

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DOROTHY AGAR, et al.,	:
	:
Plaintiffs,	:
	:
v	: Civil Action
	: No. 9541-VCL
MICHAEL JUDY, et al.,	:
	:
Defendants.	:

- - -

Chancery Courtroom No. 12B  
 New Castle County Courthouse  
 500 North King Street  
 Wilmington, Delaware  
 Wednesday, December 6, 2017  
 10:00 a.m.

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BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

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ORAL ARGUMENT ON DEFENDANTS' MOTIONS FOR A PROTECTIVE  
ORDER and RULINGS OF THE COURT

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CHANCERY COURT REPORTERS  
 New Castle County Courthouse  
 500 North King Street - Suite 11400  
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1 APPEARANCES:

2 EVAN O. WILLIFORD, ESQ  
3 ANDREW J. HUBER, ESQ.  
4 The Williford Firm LLC  
5 for Plaintiffs

6 MICHAEL W. McDERMOTT, ESQ.  
7 Berger Harris, LLC  
8 for Defendant Michael Judy

9 JOHN H. NEWCOMER, JR., ESQ.  
10 Morris James LLP  
11 for Defendant Michael Scott

12 RYAN M. ERNST, ESQ.  
13 O'Kelly Ernst & Bielli, LLC  
14 for Defendant Carole Downs

15 JOSEPH B. CICERO, ESQ.  
16 Chipman Brown Cicero & Cole LLP  
17 for the Special Litigation Committee of the  
18 Board of Directors of Preferred Communication  
19 Systems, Inc.  
20  
21  
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1 THE COURT: Welcome, everyone.

2 ALL COUNSEL: Good morning, Your  
3 Honor.

4 MR. McDERMOTT: Good morning, Your  
5 Honor. May it please the Court. Mike McDermott of  
6 Berger Harris on behalf of Mr. Judy. I don't think  
7 any other introductions are necessary. Your Honor  
8 knows everyone in the court.

9 Two motions seeking a protective order  
10 are presently before the Court, precluding depositions  
11 and limiting discovery to those documents that have  
12 already been produced -- relevant, probative documents  
13 from which some evidence of collusion involving the  
14 SLC could be discovered.

15 A little bit of background, though if  
16 Your Honor doesn't need that, you'll let me know.  
17 November 2016, this time last year, the board of PCSI  
18 voted unanimously to form a single-member committee,  
19 with Mr. Schaffer as the sole member, to independently  
20 address and consider issues arising out of the Agar  
21 litigation. That was unanimously approved by a board  
22 who had two plaintiffs and two defendants in the Agar  
23 litigation.

24 Mr. Schaffer hired counsel and

1 commenced his investigation in early 2017, and in  
2 August 2017, the SLC issued his report. After a  
3 proposal to engage Mr. Trujillo and Agar's counsel to  
4 continue prosecuting the litigation was rejected, in  
5 September 2017, the SLC moved to realign and amend the  
6 complaint. Discovery directed to the SLC, Mr. Judy,  
7 Mr. Scott, and corporate counsel to PCSI has  
8 commenced. The briefing on the motion to realign, I  
9 understand, is set to be completed in January, and I  
10 don't know if there's a hearing date, but I expect  
11 there will be shortly thereafter.

12           The motion implicates, as Your Honor  
13 is well aware, an exercise of discretion, and we  
14 submit that Mr. Judy -- and I won't speak for Mr.  
15 Scott, although we've coordinated in an effort not to  
16 cover the same ground in this hearing. We submit that  
17 we've sought a sensible balance of the relevant  
18 competing interests here in connection with discovery.  
19 Those interests that are competing are the plaintiffs'  
20 ability to confirm that no defendant has engaged in  
21 collusion relating to the SLC's investigation or  
22 conclusions and defendants' competing interest as a  
23 continuing defendant in this litigation, which  
24 involves serious claims, not to have a parallel,

1 secondary investigation, a competing investigation, by  
2 plaintiffs on top of the SLC's investigation and their  
3 report and their efforts to realign.

4           With respect to the depositions -- I'm  
5 sorry. That balance is struck in connection with the  
6 Bluth case that we've cited. And Bluth indicates that  
7 the mechanisms established in Zapata are designed to  
8 protect against the risk -- and I quote -- "that a  
9 meritorious law suit will be terminated, with the  
10 result that the corporation will be injured, because  
11 of the board's self interest. Where the corporation  
12 decides to pursue litigation, those concerns are not  
13 present." That's Bluth.

14           A later case of this Court, London v.  
15 Tyrrell, observes, similarly, that where an SLC  
16 investigates whether a derivative suit should be --  
17 should proceed and recommends dismissal after its  
18 investigation, that's where Zapata comes in. Bluth  
19 indicates that to the extent discovery is necessary in  
20 connection with the motion to realign, it's even more  
21 limited than Zapata.

22           Here, Mr. Judy -- and, I submit, Mr.  
23 Scott as well -- has sought to strike that balance,  
24 recognizing Bluth, producing all communications

1 between Mr. Judy and Mr. Schaffer relating to the --  
2 I'm sorry, during the time of the SLC investigation.  
3 That covers the issue of collusion.

4           The balance of the issues that are  
5 permissively discoverable in connection with the  
6 motion to realign ought to be directed, and presumably  
7 had been directed, to the SLC. The plaintiffs have  
8 sought a deposition of Mr. Judy and Mr. Scott. And  
9 while we have opposed that from the beginning, we've  
10 also indicated that, you know, perhaps after deposing  
11 the SLC, Mr. Schaffer -- and two days of deposition  
12 testimony has been obtained from Mr. Schaffer -- that  
13 if a proffer can be made that supports the further  
14 request for a deposition from Mr. Judy or, perhaps,  
15 Mr. Scott, that we would reconsider our opposition.  
16 No such proffer has been made, and I submit that no  
17 such testimony has been provided by Mr. Schaffer that  
18 would support such a proffer to depose a continuing  
19 defendant in this procedural context.

