IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICHAEL SCULLY, on Behalf of Himself and All Others Similarly Situated, Plaintiff, v. NIGHTHAWK RADIOLOGY HOLDINGS, INC., DAVID ENERT, PETER Y. CHUNG, DAVID J. BROPHY, CHARLES R. BLAND, JEFF TERRILL, VIRTUAL RADIOLOGIC CORPORATION and EAGLE MERGER SUB CORPORATION, Defendants.	)	C.A. No. 5890-VCL

BRIEF OF SPECIAL COUNSEL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES & RULES

OTHER AUTHORITIES

NATURE OF THE PROCEEDINGS

Pursuant to the Court's letter of December 22, 2010 (Trans. ID 35000380) (the "Special Counsel Letter") and the Court's Order Appointing Special Counsel (Trans. ID 35048651), the Court appointed Gregory P. Williams as Special Counsel to provide briefing from the point of view of Delaware and the public interest. Special Counsel has reviewed the parties' briefs and has reviewed communications between the parties regarding their settlement negotiations.

At the Court's request, this brief addresses the following issues:

> 1. Is forum-shopping for purposes of securing an advantageous settlement a wrong under existing law, taking into account *Prezant v. De Angelis*, 636 A.2d 915 (Del. 1994), and other authorities? What is (or should be) the standard for determining when a settlement is collusive?
>
> 2. What role, if any, should the disfavored forum (here, the Court of Chancery) have when it receives notice of what appears to be a collusive settlement?
>
> 3. My principal concern has been that, given the manner in which representative action settlements typically are presented, the court in the favored forum (here, the Arizona Superior Court) would not have reason to learn about (i) forum shopping efforts or (ii) prior adverse rulings or commentary by the court in the disfavored forum. Is this concern valid and, if so, how should it be addressed?
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> 4. Lawyers are the repeat players in the multi-jurisdictional litigation process. What remedy, if any, should there be if counsel is found to have engaged in a collusive settlement? Should the *pro hac vice* status of forwarding counsel be revoked? Should the revocation go beyond the civil action relating to the collusive settlement? If Delaware counsel participates in a collusive settlement, what action should be taken?
>
> 5. How should the answers to the foregoing questions be applied to the facts of this case?

Special Counsel Letter at 2.

ARGUMENT

Before addressing the specific questions posed in the Special Counsel Letter, this brief sets out a general legal background for the issues raised therein. First, the brief discusses forum-

shopping in the context of multi-jurisdictional class actions, including the "reverse auction" phenomenon, in which plaintiffs' counsel are said to underbid each other to settle with defendants and secure higher attorneys' fees. Next, the brief discusses the effects of the "settlement class" procedure, in which the Court does not certify a class until the settlement is approved. Then, the brief addresses the Court's review of settlements, particularly those involving issues of potential collusion. Following that general discussion, the brief responds directly to the questions set forth in the Special Counsel Letter.

I. FORUM-SHOPPING, "REVERSE AUCTIONS," AND COLLUSION.

While the concept of "forum-shopping" often carries with it a negative connotation, the term is merely descriptive of a number of actions, many of which either are unquestionably proper or are part of the zealous advocacy expected of attorneys. Plaintiffs consider prevailing law in the available jurisdictions, and other factors distinguishing one forum from another, before deciding where to file a lawsuit. When faced with multi-jurisdictional litigation, defendants would be expected to do no less in deciding where efforts might be best focused to reach their desired outcome.

Plaintiffs gain some leverage by filing deal litigation in multiple courts. As this Court has recognized, plaintiffs' lawyers may choose multiple forums to gain advantage in the contest for lead counsel status; they also do so to force defendants to engage with their individual suits. *See, e.g.*, *In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL, at 20 (Del. Ch. Jan. 13, 2011) (TRANSCRIPT) ("[W]hen everybody is filing in the same forum, you're not guaranteed to get control of a case. But if you then go and file in another forum, you do have control of that case and then the defendants have to deal with you. You may get control of the entire action but, at a minimum, you get control of a piece of the litigation for purposes of the fee negotiations."). For example, an individual lawsuit in Kansas could require more attention from

defendants than would any given one of six lawsuits in Delaware. *See also* Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. Rev. 765, 775 (1998) ("In the class action context, . . . forum shopping takes a different, and more sinister, form. It entails the ability of class counsel to commence an action in a forum that is most favorable to *counsel's own* (rather than the class members') interests, such as a forum in which judges are predisposed to exercising little scrutiny of class action settlements.").

Defendants in multi-jurisdictional deal litigation can attempt to regain some of this leverage by trying either to "divide and conquer" or to force consolidation. Virtually no defendant wishes to defend the same litigation in more than one forum. *Cf. In re Topps Co. S'holders Litig.*, 924 A.2d 951, 953 (Del. Ch. 2007) ("Presented with the inefficient prospect of litigating identical issues in two courts simultaneously, the defendants now seek to have this court refrain from hearing the injunction motion in order to avoid an unseemly and wasteful duplication of effort."); *In re Wyeth S'holders Litig.*, C.A. No. 4329-VCN, at 20-21 (Del. Ch. Apr. 7, 2009) (TRANSCRIPT) ("I understand [the] point that there may be some unnecessary duplication. I don't think there's a whole lot that I can do about that. That's just the nature of the beast of having litigation going on in multiple venues at the same time."). And defendants similarly do not wish to alienate potential fact-finders by openly fleeing one court for another. *See, e.g.*, *Continuum Capital v. Nolan*, C.A. No. 5687-VCL, at 87 (Del. Ch. Feb. 3, 2011) (TRANSCRIPT) ("And as all litigators know, and as I've mentioned before, it is never an easy task to say to a judge, 'We don't want to be in your courtroom.' There is always concern about collateral consequences from that."). Nevertheless, defendants can still attempt to advance one jurisdiction over another by allowing or resisting expedition, providing or withholding document

