or all of the following features: highly complex facts, an extensive discovery burden, an expedited schedule, difficult privilege questions, or a pattern of discovery disputes between counsel. Parties may also request that the Court appoint a Discovery Facilitator. In the Court's experience, the presence of a Discovery Facilitator is a net benefit for everyone involved. Although there is an additional upfront cost, the involvement of a Discovery Facilitator can reduce the number of disputes and the cost of discovery for the case as a whole.

8. Compendia and Appendices

a. Use tabs. An untabbed appendix or compendium is not useful.

b. If a compendium or appendix is huge, uncomfortable to hold, and likely to fall apart, break it into separate usable volumes.

The **compendium** is counsel's opportunity to provide the Court with authorities that the Court otherwise does not have at its fingertips or which counsel want to highlight for the Court.

c. The parties should provide the Court with hard copies of key cases. That said, a compendium that includes every single case cited in briefing will be large and cumbersome. Include the decisions that the Court should read. As a rough guideline, if a case is cited only once, consider leaving it out of the compendium. If a case already has been provided in an earlier compendium, simply note that fact. You need not provide an additional copy. Submitting a handy-to-use compilation of the key legal sources is the best way to ensure that the Court is familiar with your preferred authorities.

d. Movants should consider preparing a single compendium for their opening and reply briefs upon the filing of their reply brief.

e. Neither the judicial officers nor the Court's personnel have access to Lexis. If you are citing to Lexis versions of cases, it is important to provide Lexis versions.

f. The Court has ready access to the major Delaware treatises. If you are relying on excerpts from other treatises or practitioner pieces, consider including these materials in the compendium.

The **appendix** is counsel's opportunity to provide the Court with the evidence necessary to decide a motion.

g. The appendix should be manageable. To the extent possible, parties responding to a motion or opening brief should avoid duplicating materials in their own appendices. The Court does not need multiple copies of large documents. Cite to the document that appeared in the appendix that accompanied the opening brief.

h. Pincite to specific pages or sections of the exhibits. Do not cite to the entire exhibit, which may be lengthy.

9. Trial

a. Pre-trial briefs

i. Pre-trial briefing generally should consist of a total of two pretrial briefs, one from the plaintiffs and one from the defendants. The pre-trial briefs should summarize the evidence and arguments that each side intends to present at trial. They should not go into the same level of detail as post-trial briefs.

ii. In a case where the parties do not anticipate post-trial briefing, the parties should propose a sequence of pre-trial briefs that will present the matter to the Court for decision. Examples where this approach could make sense include a trial that will take place on a stipulated record, or where the parties do not anticipate post-trial briefing because the issues to be tried are narrow and straightforward, such as a simple books-and-records proceeding or an advancement dispute involving limited issues.

b. Pre-trial orders

i. The judicial officers find it helpful for parties to use their best efforts to prepare stipulated facts, with a particular focus upon the parties' identities, the relevant entities (including capital structure, as appropriate), a general timeline of critical events or other key dates, and the nature and dates of key documents and/or agreements. The Court is not looking for quotations from documents or argumentative characterizations of events. Parties should consider submitting the pre-trial order after the close of pre-trial briefing so that the parties can take into account the other side's briefs when negotiating stipulated issues of fact and drafting proposed issues of fact. For instance, when proposing statements of fact, a party might include quotations from the other side's briefs or expert reports with supporting citations. If one side has made an assertion and the other side wants to adopt it, the Court likely will treat it as fact unless it appears completely contrary to the evidence or the opposing party changes its position and shows good cause for doing so.

ii. The pre-trial order should identify all witnesses, including potential rebuttal witnesses.

iii. In cases with large records, there are often substantial numbers of exhibits and extensive portions of transcripts that are not cited in the briefs or discussed at trial. The failure to reference these materials can raise questions about the scope of the record before the trial court. To address this issue, parties may specify in the pre-trial order that the record for the purposes of the trial court's decision includes only those exhibits or portions of depositions that are used at trial or cited in post-trial briefs or at post-trial argument (subject to the resolution of any objections). Parties

also may agree to prepare a Schedule of Evidence after trial, briefing, and post-trial argument that lists the exhibits and deposition excerpts that form the record for purposes of the trial court's decision.

c. Deposition designations

i. Parties may lodge depositions with the Court rather than prepare deposition designations.

ii. Notwithstanding the lodging of entire depositions, the Court expects the parties to cite the portions of any lodged deposition that the parties believe are relevant in their briefs.

iii. Absent objection or agreement to the contrary, the Court may consider the entirety of the lodged deposition. But the parties should expect that the Court will focus on the portions cited.

d. Trial exhibits

i. Parties should not submit separate Plaintiffs' Exhibits or Defense Exhibits. They should submit joint exhibits. Giving a document a "JX" number does not mean you are stipulating to its admissibility; it just helps eliminate redundancy and allows everyone to work off one set of exhibits.