20           Plaintiffs' proffer, to the extent  
21 that it exists in the answering brief in opposition to  
22 our motion for a protective order, submits that  
23 evidence of collusion exists because the SLC  
24 deliberately missed some claims and deliberately

1 missed claims that it could have brought, or should  
2 have brought, by way of an amended complaint; and  
3 missed these deliberately, perhaps, in connection with  
4 its investigation. But that position reeks of  
5 convenience, because the information that is submitted  
6 in connection with the answering brief was not before  
7 the SLC. It was not considered by the SLC. And in  
8 any event, if it's an effort to put it in front of the  
9 SLC for its consideration and future investigation or  
10 future claim based upon it, it's now there. But it  
11 doesn't evidence collusion.

12           The balance of the proffer in support  
13 of the expanded discovery that's been sought generally  
14 involves claims of secret deliberations, secret  
15 engineering of board plans, conspiracies involving  
16 PCSI's corporate counsel that was hired by Trujillo,  
17 who later tricked Trujillo and Mr. Agar into agreeing  
18 to an SLC, and, of course, issues concerning Mr.  
19 Schaffer's alleged cognitive disabilities. And those  
20 also are not issues -- none of them gained traction  
21 during two days of SLC deposition testimony, and none  
22 of those wild theories are supported by any documents  
23 or communications that have been produced.

24           Specifically, with respect to what I

1 think we're here down to, in connection with the  
2 protective order, are two issues that I can glean from  
3 the answering brief. One concerns attachments to  
4 documents that Mr. Judy produced to the plaintiffs.  
5 We had some communications about those attachments,  
6 and my understanding and my review, and the reasons  
7 that those attachments were not produced therewith,  
8 was because Mr. Trujillo was copied on every email  
9 that had an attachment. And I requested from  
10 plaintiffs to identify an attachment that --  
11 specifically that they wanted that they did not have  
12 or that was not otherwise attached to an email or  
13 communication that included Mr. Trujillo. And I  
14 received no response to that.

15           There are some attachments to board  
16 communications after the time when Mr. Trujillo and  
17 Agar were not on the board. They were withheld as not  
18 responsive, but also as privileged, and they were  
19 logged on a privilege log accordingly.

20           The other issue is with respect, as I  
21 understand it, to document requests number 2 through  
22 4. And generally, they seek -- and generally we  
23 responded and produced documents that are responsive  
24 to those requests. The documents or components of

1 those requests -- because 2 through 4 each have, I  
2 think, subcategory (1) through (10). And this is set  
3 forth at the answering brief -- I beg your pardon,  
4 Your Honor -- at page 11. And they seek additional  
5 documentation and communications concerning three  
6 categories: GX licenses, Preferred Operating Company,  
7 and VentureTel 700, Inc.

8           In the course of our communications,  
9 we indicated that those were not allowable within the  
10 scope of discovery. They were not mentioned in the  
11 complaint. They were not mentioned in the amended  
12 complaint. They were not considered by the SLC in the  
13 course of its investigation. They were not opined  
14 upon by the SLC in the course of its conclusions. And  
15 they fall outside of the permissible scope of  
16 discovery. They're not relevant. They wouldn't be  
17 probative to any issue of collusion or of independence  
18 or of good faith or the SLC's ability to proceed.

19           So we have satisfied all of the  
20 requests for production but for those three limited  
21 categories. And I don't believe -- unless my friends  
22 say otherwise, I believe that is kind of specifically  
23 the documents for which they seek -- or that they've  
24 conceded at this point that they're still looking for.

1           To the extent that the plaintiffs  
2 insist that this is essentially, if not akin to, a  
3 motion to dismiss, unless Your Honor thinks otherwise,  
4 I would say that it's not an unusual scenario, the  
5 procedural scenario that we're in. There may not be a  
6 lot of case law on a motion to realign that includes a  
7 motion to amend that omits certain claims but  
8 otherwise proceeds against all of the defendants with  
9 the lion's share of the claims.

10           What's not unusual, and why it's not  
11 unusual, is two things. First, I expect it's not  
12 unusual for Your Honor and for any of us to see a  
13 complaint that has a few overstated claims, or perhaps  
14 an extra claim or two that may not reach the level of  
15 worthiness to pursue. And that's apparently what the  
16 SLC has determined to do. This is not a motion to  
17 dismiss. They have determined that these claims are  
18 not meritorious, in their judgment, in the judgment of  
19 the SLC, and they've determined not to pursue them.

20           Query whether -- if, in the course of  
21 further investigation and further pursuit of the  
22 claims against all of the defendants, they determine  
23 to come back and pursue one or more of the claims that  
24 they have left out of the amended complaint, I don't

1 believe that they would be prohibited from doing so or  
2 otherwise would be precluded from adding those claims  
3 at a later point.

4                   So we submit that Bluth applies,  
5 because this is a motion to realign, and the discovery  
6 should be limited accordingly, and that the protective  
7 order should be entered in the forms that have been  
8 attached.

9                   Unless Your Honor has any questions, I  
10 would defer to Mr. Newcomer, if he had anything  
11 further to add, unless a different order of things is  
12 appropriate.

13                   THE COURT: Okay.

14                   MR. McDERMOTT: Thank you, Your Honor.

15                   THE COURT: Thank you.

16                   MR. NEWCOMER: Good morning, Your  
17 Honor. John Newcomer of Morris James on behalf of  
18 defendant Michael Scott.

19                   Your Honor, I echo what Mr. McDermott  
20 has said, and without repeating all of that, I think  
21 the thoroughness of the special litigation committee's  
22 report is indicative of the good faith and the  
23 thoroughness with which they have undertaken their  
24 duties. As Mr. McDermott noted, I think we're really

1 down to just three requests for production. We've  
2 produced all communications on the topics indicated,  
3 with the exception of those three. As Mr. McDermott  
4 notes, they are not in the complaint, so they're  
5 really not relevant to the proceedings.

6           Plaintiffs' counsel seems to want to  
7 get beyond those communications and get any documents  
8 related to any of those topics, which I don't think is  
9 really relevant to the issue of whether there is  
10 collusion, or even, if you go further, to the --  
11 there's the Zapata standard goes to the good faith of  
12 the special litigation committee. So I think that the  
13 documents that have been produced are more than the  
14 plaintiff is entitled to, and therefore, there should  
15 not be any further requirement to produce documents.