production, or even taking or avoiding telephone calls. These actions are rarely driven by a desire to settle with the "weakest" plaintiff. Instead, the decision is often driven by, among other things, perceptions of which judge or jurisdiction may be more favorable to defendants (either to oversee the litigation or any potential settlement). "Forum-shopping" in this context is often merely a description of a rational and good-faith pursuit of the client's best interests. *Cf.* Del. Lawyers' R. Prof'l Conduct pmbl. [2] ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); Del. Principles of Professionalism A(4) ("A lawyer should represent a client with vigor, dedication and commitment."), B(1) ("Before choosing a forum, a lawyer should review with the client all alternatives, including alternate methods of dispute resolution.").

A. Potential Collusion In Multi-Jurisdictional Class Actions.

1. The "Reverse Auction" And The Potential For Collusion.

Several courts and commentators have recognized potential dangers in multi-jurisdictional settlements. The most well known of these critiques probably comes from Professor Jack Coffee, who coined the term "reverse auction." *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1370-72 (1995) ("[The] 'reverse auction' [is] a jurisdictional competition among different teams of plaintiffs' attorneys in different actions that involve the same underlying allegations. . . . The practical impact of this approach is that it allows the defendants to pick and choose the plaintiff team with which they will deal. Indeed, it signals to the unscrupulous plaintiffs' attorney that by filing a parallel, shadow action in state court, it can underbid the original plaintiffs' attorney team that

researched, prepared and filed the action. The net result is that defendants can seek the lowest bidder from among these rival groups and negotiate with each simultaneously.").[1]

The Delaware courts recognized this phenomenon years ago. In *Stepak v. Tracinda Corp.*, Chancellor Allen noted that the "class action form of action does make possible opportunistic behavior at the expense of absent class members." 1989 WL 100884, at *6 (Del. Ch. Aug. 21, 1989). "Where there are two or more attorneys purporting to act on behalf of the same or overlapping classes," the Court stated, "there is a special risk that a defendant will seek advantage in choosing the adversary with whom it will negotiate, and a risk that the blessed plaintiff will be accommodating in exchange for an agreement that includes legal fees." *Id.* (citing federal cases from the 1970s); *see also In re MCA, Inc. S'holders Litig.*, 1993 WL 43024, at *5 (Del. Ch. Feb. 16, 1993) (noting that the "potential for this type of abuse clearly exists in representative litigation" (citing *Stepak*, 1989 WL 100884)); *cf.* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 9.04[b], at 9-179 (2010 Supp.) ("It is increasingly the case that numerous representative complaints are filed by separate plaintiffs challenging the same conduct. Even where, as is often the situation, these multiple actions are consolidated by stipulation of the parties, defendants occasionally have elected to negotiate exclusively with a select plaintiff, cognizant that the judicial approval of the

[1] *See also* Kahan & Silberman, 73 N.Y.U. L. Rev. at 775 ("The plaintiff/lawyer shopping problem arises when a second competing class action covering the same or a related set of claims is filed (or, for that matter, when a class attorney is worried that a competing action *may* be filed). When there are competing class actions, the outcome of the action that is concluded first is binding on the whole class. Because judges typically award attorneys' fees predominantly to the lawyers who act as class counsel in their courts, each set of competing lawyers has a strong financial incentive to bring its action to a speedy conclusion. Defendants, well aware of these incentives, can thus go plaintiff and lawyer shopping: By indicating that they will deal with class counsel who is willing to settle for the least, they implicitly create a 'reverse auction' in which competing class lawyers 'underbid' each other in order to have their own action settled first and earn attorneys' fees.").

settlement of one such suit will extinguish all related litigation."). Chancellor Allen mentioned again in 1991 the potential for abuse in class actions where "valid or strong claims may be settled too cheaply as part of an implied bargain with defendants that assures plaintiffs' counsel that there will be no opposition to payment of a generous fee." *In re Mobile Commc'ns Corp. of Am. Consol. Litig.*, 1991 WL 1392, at *11 (Del. Ch. Jan. 7, 1991); *see also id.* at *12 ("The purpose of Rule 23(e) and the hearing it contemplates is to create some protection against [this] risk[]."); *cf. In re MCA, Inc. S'holder Litig.*, 785 A.2d 625, 639 (Del. 2001) ("It has been recognized that there is an inherent conflict when class counsel seeks to settle claims on behalf of a class whose claims have been asserted globally in different jurisdictions on different grounds. . . . Courts have recognized the problem inherent in this situation and have established standards to prevent class counsel from selling out the class merely to collect that fee."). This Court in 1995 identified in one case the "unmistakable footprint of an effort by the defendants to negotiate a settlement with an adversary that they preferred, in order to extinguish claims being pressed by the adversary whom they disfavored, and to relegate that disfavored adversary to the status of an objector to the settlement." *In re MAXXAM, Inc./Federated Dev. S'holders Litig.*, 659 A.2d 760, 776 (Del. Ch. 1995).