ii. Exhibits should be in chronological order. If the matter is highly expedited, such that chronological ordering is not feasible, parties should give the Court a chronological list of exhibits as soon as practicable.

iii. Parties should work together to avoid duplication. If a duplicate is discovered, it should be eliminated.

iv. Each side should plan its case so as to avoid deluging the Court with exhibits. It is not acceptable to simply dump in every deposition exhibit.

v. The judicial officers do not require appendices of exhibits with pre-trial briefs. If the pre-trial briefs cite to exhibits, those documents should be included on the trial exhibit list and referenced in the brief by JX number. This best way to make this feasible is to prepare the trial exhibits and exhibit list before pre-trial briefing is due. Less optimal, the parties may submit annotated pre-trial briefs after the trial exhibit list has been prepared that includes JX references.

vi. Parties should meet and confer regarding and attempt to resolve as many evidentiary issues as possible.

(A) Any objections to proposed exhibits or witnesses shall be identified on the joint exhibit list.

(B) Major evidentiary issues should be raised by motion in *limine*.

(C) Minor evidentiary issues should be addressed during trial, and may be further elucidated in post-trial briefs.

(D) Any evidentiary objections not raised as set forth above will be deemed waived.

i. Exhibit binders and flash drives

(A) Not later than the day before trial begins, parties should deliver to the Register in Chancery (i) four hard copies of tabbed exhibit binders and (ii) three flash drives containing searchable versions of the exhibits.

(1) The hard copies are allocated as follows: Court, Witness Stand, Judicial Clerk, and Register in Chancery.

(2) The flash drives are allocated as follows: Court, Judicial Clerk, Court Reporter.

(3) The Register in Chancery's hard copy becomes the official copy after trial for purposes of appeal.

(4) Counsel should contact Chambers to arrange the timing of delivery, as judges may want them earlier in the day in particular cases.

(5) As discussed below, particularly in a large case, the Court may direct the parties only to submit electronic copies.

(B) All binders, including trial exhibit and witness binders, should have rings that measure no more than 2" in circumference. A binder with 2" rings will measure 3" across the spine. The Court, its staff, and the Court Reporters have found that larger binders are cumbersome.

(C) Some judicial officers appreciate witness binders containing the exhibits that examining counsel expects to refer to when examining a particular witness. If you are unsure of a judicial officer's preference, you should inquire during the pre-trial conference.

(D) In lieu of the process outlined above, and at the discretion of the presiding judicial officer, parties may opt to conduct a nearly paperless trial.

(1) In that event, four flash drives, which hold all of the trial exhibits and depositions transcripts, should be provided, along with one hard copy set of binders.

(2) If the trial exhibits are updated over the course of trial, the parties should provide replacement flash drives containing the entirety of the updated trial exhibit set.

(3) A nearly paperless trial can be preferable for larger cases (typically lasting three or more trial days) and when the parties have trial presentation specialists who can ensure the smooth and efficient use of technology. Parties should not attempt a nearly paperless trial if they do not have a designated person in trial each day who can operate the technology efficiently. Parties wishing to conduct a paperless trials should confer with their opponents and then raise the issue with the Court during the pre-trial conference or at an earlier time.

e. Trial procedure

i. Parties should expect to divide trial time equally.

(A) If your side is talking, it comes out of your time. This includes questioning witnesses, making objections, and arguing points.

(B) Parties should track time usage. Beginning with day two of a multi-day trial, the parties should confer and agree at the lunch break or at the end of each day on time usage to date and the anticipated time remaining for each side.

ii. As a general principle, whoever has the burden of proof should present their case first and control the call of the witnesses. This means that the party with the burden of proof may call an opposing party's witness as part of its case-in-chief.

iii. As a general principle, witnesses should appear only once unless recalled in the rebuttal case. If both sides are calling a witness, then the party with the burden of proof has the option of how to proceed. The Court generally finds that it is more efficient and comprehensible to hear witnesses tell their own story first and then be cross-examined. If the party with the burden of proof elects to proceed in that fashion, then at the time the witness is called, the party controlling the witness presents the witness first, then the other side cross-examines the witness without any limitation to the scope of direct. Alternatively, the party with the burden of proof may elect to proceed with a hostile examination of the witness. If this course is followed, then the party controlling the witness will be permitted to follow with a complete direct examination.

10. Forms of Order

a. Parties should work cooperatively to agree upon forms of order.

b. An order may be agreed as to form so as to avoid any argument that a party has waived a right to appeal or to revisit an issue that has been determined preliminarily for purposes of an injunction, discovery, or similar pre-trial purpose.

i. If parties are truly unable to agree, then the prevailing party should submit a form of order and short motion that sets forth why the proposed form of order should be entered.

ii. The non-prevailing party should respond by opposition and provide a mark-up of the prevailing party's proposed form of order. The non-prevailing party should not respond with a completely different form of order.

iii. The prevailing party should then reply.

iv. If a motion or relief was granted in part and the Court has not otherwise directed a party to take the lead on submitting a form of order, then the movant is the prevailing party for purposes of initiating the submissions.

c. If the Court has requested a form of order, then unless otherwise directed, a form of order should be submitted within five business days of the ruling.