16           With respect to the deposition  
17 requests, deposition of a party beyond the special  
18 litigation committee is an extraordinary request. I  
19 think everyone would agree with that. The case law  
20 suggests that the special litigation committee and its  
21 advisors are the topic of a deposition in a situation  
22 such as this. The plaintiff has already deposed Mr.  
23 Schaffer, the special litigation committee, over two  
24 days, approximately 12 hours of time. And as Mr.

1 McDermott said, there's been no suggestion that there  
2 is some basis, based on the testimony there, as to why  
3 depositions of other individuals are required.

4           In their opposition to the motion for  
5 a protective order, they really point to Mr. Scott on  
6 two topics. One is that Mr. Scott offered to provide  
7 background information to Mr. Schaffer regarding what  
8 had happened at the company before Mr. Schaffer got on  
9 the board. And there was a draft letter following the  
10 board election in 2016 in which Mr. Scott set forth  
11 his explanation for why Mr. Trujillo and Agar were not  
12 reelected. It was sent in an email to the other  
13 directors, and the email said, "Please delete after  
14 you read this."

15           We're happy that it wasn't deleted,  
16 honestly, because it shows, I think, very clearly what  
17 happened with respect to that nonelection of the  
18 plaintiffs in this case. It was the objective,  
19 reasoned judgment of Mr. Scott, as well as other  
20 stockholders, that the plaintiffs were perhaps  
21 attempting to orchestrate a coup by which they would  
22 have control of the board for the Series A preferred  
23 stockholders. So in neither of those situations  
24 offering to provide information, the same thing Mr.

1 Williford has done. He's offered to provide  
2 information, has met with the special litigation  
3 committee, and has provided information to them.

4 And I think that the fact that the  
5 letter sets out what Mr. Scott's beliefs were with  
6 respect to the nonelection shows that there was no  
7 collusion there, or any untoward acts. So based on  
8 that, we do not think that a deposition is required or  
9 that any further documents need to be produced.

10 Unless Your Honor has any  
11 questions ...

12 THE COURT: No.

13 MR. NEWCOMER: Thank you.

14 MR. WILLIFORD: Good morning, Your  
15 Honor. Evan Williford of The Williford Firm for  
16 plaintiffs. With me is my colleague, A.J. Huber.

17 MR. HUBER: Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. WILLIFORD: And we're, of course,  
20 here to present -- make presentations to the Court  
21 about Judy and Scott's motion for protective order.

22 After our opposition in this case, in  
23 this motion, was submitted, we deposed the SLC, Mr.  
24 Schaffer, twice, as they have said. Both Judy and

1 Scott's counsel were present, either in person or by  
2 telephone. We don't have the transcript yet for the  
3 second one, but we do have the first one. I have the  
4 transcript with me, and I've handed it to opposing  
5 counsel. I think it confirms, but it doesn't  
6 drastically change, the need for targeted, narrow  
7 discovery from Scott and Judy. With the Court's  
8 permission, I'll refer to it from time to time, but I  
9 don't see the need to burden the Court with more paper  
10 unless the Court wants to conduct some independent  
11 reading.

12 I want to draw a balance between  
13 giving the Court information that it already knows or  
14 too much information with summarizing where we are.  
15 The parties were last before the Court in July of this  
16 year. That was the SLC's motion to stay the  
17 litigation, which the Court granted. In August, the  
18 SLC published a 98-page revised report. The report  
19 recommended continuing to pursue certain claims,  
20 mainly certain ones against former directors.

21 The report recommends also dismissing  
22 several claims. One of them is a claim against  
23 current chairman of the board, Michael Judy, for  
24 payments made in connection with alleged services he

1 performed. That payment was \$52,500, approximately  
2 the median American household income, as this Court  
3 pointed out at the motion to dismiss hearing in 2015.

4           It also recommended dismissing bonus  
5 and salary claims against former president Knapp.  
6 Knapp earned hundreds of thousands of dollars in  
7 salary while he was secretly spending at least half  
8 his time working for a different affiliate. He was  
9 also paid hundreds of thousands in a bonus that, as a  
10 matter of simple contractual interpretation, he didn't  
11 earn.

12           Current director Michael Scott played  
13 an instrumental role in setting his compensation and,  
14 I understand, has advocated to the SLC that it is  
15 fair. Moreover, the SLC has rejected an allegation  
16 that directors approved the payments to others in  
17 return for the payments to themselves. I'll call this  
18 the quid pro quo allegations.

19           There was a meeting on June 6, 2014,  
20 at which a number of payments to all directors were  
21 approved. There was no substantive discussion at the  
22 meeting, as I understand, and the list of payments was  
23 distributed right before the meeting. This  
24 recommendation by the SLC would cut off liability for

1 current directors Judy and Scott for payments worth  
2 millions of dollars.

3           The SLC also recommended realigning as  
4 plaintiff -- as a practical matter, replacing  
5 plaintiffs and their counsel. The SLC has, since that  
6 time, moved to amend the complaint and to realign as  
7 plaintiff. It does not seek to add claims. It solely  
8 seeks to remove the allegations and claims I just  
9 talked about.

10           I want to note a -- a very few, I  
11 think, really notable aspects about that motion that  
12 impact why we are seeking the discovery we're seeking.  
13 The SLC wants to take over the case and dismiss some,  
14 but not all, of the claims against the incumbent  
15 directors. The Judy group now controls four or five  
16 of the five directors on the board, depending upon  
17 whether Schaffer is counted among that group. Mr.  
18 Schaffer has admitted that he could be removed as a  
19 director at will by the Judy group.

20           Typically, when an SLC moves to take  
21 over claims, those are asserted against nonincumbents.  
22 We think it's extremely naive for the SLC to think he  
23 can press claims against his current colleagues and  
24 not upset them, particularly after what happened to

1 Trujillo and Agar.

2           The SLC's report discusses evidence  
3 that significantly supports the very claims that the  
4 SLC seeks to dismiss. Shortly before the June 2014  
5 meeting I was referring to earlier, Knapp threatened  
6 Judy in writing that if he did not play ball with him,  
7 that he was "going to crush" Judy. Judy admitted the  
8 obvious: that Knapp was trying to bully him.

9           Knapp then said to the other directors  
10 that he appreciated Judy's time and effort and  
11 agreeing to do so for no compensation whatsoever.  
12 These communications support both the quid pro quo  
13 claims and the claim against Judy for a bogus payment  
14 for services. Yet the SLC is nevertheless seeking to  
15 dismiss those claims.