The Delaware Supreme Court has also recognized that the "reverse auction" phenomenon may entail risk for absent class members. *See Prezant v. De Angelis*, 636 A.2d 915, 919, 922 (Del. 1994). In *Prezant*, nine class action suits challenging an IPO were brought and consolidated in Illinois federal court. *Id.* at 918. Plaintiffs in the Illinois actions began preliminary settlement discussions that "quickly reached an impasse when defendants' settlement offer of $1.2 million was rejected." *Id.* Over a month after the Illinois cases were filed, Joseph De Angelis brought a class action suit in Pennsylvania federal court—he allegedly then tried to

dismiss it voluntarily (in violation of Fed. R. Civ. P. 23(e)) to avoid transfer and consolidation with the Illinois actions. *Id.* De Angelis's counsel next, without consulting De Angelis himself, filed an action in the Court of Chancery and two weeks later began settlement negotiations. *Id.* De Angelis's counsel undertook no formal discovery and—without consulting a damages expert—entered into a settlement agreement for $1.225 million. *Id.* at 918-19. The Illinois plaintiffs filed suits in the Court of Chancery, but the Court refused to designate lead counsel for the Delaware cases, "thereby thwarting the attempt of the Illinois plaintiffs to control the Delaware actions as well." *Id.* at 919. Four of the Illinois plaintiffs objected to the De Angelis settlement. *Id.*

The Court of Chancery imposed heightened scrutiny on the settlement, noting that "the contrast between defendants' lack of defense to the De Angelis litigation in this Court and their defense in the Illinois Action gives the unfortunate impression that defendants preferred De Angelis as a foe." *De Angelis v. Salton/Maxim Housewares, Inc.*, 641 A.2d 834, 838 (Del. Ch. 1993), *rev'd*, *Prezant*, 636 A.2d 915. The Court of Chancery stated that "[u]nnecessary parallel litigation . . . . raises the specter that a defendant will negotiate a 'low-ball' settlement with an unscrupulous or lax plaintiff in one forum to circumvent a vigorously pursued case in another forum." *Id.* at 841. Finding "no direct evidence that such conduct occurred here," the Court nevertheless refused to "look favorably upon litigants who unnecessarily create such risks." *Id.* The Court accordingly approved the settlement but refused to award plaintiffs any attorneys' fees. *Id.* On appeal, the Supreme Court recognized that, "[w]hen competition among different sets of plaintiffs' counsel exists, as it does here, there is the ever present danger that unscrupulous counsel may 'sell out' the class in order to receive a fee." *Prezant*, 636 A.2d at 922.

Other courts have also discussed the "reverse auction" concept. *See, e.g.*, *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002) (describing a reverse auction as "the practice whereby the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant"); *Vallier v. Am. Fid. Assurance Co.*, 2008 WL 4330028, at *4 (D. Kan. Sept. 16, 2008) (same); *Larson v. Sprint Nextel Corp.*, 2010 WL 234934, at *13 (D.N.J. Jan. 15, 2010) (same, noting that "the danger underlying a reverse auction is the potential for collusiveness"). Nevertheless, some have refused to give the concept too much credence. The Ninth Circuit noted that the term "has an odor of mendacity about it," *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1099 (9th Cir. 2008), but quoted *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180 (10th Cir. 2002), which stated that the "reverse auction argument would lead to the conclusion that no settlement could ever occur in the circumstances of parallel or multiple class actions—none of the competing cases could settle without being accused by another of participating in a collusive reverse auction," 314 F.3d at 1189 (internal quotation marks omitted). Even this Court has noted that—unless all plaintiffs agree to join in the settlement—there will almost always be someone left out. *See, e.g.*, *In re Allion Healthcare Inc. S'holders Litig.*, C.A. No. 5022-CC, at 9 (Del. Ch. Jan. 19, 2011) (TRANSCRIPT) ("Unfortunately, what happens when you have multiple lawsuits in different states and different jurisdictions is someone is always going to be left at the altar. That's just inevitable, unless there is agreement where everyone comes together ahead of time and agrees to work together cooperatively."); *see also id.* at 11 (similar). Accordingly, Chancellor Chandler noted, "I'm not going to fault defendants' counsel for settling a case in one jurisdiction." *Id.* at 10.

2. Collusion And The "Settlement Class."[2]

It is quite common in Chancery settlements for the class to remain conditional until the Court finally certifies the class at the settlement hearing. The Delaware Supreme Court in *Prezant* voiced some criticism of "settlement classes," 636 A.2d at 922 ("The principal criticism of the temporary settlement class procedure is that it facilitates premature, inadequate, and perhaps collusive settlements because plaintiffs' counsel is under strong pressure to conform to the defendants' wishes at the early stages of the litigation."), but it ultimately condoned their use, so long as Chancery Court Rule 23 is satisfied, *id.* at 923 ("Temporary settlement classes foster settlement of contested issues, a favored result under Delaware law. For these reasons, we approve the use of temporary settlement classes generally, and condone the use here, so long as the strictures of Rule 23 are ultimately satisfied." (citation omitted)). This Court accordingly will allow parties to use the "settlement class" procedure, but it requires the parties (usually the plaintiff) to create a record allowing the Court to determine that Chancery Court Rule 23 is satisfied in all respects.