11. Representative Actions

a. Other proceedings involving the same subject matter

i. Parties to representative actions who are aware of other proceedings involving the same subject matter should (i) advise the Court promptly of the existence of the other matters and (ii) regularly update the Court regarding the status of the other matters.

b. Settlements

i. If a settlement has been reached in representative litigation challenging a pending transaction, the parties should advise the Court promptly and submit the memorandum of understanding. The settlement should be presented promptly for approval following the closing of the transaction.

ii. The scheduling order for a settlement in a representative action should provide for the following:

(A) Mailing of a notice at least 60 days before the hearing date, with a shorter time only upon application and for good cause shown;

(B) A brief in support of the settlement and any supporting documents to be filed 30 days before the hearing date;

(C) Objections to be filed 15 days before the hearing date, and

(D) A short reply in support of the settlement and in response to any objections five days prior to the hearing date.

(E) A sample settlement scheduling order appears as Exhibit 9.

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As amended through July 19, 2022

Rule 30 - Depositions Upon Oral Examination

(a) **When depositions may be taken.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of Court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in paragraph (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the Court prescribes.

(b) **Notice of examination: general requirements; special notice; method of recording; production of documents, electronically stored information, and tangible things; deposition of organization.**

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name ar[illegible] person to be examined, if known, and, if the name is not known, a gen[illegible]ufficient to

the testimony shall be recorded.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the State of Delaware and will be unavailable for examination unless the person's deposition is taken before the expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and the attorney's signature constitutes a certification by the attorney that to the best of the attorney's knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

(3) The Court may for cause shown enlarge or shorten the time for taking the deposition.

(4) Unless the court orders otherwise, a deposition may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means. With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents, electronically stored information, and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in the party's notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate 1 or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This p[Download]loes not preclude taking a deposition by any other procedure authorized in these Rules.

(c) **Examination and cross-examination: record of examination; oath; objections.** Examination and cross-examination of witnesses may proceed as permitted at the trial under he provisions of Rule 43(b). The officer before whom the deposition is to be taken shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by paragraph (b)(4) of this rule. If requested by l of the parties, the testimony shall be transcribed. Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings, shall be noted by the officer upon the record of deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) **Schedule and duration; motion to terminate or limit examination.**

(1) From the commencement until the conclusion of a deposition, including any recesses or continuances thereof of less than five calendar days, the attorney(s) for the deponent shall not: (A) consult or confer with the deponent regard Download of the testimony already given or anticipated to be given, except for the purpose of conferring on

paragraph (d)(3).

(2) By order, the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistent with Rule 26(c) if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination. If the court finds such an impediment, delay or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any party as a result thereof.

(3) At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted or defended in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party, the Court in which the action is pending or a Court of competent jurisdiction in the state where the deposition is being taken may order: (A) that examination cease forthwith; (B) that the scope and manner of the taking of the deposition be limited as provided in Rule 26(c); or (C) such other relief as the Court reasonably deems to be appropriate. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the Court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) **Submission to witness; changes; signing.** When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days after the date when the reporter notifies the witness and counsel by mail of availability for examination, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the

(f) **Certification by officer; exhibit, copies; notice of filing.**

(1) The officer shall certify that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. The certification shall be in writing and accompany the record of the deposition. The officer shall securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly send it by registered or certified mail to the attorney who arranged for the transcript or recording, who shall store it under conditions that will protect it against loss, destruction, tampering or deterioration. Documents, electronically stored information, and tangible things produced for inspection during the examination of the witness, shall, upon the request of the party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (A) the person producing the materials may substitute copies to be marked for identification, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the Court, pending final deposition of the case.

(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) **Failure to attend or to serve subpoena; expenses.**

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by an a to the notice, the Court may order the party giving the notice to pay to reasonable attorney's fees incurred by that party and that party's attorney in attending.

pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

(h) **Counsel fees on taking depositions; depositions more than 150 miles distant.** In the case of a proposed deposition upon oral examination at a place more than 150 miles from the courthouse where the action was commenced, the Court may order or impose as a condition of denying a motion to vacate notice thereof, that the applicant shall pay the expense of the attendance of 1 attorney for the adversary party or parties, at the place where the deposition is to be taken, including reasonable counsel fees, which amounts shall be paid or secured prior to such examination. The amount paid by such applicant to the applicant's adversary on account of attorney's fees and expenses may be a taxable disbursement in the event that the applicant recovers costs of the action.

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Rule 29 - Stipulations Regarding Discovery Procedure

Next Section
Rule 31 - Depositions Upon Written Questions