16           Now, the SLC -- and likely Judy and  
17 Scott -- have various factual responses on each of  
18 these things. But we haven't had a chance to ask  
19 Knapp what he meant before these claims are dismissed,  
20 and if the SLC has its way, we never will. Also,  
21 after all these threats and admitted bullying, Judy  
22 received a questionable payment while a Downs  
23 affiliate received millions of dollars in a  
24 transaction that even the SLC admits is actionable.

1           Another unique aspect of the SLC's  
2 motion is that it seeks to dismiss claims against  
3 certain defendants even though other claims based on  
4 the same or related facts will proceed against those  
5 defendants and others anyway. In the normal setting,  
6 where the SLC decides to bring no claims, or no claims  
7 on a particular subject matter, it's arguably saving  
8 money. You can put that on the scale in favor of its  
9 decision, as opposed to whatever is put on the scale  
10 against. Here, that is arguably not true, because the  
11 discovery will be going forward regardless. For a  
12 plaintiff to voluntarily do this before discovery,  
13 without even getting the consideration of a  
14 settlement, is otherwise inexplicable.

15           Plaintiffs have received written  
16 discovery from the SLC, and we have taken one and a  
17 half days of deposition of the SLC. I will note that  
18 defendant Michael Judy himself personally made an  
19 appearance telephonically at the Schaffer deposition,  
20 despite the position that he's taking here that he  
21 should not be deposed.

22           Plaintiffs have also received written  
23 discovery and noticed the deposition of corporate  
24 counsel to PCSI, Chris Messa of Berger Harris. Berger

1 Harris, of course, represents Judy in this litigation.  
2 Messa advised the board of directors in forming the  
3 SLC and determining what authority to give to it. He  
4 also advised the SLC at the beginning of its  
5 existence.

6                   What we seek. Simply put, we seek  
7 additional targeted and narrow document discovery and  
8 narrow depositions. We served discovery requests.  
9 Then, in negotiations, we agreed to withdraw certain  
10 requests if there was a final agreement. Even though  
11 there was no final agreement, we have not pursued many  
12 of those other requests. Rather, we seek compliance  
13 only with requests 2 through 4.

14                   And I would add that I spent a  
15 considerable amount of time in negotiations with Judy  
16 and Scott previously, and I'm happy to spend more --  
17 more time, if the Court thinks it's necessary -- or if  
18 the Court wants to discuss it here -- in talking about  
19 ways to narrow it down. It's possible that we could  
20 narrow it down. Nevertheless, each of those topics,  
21 however narrowed down it is, has particular and  
22 specific relevance to this case. And that's why we  
23 seek them.

24                   We also seek narrow depositions of

1 Judy and Scott. We have previously provided Judy and  
2 Scott reassurance on the limited -- on the limitations  
3 of those depositions, and we're happy to discuss them  
4 here. We're not going to be asking them questions  
5 about the substance of the allegations against them.  
6 That's not what we're going to depose them on, and  
7 that will not be on the table.

8           Obviously, a discussion of what  
9 evidence is relevant requires a discussion of what  
10 legal matters are at issue. As I said, this is, in  
11 essence, a motion to dismiss certain claims. The  
12 Zapata standard is well established on that. The SLC  
13 has the burden to show independence, good faith, and a  
14 reasonable investigation.

15           Since this is a single-member SLC, the  
16 burden is to prove that it is above reproach on these  
17 matters. The reason for that, as the Court knows, is  
18 because a single member does not have the benefit of  
19 discussing matters with a colleague. They are, in a  
20 sense, at sea. They have advisors, but they have no  
21 one with them to discuss things. And I think, as  
22 we've seen in the materials, this led to certain  
23 problems.

24           The Court can also proceed to a second

1 step in which it considers the merits of the claims to  
2 be dismissed as a sort of smell test. A motion to  
3 realign involves some of the same concerns. The Court  
4 must ask whether there is any hint of collusion or  
5 evidence that the SLC may not prosecute the action in  
6 good faith.

7           The well-known Drexler, Black, and  
8 Sparks treatise has this to say about SLCs -- and I  
9 don't think this comes as a surprise to anyone: "It is  
10 a virtual certainty that every facet of the endeavor,  
11 from the independence of the membership and the  
12 attorneys and other experts it employs, to the  
13 thoroughness of their investigation, analysis and  
14 report, will be vigorously challenged by the  
15 derivative plaintiff and closely scrutinized by the  
16 courts. An acceptance of a committee's recommendation  
17 is, at best, uncertain."

18           That is exactly what plaintiffs are  
19 doing here: closely scrutinizing the process by which  
20 the SLC was formed, deliberated, and came to the  
21 conclusions that it did, and seeking discovery on  
22 issues with that process.

23           I wanted to talk about a few brief  
24 factual circumstances that underline the specific

1 discovery requests we made. As the Court may surmise,  
2 particularly in this setting, where discovery is  
3 constrained, we looked for specific reasons why we had  
4 to have the specific evidence we do. And here -- and  
5 while our briefing addresses a number of those, I'll  
6 address a few in particular. We believe those will  
7 show that the SLC lacked independence and good faith  
8 and did not do a reasonable investigation. It is  
9 those factual circumstances that we need discovery on.  
10 My discussion is supplemented by my now having had the  
11 chance to interview Mr. Schaffer twice and  
12 understanding better what happened.

13                   One is the SLC deliberation with  
14 defendants. As the Court knows, one problem, as I  
15 discussed, with an SLC of one is that it doesn't have  
16 colleagues. Here, it appears that Schaffer responded  
17 to that problem by discussing a specific issue that  
18 had come up in the functioning of the case with Scott,  
19 who is a defendant. They discussed topics like  
20 whether an in-person meeting was appropriate or a ploy  
21 by his attorneys to get more money, what fees the SLC  
22 should or should not agree to pay, and SLC composition  
23 after the election of new directors.

24                   Disturbingly, the SLC reassured

1 defendant Scott, very shortly after its creation, that  
2 he didn't plan to "rubber stamp" all of the  
3 plaintiffs' demands. That implies that  
4 notwithstanding the SLC's claim to have done a  
5 reasonable investigation, the SLC had already made a  
6 decision to oppose plaintiffs in at least certain  
7 respects.