Some courts and commentators, however, have pointed to the "settlement class" procedure as giving rise to or exacerbating the "reverse auction" phenomenon. Professor Coffee,

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[2] The Delaware Supreme Court has described the use of a "settlement class" as follows:

> [T]he [Chancery C]ourt does not make the explicit determination, contemplated by subsection [23](c)(1), that the requisites of subsections (a) and (b) have been satisfied before permitting a proposed settlement to proceed toward consummation. Instead, the parties stipulate that the action may be maintained as a class action for settlement purposes only, with court approval pursuant to subsection (d), in conjunction with the mailing of notice to class members as required by subsection (e), and a date is set for a court hearing on the proposed settlement. At the hearing, any objections to the proposed settlement are heard, including objections to the adequacy of representation.

Prezant, 636 A.2d at 921-22 (footnote omitted).

referring to settlement classes, stated that "[n]othing better facilitates collusion than the ability on the part of the defendants to choose the counsel who will represent the plaintiff class." 95 Colum. L. Rev. at 1378 (stating that "the dynamics for collusion are set in motion when such a selection process is possible"). Professor Coffee compares the effect of settlement classes on defendants' and plaintiffs' negotiating leverage. For defendants, he terms settlement negotiations in the context of a settlement class as a "'no lose' proposition: if defendants can obtain agreement from plaintiffs' attorneys and the court to a favorable settlement, the technique advances their interests; if they cannot, they are no worse off and can still object to any attempt by plaintiffs to obtain final class certification." *Id.* at 1379. On the other hand, he believes that the availability of a settlement class reduces plaintiffs' counsel's negotiating leverage. "In the settlement class action . . . , the plaintiffs' attorney has only a commission to settle and not to litigate. Such a plaintiffs' attorney has little more than a right of first refusal on the terms offered by the defendants. As this attorney must be painfully aware, a failure to exercise that option implies only that the option may pass to whomever is next in line." *Id.*; *see also* Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 Notre Dame L. Rev. 1377, 1391 (2000) (describing Coffee's argument that "individual plaintiffs' lawyers have an incentive to underbid one another, because the one who makes the winning bid is designated class counsel and earns class counsel fees").

The Third Circuit has made similar observations, noting that, "because the court does not appoint a class counsel until the case is certified, attorneys jockeying for position might attempt to cut a deal with the defendants by underselling the plaintiffs' claims relative to other attorneys." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 788 (3d Cir. 1995). The court also stated that "[s]ettlement classes, which constitute ad hoc

adjustments to the carefully designed class action framework constructed by Rule 23, lack the regulatory mechanisms that ordinarily check this improper behavior." *Id.* (mentioning that another "court has warned that 'the danger of a premature, even a collusive, settlement [is] increased when as in this case the status of the action as a class action is not determined until a settlement has been negotiated'" (alteration in original)). Other courts have echoed the Third Circuit's observations; for example, one court noted that the use of settlement classes could "raise questions about collusion and the ability of plaintiffs' counsel to represent the interests of the entire class." *Polar Int'l Brokerage Corp. v. Reeve*, 187 F.R.D. 108, 113 (S.D.N.Y. 1999). As discussed further below, this is typically why some courts impose a higher scrutiny on settlements involving conditional classes. *See, e.g.*, *id.* ("[B]ecause of these concerns, when a settlement class is certified after the terms of settlement have been reached, courts must require a clearer showing of a settlement's fairness, reasonableness and adequacy and the propriety of the negotiations leading to it." (internal quotation marks omitted)); 5 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 15:26, at 95 (4th ed. 2002) ("Courts examine class actions for abuse most carefully when considering requests for certification in connection with proposed settlements. . . . Courts are likely to be even more scrupulous than usual in approving settlements when no class has been formally certified.").

The "settlement class" procedure can be helpful in this Court, even though class certification is rarely a serious point of contention in multi-jurisdictional deal litigation. *Cf., e.g.*, *In re Protection One, Inc., S'holders Litig.*, C.A. No. 5468-VCS, at 64 (Del. Ch. Oct. 6, 2010) (TRANSCRIPT) ("I'm obviously going to certify the class as a quintessentially appropriate situation, to certify the class."); *In re Genentech, Inc. S'holders Litig.*, C.A. No. 3911-VCS, at 42 (Del. Ch. July 9, 2009) (TRANSCRIPT) ("[C]orporate cases like this are a quintessential form of

a class action."). For example, a class may not be definable until a transaction closes; in such cases it might be helpful to leave open the class definition until the settlement is finalized. A formal class certification proceeding may also be an inefficient distraction in highly expedited litigation. Thus, a "one size fits all" approach to class certification should not be adopted for this type of litigation. As the Delaware Supreme Court explained in *Prezant*, settlement classes have a number of beneficial aspects, including (1) efficiency of time and resources, (2) potentially broader releases for defendants, and (3) potentially broader recovery for class members. *Prezant*, 636 A.2d at 922-23.

3. Judicial Scrutiny Of Potential Collusion In Class Settlements.

As part of its role in the class settlement process, this Court has a duty to review settlements before approving them. *See, e.g.*, *id.* at 921 (noting that "the settlement of a class action is unique because the fiduciary nature of the class action requires the Court of Chancery to participate in the consummation of the settlement to the extent of determining its intrinsic fairness"). This Court therefore scrutinizes potential collusion when that issue is raised in the context of settlement approval, but review for collusion is not a typical element of the Delaware settlement approval process.