8           We seek discovery from Scott and Judy  
9 as to what they discussed about the case with and  
10 about Mr. Schaffer. And let me quickly detour into  
11 specifically what they have and haven't produced. I  
12 understand that they have represented that they have  
13 produced communications, written communications, with  
14 Mr. Schaffer. I hope that's the case. In any event,  
15 this -- what's left unproduced is at least -- or  
16 untestified to is at least two other groups. One is  
17 communications about Mr. Schaffer: what did they say  
18 to third parties about him? That could be very  
19 important, depending on what they've said.

20           Also, since they've produced  
21 communications about what they said to Mr. Schaffer, I  
22 don't understand their absolute statement that they  
23 are immune from being deposed. If they are immune  
24 from being deposed, we simply will never learn what

1 they talked about orally with Mr. Schaffer, assuming  
2 that Mr. Schaffer doesn't recall it or didn't testify  
3 about it.

4           There are also several circumstances  
5 involving potential lawyer conflicts of interest. And  
6 I will say that this is an evolving area that -- that  
7 we're continuing to consider. PCSI's general counsel  
8 is Chris Messa of the law firm of Berger Harris.  
9 Berger Harris, including lawyer Michael McDermott,  
10 also represents Michael Judy, of course, in this  
11 litigation. At the November 2016 meeting, the board  
12 agreed to appoint a committee with respect to the Agar  
13 litigation and that a resolution describing its duties  
14 would be submitted later.

15           At a December 2016 meeting, less than  
16 a month later, there were two competing resolutions  
17 for the scope of that duty. Schaffer has testified  
18 that Messa, in effect, recommended one resolution by  
19 describing it as the one granting authority approved  
20 at the November meeting.

21           There was such dispute about what  
22 happened at the second meeting that the final minutes  
23 specifically noted that it left relevant matters  
24 undescribed. Because Judy and Scott were at both

1 meetings, it is critical to depose and get discovery  
2 about them, about what they remember happening at  
3 those meetings. I suspect if we don't get  
4 depositions, we may well get affidavits from them  
5 saying, "Oh, yes, I agree with whatever specific  
6 factual circumstance the SLC wishes to advance on  
7 that." That is one specific topic: specifically what  
8 happened and what was discussed at those two meetings.  
9 That is very, very important in evaluating the process  
10 of the SLC in this matter.

11           Another topic relating to counsel is  
12 Messa's initial advice to the SLC. Between the  
13 November and December meetings, even though the  
14 committee's authority was not yet specified in  
15 writing, Messa gave initial advice to the committee.  
16 This advice included -- or at least he described it,  
17 in soliciting the meeting, as including -- the duties  
18 of the SLC. This may have contributed to Schaffer's  
19 belief that the issue of its authority had already  
20 been resolved when, as we believe, it had not.

21           Another issue that has arisen is  
22 Messa's advice on the threat posed by the PIA. One of  
23 the reasons that the Judy group has claimed for voting  
24 out plaintiffs in the 2017 meeting is because of an

1 alleged threat that the preferred stockholders could  
2 elect directors. As Your Honor may recall, PCSI has  
3 had several past elections and has never had preferred  
4 directors. Schaffer has clearly testified that Messa  
5 advised Scott that plaintiffs had an ability to do  
6 that, and that led to the result in this -- in the  
7 2017 meeting. We need to ask Scott what Messa told  
8 him and what he told Schaffer about that.

9           Plaintiffs have received some written  
10 discovery, and we have scheduled the deposition of Mr.  
11 Messa on Monday. But we are also entitled to  
12 discovery from Scott and Judy concerning this. For  
13 instance, if Messa says that he did not give that  
14 advice to Scott, then we will want to know from Scott  
15 why he said what he said to Schaffer. Because if he  
16 is a defendant in this lawsuit, that will be relevant  
17 to independence. And I should add that the deposition  
18 hasn't just been noticed. It has also been agreed  
19 upon with counsel for Mr. Messa.

20           Another unique circumstance here is  
21 what I just talked about, the 2017 meeting. After  
22 being appointed SLC, Schaffer participated with  
23 defendants in a secret plan by which plaintiffs voted  
24 for them for director, but then they voted out all the

1 plaintiffs. Or at least all of the plaintiffs who  
2 were on the board at the time.

3           Plaintiffs Ed Trujillo and Rod Agar  
4 were, along with Schaffer, elected by written consent  
5 in January of 2016. This united two factions of the  
6 board: the Judy group and the PIA group. Starting  
7 around May of 2017, a number of months into Schaffer's  
8 tenure as SLC, Schaffer agreed with defendants to vote  
9 out plaintiffs. Schaffer didn't have to vote against  
10 Trujillo and Agar or for the new directors, Bell and  
11 Caglia, because the outcome would have been the same  
12 regardless, as he's admitted. Nevertheless, he chose  
13 to do so anyway, underlying the issue that presents to  
14 his independence.

15           The day before that meeting, he had  
16 interviewed Scott and Judy for this case. Plaintiffs  
17 seek discovery from Scott and Judy about that meeting  
18 that is also relevant to the motion. For example,  
19 Scott or Judy may have emailed others about why  
20 Schaffer joined them. That would be highly relevant  
21 to Schaffer's independence.

22           Another aspect of this dispute that I  
23 think it's important to understand is that Schaffer  
24 appears to have developed a really intense, irrational

1 and personal dislike of Trujillo. Like many  
2 successful people, Mr. Trujillo can be stubborn and  
3 idiosyncratic. He is also enormously knowledgeable  
4 about the company's history and would walk through a  
5 fire for PCSI. Schaffer's antipathy -- and I think  
6 it's a circumstance that the Court should understand,  
7 because it's a thread running through all of this --  
8 led him, we believe, to uncritically accept  
9 far-fetched stories and speculation from Judy and  
10 Scott while rejecting accurate input from Mr.  
11 Trujillo. He also rejected a specific attempt in  
12 writing by Mr. Trujillo to reach out to him as to  
13 Mr. -- what Trujillo was doing with respect to his  
14 role as chairman a few months before the 2017  
15 election.