As set forth by the Delaware Supreme Court, in reviewing a proposed settlement the Court of Chancery is to "consider the nature of the plaintiff's claim, the possible defenses thereto, the legal and factual circumstances of the case, and then to apply its own business judgment in deciding whether the settlement is reasonable in light of these factors." *Id.*; *see also Nottingham Partners v. Dana*, 564 A.2d 1089, 1102 (Del. 1989) (same); *Rome v. Archer*, 197 A.2d 49, 53 (Del. 1964) (same); *In re Burlington N. Santa Fe S'holder Litig.*, C.A. No. 5043-VCL, at 49 (Del. Ch. Oct. 28, 2010) (TRANSCRIPT) (same); *Ryan v. Gifford*, 2009 WL 18143, at *5 (Del. Ch. Jan. 2, 2009) ("In reviewing the settlement of a derivative suit, the Court must

determine, using its business judgment, whether the settlement terms are fair, reasonable, and adequate. In making this determination, the Court should look to the legal and factual circumstances of the case, the nature of the claims, and any possible defenses." (footnote omitted)). The Delaware Supreme Court has stated that the "considerations applicable to such an analysis include:"

> (1) the probable validity of the claims, (2) the apparent difficulties in enforcing the claims through the courts, (3) the collectibility of any judgment recovered, (4) the delay, expense and trouble of litigation, (5) the amount of the compromise as compared with the amount and collectibility of a judgment, and (6) the views of the parties involved, pro and con.

Polk v. Good, 507 A.2d 531, 536 (Del. 1986). This Court has noted that it "can also consider other factors, including the diligence of plaintiff in investigating the claims, and whether the proposed settlement is supported by mutual consideration." *Ryan*, 2009 WL 18143, at *5 (internal quotation marks omitted).

Many federal courts, on the other hand, explicitly require review for indicia of potential collusion in approving settlements. For example, the First Circuit in 1991 stated that "[i]t is because of the potential risk that plaintiffs' attorneys and defendants will team up to further parochial interests at the expense of the class that the Rule 23(e) protocol employed by several circuits explicitly includes scrutinizing settlements for indicia of collusion." *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991) (citing cases from the Second, Fifth, and Ninth Circuits). While settlement review in the Second Circuit includes some inquiries that overlap with those employed by the Delaware courts, the following passage is instructive of the approach taken by other courts: "In determining whether to approve a class action settlement, the district court must carefully scrutinize the settlement to ensure its fairness, adequacy and reasonableness, and that it was not a product of collusion." *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 336 (S.D.N.Y. 2005) (internal quotation marks omitted). Thus, the *WorldCom*

court went on, a "district court determines a settlement's fairness 'by examining the negotiating process leading up to the settlement as well as the settlement's substantive terms.'" *Id.* at 337. The court is to "analyze the negotiating process in light of 'the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves'" and to "ensure that the settlement resulted from 'arm's-length negotiations' and that plaintiff's counsel engaged in the discovery 'necessary to effective representation of the class's interests.'" *Id.*; *Polar*, 187 F.R.D. at 112 ("The court's analysis has a second prong as well: the court must also look at the negotiation process leading up [to] the settlement."); *see also Knight v. Alabama*, 469 F. Supp. 2d 1016, 1031 (N.D. Ala. 2006) ("A court must answer two questions when examining a proposed settlement agreement: (1) whether the settlement is the result of fraud or collusion; and (2) whether the proposed settlement is fair, adequate, and reasonable.").

The Delaware approach does not explicitly require analysis of potential collusion, but instead employs a higher scrutiny of class settlements that involve the potential for collusion.[3] *See, e.g.*, *Kahn v. Occidental Petroleum Corp.*, 1989 WL 79967, at *3 (Del. Ch. July 19, 1989) ("An abuse of the litigation-settlement process cannot be tolerated and this Court must closely scrutinize any proposed settlement which appears to be unfair, not only to the stockholders on whose behalf the suits are allegedly brought, but also other parties or counsel."). For example,

[3] The Court of Chancery's analysis in the *De Angelis* case is a prime example. The Court noted that a "settlement will be examined with heightened scrutiny and an enhanced standard of review will be applied if the settlement process appears likely to be unfair." *De Angelis*, 641 A.2d at 838. Because "[s]everal aspects of the settlement process in [that] action [were] disturbing," the Court held that the "terms of the settlement, as the end-product of that process, must be given the closest scrutiny." *Id.*; *see also id.* at 839 ("Because of these deficiencies in the settlement process and the existence of the undesirable forum shopping, the proposed settlement must receive heightened scrutiny.").

"a decision by defendants to deal with fewer than all [plaintiffs'] counsel in turn can affect the level of judicial scrutiny applied to any resulting settlement agreement." Wolfe & Pittenger, *supra*, § 9.04[b], at 9-179. Similarly, where two or more attorneys are purporting to act on behalf of the same class, "and particularly where a settlement is reached over the objection of other representative plaintiffs, the court will carefully scrutinize the settlement and, where appropriate, decline to approve it." *Id.* at 9-180 (footnote omitted); *see also id.* at 9-181 (acknowledging that the Court of Chancery has not precisely defined this heightened scrutiny, but noting that "it is likely that [the Court] will be far less inclined to accord deference to the views of the settling plaintiffs"). This Court is also "particularly careful in reviewing a proposed settlement that has the effect of barring claims of at least arguable merit that are not asserted in Delaware but are being asserted in another forum."[4] *MCA*, 1993 WL 43024, at *3.

When appropriate, this Court's heightened scrutiny of settlements includes a heightened scrutiny of the settlement negotiations. The Court of Chancery has historically been willing to grant objectors discovery into settlement negotiations when they challenge settlements.[5]

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[4] Other courts and commentators suggest that heightened scrutiny is appropriate in situations involving a settlement class. *See, e.g.*, 5 *Newberg on Class Actions* § 15:26, at 95; Manual for Complex Litigation (Fourth) § 21.612, at 313 (David F. Herr, *Annotated Manual for Complex Litigation, Fourth* (2010)) ("Courts have held that approval of settlement class actions under Rule 23(e) requires closer judicial scrutiny than approval of settlements reached only after class certification has been litigated through the adversary process."); *id.* § 21.61 (noting that courts should be wary of "reverse auctions"); Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. Legal Analysis 167, 194 (2009) (suggesting that early settlements should receive "intermediate scrutiny" and noting that "courts allow settlement classes to go forward but demand stronger justifications of the decisions made than would be required if the settlement had occurred later in the litigation" (footnote omitted)); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) ("Several circuits have held that settlement approval that takes place prior to formal class certification requires a higher standard of fairness.").

[5] When an objector requests discovery regarding a proposed settlement, the Delaware courts are generally willing to allow the objector to probe into the settlement negotiations. *See*

[Footnote cont'd]

Furthermore, support for such an inquiry in the context of heightened scrutiny can be found in Delaware's Rule 23 jurisprudence. The Delaware Supreme Court in *Prezant* directed this Court to ensure that Rule 23 is satisfied before approving any settlement: "Consideration of the merits of the settlement can occur only *after* the requisites of Rule 23 have been satisfied." 636 A.2d at 926 (emphasis added). The adequacy of the class representative—required by Rule 23(a)(4)—must be determined before this Court can review the settlement's merits. *See also id.* at 925 (holding that "the Court of Chancery is required to make an explicit determination on the record of the propriety of the class action according to the requisites of Rule 23(a) and (b)").

As the Delaware Supreme Court has noted, "adequacy of representation under Rule 23(a)(4) is generally dependent not only upon the ability of the named representative to represent the class fairly and adequately but also upon the qualifications, experience, and general ability of

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[Footnote cont'd]
In re Amsted Indus., Inc. Litig., 521 A.2d 1104, 1108 (Del. Ch. 1986) (Allen, C.) (noting that, "as a general matter, reasonable discovery when timely requested should be permitted to test the *good faith* of the class representative, at least if there is any basis to suppose lack of good faith"). "Thus, for example, inquiry into how negotiations came about, how they proceeded, and when various elements of the proposal (including attorneys fees) were agreed upon and why should generally be permitted." *Id.*; *see also id.* ("Because the Court, while exercising a judgment of [its] own, in this setting must depend to some extent upon the litigation judgments of the class representative and his counsel, it is essential that the Court and the class members be, at a minimum, content that such persons have proceeded at all times in good faith, with the single goal of protecting class interests. Accordingly, discovery into that subject may be expected to be more readily permitted, in this context, than discovery into other areas."). While objectors need to make some showing to obtain discovery on the merits of the case, this Court has held that they "should be generally permitted, when they make timely application, to inquire into the good faith of the parties to the negotiating process." *Id.* at 1109; *see also In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1124 (7th Cir. 1979) ("We think that the conduct of the negotiations was relevant to the fairness of the settlement and that the trial court's refusal to permit discovery or examination of the negotiations constituted an abuse of discretion."). *But see Vollmer v. Publishers Clearing House*, 248 F.3d 698, 708 (7th Cir. 2001) (stating that discovery of settlement negotiations is "only proper where the party seeking it lays a foundation by adducing from other sources evidence that the settlement may be collusive" (internal quotation marks omitted)).

the representative's attorneys." *MCA, Inc. v. Matsushita Elec. Indus. Co., Ltd.*, 785 A.2d 625, 637 n.12 (Del. 2001). Logically, therefore, when a *prima facie* showing is made that a settlement may be unfair, this Court should ensure the adequacy of the class representative and its counsel—including through heightened scrutiny of settlement negotiations—before proceeding to pass on the adequacy of the settlement terms. *Cf. In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 955 (Del. Ch. 2010) ("'A trial court has a continuing duty in a class action case to scrutinize the class attorney to see that he or she is adequately protecting the interests of the class, and if at any time the trial court realizes that class counsel should be disqualified, the court is required to take appropriate action.'" (quoting 4 *Newberg on Class Actions* § 13:22, at 417)).

B. Is Forum-Shopping For Purposes Of Securing An Advantageous Settlement A Wrong Under Existing Law?

Under a close reading of *Prezant*, forum-shopping for purposes of securing an advantageous settlement is not an independent wrong under existing Delaware law. That is, such forum-shopping should not be equated with a collusive settlement.