16           Plaintiffs' discovery is consistent  
17 with Delaware case law. For instance, in the Oracle  
18 case cited in our submission, the Court discussed a  
19 deposition of a director defendant about conversations  
20 with the SLC related to independence. There is no  
21 rule in Delaware case law that limits plaintiffs to a  
22 deposition of the SLC. Other depositions and  
23 discovery -- limited depositions and limited  
24 discovery -- can be appropriate, depending upon the

1 circumstances.

2           In the Abbey case cited by Judy,  
3 plaintiffs apparently attempted to depose everyone  
4 related to the merits, including directors, officers,  
5 and other third parties. Of course, the Court of  
6 Chancery rejected that broadbrush attempt. That's not  
7 what we're doing here.

8           What this is not. We have seen  
9 Delaware courts sometimes express a reservation about  
10 lengthier discovery in the context of SLC motions to  
11 dismiss. In particular, one of the principles seems  
12 to be that this is not the place for plaintiff to seek  
13 discovery that will support its merits claims. That's  
14 not what we're seeking. We won't be asking those  
15 questions.

16           And I wanted to discuss a few specific  
17 topics, because they were referred to by Mr.  
18 McDermott. As to attachments, Judy refused to produce  
19 attachments, although he produced emails. His counsel  
20 has not argued that it was impossible to produce them,  
21 only that he just doesn't want to. And he argued  
22 that -- in fairness to his argument, he also argued  
23 that Mr. Trujillo already had certain of them. I  
24 think it would help us if he was able to give us a

1 representation that Mr. Trujillo was copied on all  
2 such -- on all such documents. I would add, though,  
3 that in my experience, attachments are common --  
4 commonly produced, and I'm not aware of any blanket  
5 exception for them, even where people are exchanging  
6 emails. Because sometimes emails get lost or deleted,  
7 not based on any nefarious purpose, but just because  
8 those things happen.

9           VentureTel. That is a subsidiary of  
10 PCSI. Trujillo was appointed president of VentureTel  
11 by the board in 2016. He conducted an investigation  
12 that ultimately revealed that Judy had received a  
13 double payment in connection with it of about \$86,000.  
14 I note that in his deposition, after being shown the  
15 evidence to this, Schaffer said he would be open to  
16 considering such a claim. So even the SLC agrees this  
17 is a real issue. It is also relevant because even  
18 after plaintiffs told the SLC, "Hey, you should ask  
19 about other payments to defendants," the SLC still  
20 missed this payment. They didn't get it, and Trujillo  
21 managed to uncover it.

22           If Judy or Scott communicated about  
23 that claim with Schaffer, that would be highly  
24 relevant, including to provide an ulterior motive for

1 collusion. It would also be contrary to Schaffer's  
2 testimony. For example, what if Judy criticized  
3 Trujillo for wasting time on VentureTel, and used that  
4 to persuade Schaffer to vote against him, when Judy  
5 secretly knew that there was a potential claim against  
6 him?

7                   GX licenses. These are contractual  
8 agreements PCSI has with certain parties, including  
9 defendant Judy. Trujillo has always objected to  
10 paying anything on those generally, and I note that  
11 defendant Knapp also indicated in writing that he  
12 opposed paying them on the grounds that there are  
13 certain things -- as I understand it, generally  
14 speaking, with the contracts, there are certain things  
15 that must arise in order for them to generate any  
16 obligation. Those certain things happened.  
17 Therefore, regardless of whether they may be owed in  
18 the future, they are not currently owed.

19                   Schaffer has indicated that Trujillo's  
20 stubbornness on this topic in an effort to protect  
21 PCSI is one reason that led him not to vote for  
22 Trujillo, which we find rather disturbing. To the  
23 extent there was a communication on this, it could  
24 show collusion. Also, early in this litigation, the

1 Court dismissed a claim as to GX licenses only on the  
2 understanding that plaintiff be notified if, in fact,  
3 there was a planned payment.

4 That's it as far as specifics. I'm  
5 happy to discuss with the Court, if the Court has any  
6 specifics.

7 THE COURT: Thank you.

8 MR. WILLIFORD: All right.

9 THE COURT: Reply?

10 MR. McDERMOTT: Your Honor, I don't  
11 think Mr. Newcomer or I have anything further.

12 THE COURT: Great. Why don't we take  
13 ten minutes, and I'll come back in and give you guys  
14 some thoughts.

15 (A recess was taken, 10:42 to 10:55 a.m.)

16 THE COURT: Welcome back, everyone.  
17 Thank you for your submissions and for your  
18 presentations this morning. We're here on motions for  
19 a protective order by defendant Michael Judy and  
20 defendant Michael Scott. I am denying the motions,  
21 and I'm going to explain to you why.

22 I'm not going to use this case to try  
23 to give any summary or recapitulation or definitive  
24 discussion of either the standards that are necessary

1 for an SLC to take over claims and not pursue others  
2 or what discovery goes into that. I think the cases  
3 that you folks have cited are very informative,  
4 including the Bluth case. And generally speaking, I  
5 do think that there are some similarities to Zapata  
6 when a special committee is not going to pursue  
7 certain claims.

8           But for the history of this case, I  
9 would be highly likely to grant these motions for  
10 protective order and limit the scope of Mr.  
11 Williford's discovery. But this is not a typical  
12 case, and this is a case where things, to date, have  
13 often not been as they seem. I was joking with my  
14 clerks, but only half joking, I really think that  
15 there's potential here for a multi-season Netflix  
16 series, given the twists and turns in this case, when  
17 you think about that it all started with Waugh, and  
18 then we had the Austin era, and then we had the Judy  
19 board with Knapp and Downs. I mean, we've just had a  
20 series of iterations on this.

21           No phase of this company's multi-phase  
22 history has ever involved actions that are inspiring  
23 of confidence. Every phase in this company's history  
24 has involved things that, at a minimum, induce

1 skepticism. Look, I am not an adherent of conspiracy  
2 theories, but this is actually a case where there have  
3 been twists and turns that are quite surprising.  
4 Given that background and the nature of the issues  
5 that are presented, I am going to deny the motions.

6           In terms of the issues presented, this  
7 isn't a case where the SLC is taking over everything.  
8 This is a case where the SLC is taking over most  
9 things. I do agree with Mr. McDermott that that isn't  
10 technically akin to a motion to dismiss. But if those  
11 claims aren't pursued, the likelihood that they get  
12 picked up later and don't get foreclosed is small. So  
13 I do think that some greater discovery is warranted  
14 because of that.

15           The second thing is that you have  
16 folks who are moving for protective orders who have  
17 relationships with the committee and the actions of  
18 the committee that are different than just, for  
19 example, directors who made the original decision and  
20 then were interviewed, or folks who maybe weren't  
21 involved at all. I think Scott's communications with  
22 Schaffer are probably sufficient to warrant a  
23 deposition regardless. Likewise, Judy's series of  
24 relationships with the various parties in this case,

1 and particularly with Schaffer, I think are sufficient  
2 to warrant allowing him to be deposed.

3           In terms of the specifics, what I'm  
4 going to do is I'm going to enter the order that Mr.  
5 Williford has submitted. I appreciate Mr. Williford's  
6 clarification in undertaking to limit the scope of the  
7 depositions and to not go into the merits, but rather,  
8 only go into the SLC-related questions. I think you  
9 should try to get these depositions done in three to  
10 four hours. I think that will also be a helpful  
11 limitation to make you focus so that you're not  
12 inclined to go far afield. That does not mean that  
13 the defendants should try to run out the clock by  
14 taking frequent breaks and making objections and  
15 things like that. Mr. Williford should be efficient,  
16 but I don't think these need to be full days.

17           In terms of the attachments, produce  
18 them. That is just goofy. Why would you not produce  
19 the attachments along with the emails? This strikes  
20 me as a narrowed variant of the old-school objection  
21 that would always trigger a massive reaction from me  
22 to the effect that "We object to the extent you  
23 already have the documents because we're psychic and  
24 we know what you have." The attachment is part of the

1 document. So go back and produce them. I don't know  
2 why you wouldn't do that in the first place. That  
3 just seems, to me, to be a dubious choice.

4 In terms of the document requests,  
5 again, we are just dealing with these things to the  
6 extent they relate to the SLC or communications with  
7 the SLC. And given the history of this case and  
8 what's going on, I think that that type of document  
9 production is warranted and should happen.

10 By making these comments, first of  
11 all, I'm not casting any aspersions on current  
12 counsel. Except for Mr. Williford, most of you  
13 haven't been involved in every season of this  
14 multi-season saga. And so please don't think that,  
15 when I talk about this case not inspiring confidence,  
16 I'm calling into question anything that you-all have  
17 done or anything like that. I'm not.

18 I'm also not foreshadowing any view on  
19 the SLC's motion. I took a preliminary look at the  
20 report. I'll go through it in more detail. It looks  
21 to me, at first blush, like it's very thorough. I  
22 understand that there are strong feelings in this case  
23 on many sides, but I am going to consider the SLC's  
24 motion on its merits when we get there. I do,

1 however, at this stage, think that this discovery is  
2 important, given the numerous twists and turns, so  
3 that Mr. Williford can present his side of matters.

4 Any questions?

5 MR. McDERMOTT: I do, briefly, Your  
6 Honor.

7 THE COURT: Sure.

8 MR. McDERMOTT: If I may.

9 THE COURT: Come on up.

10 MR. McDERMOTT: I appreciate Mr.  
11 Williford's clarification, as well, that he'll not  
12 seek discovery -- deposition testimony into the  
13 substantive allegations that have been made. And for  
14 obvious reasons, because we're still defendants. But  
15 the concern is that he'll seek testimony into  
16 substantive allegations that have not been made or  
17 that don't exist anywhere. And that's -- you know,  
18 and we have documents that were not presented to the  
19 SLC, that were not considered by the SLC. There  
20 are -- you know, there's a number of those things out  
21 there. And that's the concern.

22 I know you've limited, or you've  
23 suggested a limitation, to three to four hours, but --

24 THE COURT: Look, when I said I was

1 denying your motion and permitting Mr. Williford to go  
2 forward, I wasn't limiting the subject matter. I  
3 understand what you're saying, which is that these  
4 things seem to be outside the pleadings. But part of  
5 their theory here is that there's portions of the  
6 Schaffer web of contacts -- be it with Judy or other  
7 folks, or whatever -- that haven't ever come into  
8 view. And when people attack an SLC decision, they  
9 often raise things that aren't in the pleadings. Most  
10 of the time these folks come in post pleadings.

11 I'm going to allow him to explore  
12 these issues. Prepare your client. And if that ends  
13 up being something where nothing comes of it, that's  
14 great. But that's what I'm going to permit.

15 MR. McDERMOTT: One additional issue,  
16 if I may. With respect to the temporal limitation on  
17 the scope of this, Mr. Williford's document discovery  
18 seems to want to go back a year before the SLC was  
19 ever formed, and it's not clear exactly which  
20 communication he's abandoned, in terms of -- he's  
21 asked for communications from Steptoe and Johnson  
22 about things.

23 There is no temporal limitation. We  
24 have limited the temporal limitation to somewhere

1 around the time where the SLC was formed.  
2 Collusion -- you know, secret communications designed  
3 for some furtive or some, you know, sinister purpose  
4 relating to the investigation. And our position is  
5 that it should be limited in some means that it  
6 relates to the actual formation and conduct of the  
7 SLC's investigation.

8 And, you know --

9 THE COURT: Hold on.

10 One year before is what you want?

11 MR. WILLIFORD: Yes, Your Honor.

12 THE COURT: All right. Look, one year  
13 before. The theory here, or one of the theories  
14 here -- which, again, I'm not suggesting that I  
15 believe it -- but one of the theories here is that  
16 Judy and Scott have a meaningful relationship, in  
17 terms of friendliness, with Schaffer. Normally, in  
18 the old school, what you do is you would put somebody  
19 in who then would whitewash stuff and get rid of the  
20 claims, period.

21 I think what Mr. Williford is at least  
22 implying is that your guys are smarter than that, and  
23 your guys know that that would not fly because of the  
24 strength of some of these claims. And so what your

1 guys did was they were more subtle. They got a guy  
2 who would have a positive view of them, and hence, in  
3 all things, when making judgments -- because we're  
4 always talking about human judgments -- would be a  
5 little bit -- or maybe a lot of bit -- easier to deal  
6 with than Trujillo or the plaintiffs, or something  
7 like that, so that if there's a range of possible  
8 outcomes that goes from 3 to 7, maybe if you get a guy  
9 like Schaffer, and he's got past ties to your guys --  
10 just in terms of friendliness, just in terms of, "Hey,  
11 we're buddies. We like each other or we see each  
12 other every now and then," et cetera -- that Schaffer  
13 is a guy who would get you a 3, whereas Trujillo is a  
14 guy who doesn't like you, and not only that, is  
15 motivated. And so he's not only going to push for the  
16 7. He's probably going to push for an 8 or a 9 and  
17 it's going to be really unpleasant.