The Delaware Supreme Court in *Prezant* recognized fully the dangers presented by the reverse auction: "When competition among different sets of plaintiffs' counsel exists, as it does here, there is the ever present danger that unscrupulous counsel may 'sell out' the class in order to receive a fee." 636 A.2d at 922. But the *Prezant* Court suggested that the protection against and remedy for that wrong lay within this Court's review under Rule 23—"we believe that Rule 23(e)'s requirement that court approval be obtained before any settlement is consummated and the Court of Chancery's role in reviewing the settlement *provide adequate safeguards against impropriety by unscrupulous counsel*." *Id.* (emphasis added); *see also Mobile Commc'ns Corp.*,

1991 WL 1392, at *12 ("The purpose of Rule 23(e) and the hearing it contemplates is to create some protection against [this] risk[].").

Thus, the Delaware Supreme Court recognized the potential for a reverse auction and then suggested that nothing beyond the scrutiny imposed by this Court under Rule 23[6] was necessary to address the issue. The implication is that, because review under Rule 23 will sufficiently address the issue, forum-shopping does not represent a wrong outside that context. That conclusion also bears on the proper remedy for collusive settlements; *Prezant* suggests that any remedy would be confined to the bounds of Rule 23—for example, disapproval of a settlement or attorneys' fees or disqualification of class representatives or counsel. That issue is addressed further below (*infra* Section III).

C. What Are The Standards For Determining Whether A Settlement Is Collusive?

As one commentator has noted, "[c]ourts routinely recite that a settlement can only be approved in the absence of collusion. They rarely define what collusion is, what evidence would show its existence, or how much evidence of collusion must be found to justify rejecting a settlement." Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 Cornell L. Rev. 1045, 1119-20 (1995) (footnote omitted). That statement is fairly consistent with the cases discussed below, but a number of common factors do appear.[7]

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[6] As mentioned above (*supra* Section I.A.3), this Court would likely review such issues under a heightened scrutiny.

[7] *Black's* defines collusion as an "agreement to defraud another or to do or obtain something forbidden by law." *Black's Law Dictionary* 281 (8th ed. 2004). In addition, Professor Geoffrey Hazard testified in *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246, 306 (E.D. Pa. 1994) (alteration in original), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), that:

> [Collusion is] a charge that the lawyers sold out the class, that they were not faithful to the interests, that—it's not just that they were—failed in energy, failed

[Footnote cont'd]

Most recently, this Court set forth a few factors that it considered important in reviewing a proposed settlement. The settlement in principle had been reached before the case was filed in the Court of Chancery, but the Court examined the process and was satisfied that the settlement was not tainted by collusion. *See Continuum Capital*, C.A. No. 5687-VCL, at 89 ("In short, there was no indication of any even appearance of impropriety or collusiveness or effort to forum shop in any negative sense. That's important to me because I think there's high risk in anything that looks like a prepackaged settlement."). The Court also found "very reassuring" that there was "real litigation activity before the settlement was reached." *Id.* Finally, the Court noted that the plaintiff had taken "real discovery"—he "not only got documents," but he also "took real depositions, and a number of them." *Id.* ("Understanding that was another positive factor because, again, it countered the idea that this was some type of prepackaged effort and suggested that there was real arm's-length bargaining by the parties.").

Also recently, this Court reviewed and approved a settlement after scrutinizing whether defendants took advantage of their leverage over the Delaware plaintiffs. *See Allion*, C.A. No. 5022-CC, at 8 (finding no evidence that "the Delaware plaintiffs were somehow cozying up to the defendants in a fashion because they felt their case was about to be ended here, stayed here, that they were going to lose the posture of this case and be sent off to New York to negotiate with the plaintiffs' lawyers in New York to get some kind of position up there"). The Court found important that settlement negotiations had begun before the two courts involved made statements regarding which action would go forward. *See id.* ("The facts are that there were

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> in diligence, failed in attention to specifics and details, it is that they wanted to gain for themselves something at the price of their client, that they essentially cheated their clients.

already settlement discussions going on before that happened and that there was a mediation process in place."). The Court therefore found nothing in the record to support the objectors' argument that the "defendants somehow engaged in a process of playing off one set of plaintiffs against another and choosing to settle with the plaintiffs who were more receptive to settling and who had weaker arguments or weaker claims or weaker issues." *Id.* at 7-8.

In *De Angelis*, the Court of Chancery found several facts pertinent when determining that the proposed settlement deserved higher scrutiny: First, the plaintiff brought his suit two months after another (identical) litigation had been pending for two months. 641 A.2d at 838. Further, the primary claims in the later-filed litigation in Delaware state court were based on federal law, and the first-filed litigation had been brought in federal court. *Id.* This Court therefore noted that, given Delaware's first-filed rules, "De Angelis could not realistically have hoped to try this Delaware case but could only have hoped to settle it." *Id.* Second, the Court found it "highly suspicious" that the defendants did not move to stay or dismiss De Angelis's claim—even though the claims in his initial complaint were facially invalid. *Id.* In this regard, the Court found notable the "contrast between defendants' lack of defense to the De Angelis litigation and their defense in the Illinois Action." *Id.* Finally, the Court also mentioned De Angelis's "readily acceding to the reduction of an agreed settlement sum and [his] not insisting that defendants testify under oath." *Id.* at 838-39. The Supreme Court in *Prezant* noted one additional fact: the "objectors had already rejected a settlement offer in the Illinois action similar to the one negotiated by De Angelis' counsel." 636 A.2d at 924. *But see id.* at 924 n.5 ("We do not intend

to imply that acceptance of a settlement offer similar to one previously rejected by another establishes inadequate representation *per se*.").[8]