18 I don't know if any of this is true or  
19 not, but that's why I think some exploration of past  
20 communications is acceptable. And I don't think a  
21 year is too much.

22 MR. McDERMOTT: Thank you, Your Honor.

23 THE COURT: All right.

24 MR. NEWCOMER: John Newcomer, Your

1 Honor. If I could ask two clarifications here. With  
2 respect to the GX licenses, Mr. Scott and Mr. Schaffer  
3 serve as the committee of the board that deal with the  
4 GX licenses, so they have a lot of interactions with  
5 each other on that topic, a lot of which involve  
6 counsel. So we're going to have a lot of, I think,  
7 issues or concerns with the advice of counsel relating  
8 to those.

9 I understand where Mr. Williford is  
10 coming from, saying, okay. Mr. Judy owns GX licenses,  
11 and if you've made deals to pay him off, that that  
12 would be relevant to what's going on here. But just  
13 the GX licenses as a whole, I think, is just overly  
14 broad. And I'm hoping there's some way we can limit  
15 what the scope of that might be.

16 THE COURT: Where are you seeing GX  
17 licenses as a whole?

18 MR. NEWCOMER: When they refer to "any  
19 documents relating to the GX Licenses." It's in No.  
20 3. Because Kevin Schaffer is a member of the  
21 committee.

22 THE COURT: Yeah. I understand that.

23 MR. NEWCOMER: 2 is limited to the  
24 communications between the two individuals. 3 is any

1 documents that refer or relate to those. So it's  
2 broader than just the communications.

3 THE COURT: Mr. Williford, do you want  
4 to talk about this one?

5 MR. WILLIFORD: Sure. You know, first  
6 I would say that before all of this occurred, we did  
7 make a serious attempt to negotiate appropriate  
8 limitations. GX licenses -- I've talked a little bit  
9 specifically why they're relevant. I think they are  
10 more particularly relevant, and less objectionable,  
11 earlier into that period. That is, a year before the  
12 appointment of the -- of the committee, and then up  
13 until the 2017 meeting.

14 I understand the other side's  
15 statement to a certain extent. "Hey, we don't want to  
16 give you every single correspond we've had with our  
17 counsel." Unfortunately, if there's something like,  
18 you know, "Hey, that jerk's off the board now. Now we  
19 can just go and pay these off," that would be relevant  
20 to independence.

21 I'm open to considering and  
22 negotiating with them some limitations on producing  
23 documents post the 2017 meeting. I can't sit here  
24 today and say exactly what those appropriate -- it's a

1 tough call. It's a tough call. I would say in  
2 general they're relevant.

3 MR. NEWCOMER: I don't think we'd have  
4 any problem producing any documents if there is  
5 something saying someone is going to be paid. Because  
6 I don't think that has occurred at this point. So I  
7 don't have a problem if that's the scope of what he's  
8 looking for.

9 MR. WILLIFORD: Yeah. It's possible  
10 we could agree to limit it, maybe if it's about  
11 Trujillo or if it's about a series of other subjects.  
12 Maybe that's another way to limit it. And I'm happy  
13 to talk with them about it further.

14 THE COURT: All right. Well, look, I  
15 don't want this to drag on. I'm going to go back to  
16 my proposition that in a normal case I would probably  
17 be receptive to this. In this case, Mr. Newcomer, I'm  
18 sorry, this is just not a set of people, on any side  
19 of the case, that, as to discovery, gets the benefit  
20 of the doubt. This is a case that I've had for  
21 however many years now where people hide things, they  
22 lie, they engage in fraud. And again, I'm not  
23 suggesting that your specific guys are like that, but  
24 this is a company with a black halo.

1           In an ordinary case I'd be receptive  
2 to what you're saying. I have too much experience  
3 with this company to give people the benefit of the  
4 doubt. Produce it. Log it. Think hard about whether  
5 it's really legal advice. And we'll go from there.

6           MR. NEWCOMER: All right. Thank you,  
7 Your Honor.

8           THE COURT: All right.

9           MR. WILLIFORD: If -- Your Honor, I  
10 wanted to quickly clarify. The opposition brief is  
11 currently due on December 15th, in accordance with  
12 Your Honor's order for additional discovery. We will  
13 try to negotiate appropriate additional discovery  
14 deadlines and a revised brief due date consistent with  
15 those deadlines.

16          THE COURT: That's fine.

17          MR. CICERO: Good morning, Your Honor.  
18 I have one logistical question. It sort of dovetails  
19 off Mr. Williford's point about the briefing. I have  
20 yet to be before you on a Zapata issue, and I was  
21 wondering, is this something you want a live hearing  
22 for or just oral argument after we get briefing done?  
23 You know, what is your preference on that?

24          THE COURT: By live hearing, you mean

1 live witnesses?

2 MR. CICERO: Yes.

3 THE COURT: I personally had not  
4 anticipated that.

5 MR. CICERO: Okay.

6 THE COURT: I think it's described as  
7 a summary judgment standard, so I don't think that  
8 that is a procedural context that envisions live  
9 witnesses.

10 MR. CICERO: Okay.

11 THE COURT: Yeah. I'm just thinking  
12 about lawyers arguing.

13 MR. CICERO: That's fine, Your Honor.  
14 I just wanted to make that clear. Thanks.

15 THE COURT: All right. Thank you all.  
16 I appreciate your time.

17 (Court adjourned at 11:16 a.m.)

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CERTIFICATE

I, JULIANNE LaBADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify the foregoing pages numbered 3 through 46, contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Wilmington this 14th day of December, 2017.

/s/ Julianne LaBadia  
-----  
Julianne LaBadia  
Official Court Reporter  
Registered Diplomate Reporter  
Certified Realtime Reporter  
Delaware Notary Public