One other fact pattern noted by this Court involves the identity of the non-settling plaintiff. "Although the exclusion of a significant party litigant from the settlement negotiation will not, in and of itself, invalidate a proposed settlement," the Court stated, "that approach, because of its inherent potential for abuse, will cause the settlement to be carefully scrutinized." *MAXXAM*, 659 A.2d at 776-77. In that case, the "settlement was negotiated without the participation—and, indeed, was arrived at over the objection—of a 14% stockholder that was vigorously prosecuting its derivative claim against the defendants." *Id.* at 776.[9]

Courts outside of Delaware have also addressed collusion inquiries. For example, one court refused to approve a proposed settlement based on the following facts: The settling defendant's lead lawyer had lunch with three of the settling plaintiffs' attorneys—at a time when no suit was pending against the defendant, when it was questionable whether two of the

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[8] The Court of Chancery also scrutinized a proposed settlement for collusion in *MCA* but did not set forth any particular standards or factors in its analysis. *See MCA*, 1993 WL 43024, at *5 ("[Objectors] argue that the defendants 'cut a deal' with the plaintiffs and their attorneys in this Delaware action to achieve a settlement of the federal claims which plaintiffs and their attorneys in this litigation were unable to assert (but can only settle) instead of negotiating with the [federal] plaintiffs and their attorneys whom they allege understand the true fair value of those federal claims. . . . [W]hen the settling parties have previously proposed a patently inadequate settlement in which the class would have received no monetary benefit but the attorneys would have received $1 million in fees (as the initial, now-rejected, settlement provided), suspicions abound. Suspicion, however, is not enough and the Objectors have offered no evidence of any collusion. The proposed settlement must therefore be approved."). The Supreme Court on appeal stated that the "Court of Chancery's holding that there was no collusion is the equivalent of saying that the parties negotiated the settlement at arms length." *MCA*, 785 A.2d at 637.

[9] This Court has also reviewed a proposed settlement for potential collusion in a derivative case. *See Stepak v. Ross*, 1985 WL 21137 (Del. Ch. Sept. 5, 1985). The Court did not extensively discuss the objector's allegations, but noted that extensive discovery had been taken

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plaintiffs' attorneys had clients, and when one did not. *Reynolds v. Beneficial Nat'l Bank*, 260 F. Supp. 2d 680, 683 (N.D. Ill. 2003). The lawyers met to discuss "the possibility of a global settlement," and defendants' counsel mentioned a possible settlement figure. *Id.* Suits were later filed by those plaintiffs' counsel, and the cases were settled at the figure mentioned during the lunch. *Id.* The court also noted other facts as relevant to the adequate representation issue: two of the plaintiffs' lawyers had been involved in similar litigation against the same defendant in an earlier case, which settled and "essentially gave plaintiffs nothing."[10] *Id.* at 684. Three weeks after the suits were filed, plaintiffs' counsel (Mr. Harris) made a settlement proposal before obtaining any discovery. *Id.* The proposal was rejected, but after part of defendants' motion to dismiss was denied, defendants' counsel restarted settlement negotiations. "Mr. Harris agreed to [defendants' counsel's] request not to tell his fellow plaintiffs' counsel about the negotiations until he was given 'permission' . . . to do so by defendants' counsel." *Id.* at 685 ("Defense counsel told Mr. Harris they preferred to negotiate with him alone and did not want him to lose control of the discussions."). Further, "settlement counsel never served a single set of interrogatories, or a formal request for documents, and never took a single deposition of an employee of . . . any of the . . . released lenders. They obtained some documents from defendants and answers to some questions; there are, however, no sworn answers or responses."

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and found that the "objector's claim that the settlement is collusive is completely unsubstantiated in the record." *Id.* at *6.

[10] The existence of prior relationships alone should not be an indicator of collusion. In *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992), the court addressed—and rejected—an objector's argument that the settlement under review was the product of collusion due to the friendly relationship of the settling parties' counsel. *Id.* at 153 ("These facts in no way indicate that the parties were acting collusively.").

Id. at 686. The court found that "counsel for the settlement plaintiffs have been inadequate representatives of the plaintiff class." *Id.* at 694.

Another court—noting that "the timing and form of the settlement negotiations, the weaknesses of the suit as compared to the other pending class actions, and the substance of the initial settlement agreement are all factors relevant to the inquiry" into the procedural fairness of the settlement—found "no evidence of fraud or collusion." *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1321 (S.D. Fla. 2007). Nevertheless, the court denied the proposed settlement, finding that it was "not the product of informed, arms-length negotiations between effective Class Counsel and the Defendant. [The Defendant] did play these Plaintiffs off against the California actions, even conditioning a settlement here to the entry of an injunction prohibiting the already-certified California actions from going forward, to structure a poor settlement with weak parties." *Id.* at 1323. The defendant had a strong argument to stay the Florida action in favor of the then-pending California actions but it instead pursued settlement negotiations in Florida. *Id.* at 1322 ("Thus, Plaintiffs' counsel necessarily negotiated from a position of weakness, with the specter of a stay of this case a constant companion."). Plaintiffs settled the case on the eve of argument on class certification—with limited discovery—and after dropping their per-item settlement demand from $279.96 to $28.50 to $19.00. *Id.* Defendants requested and achieved a release of "all possible claims" and also agreed to a coupon settlement (a settlement feature that, the court noted, had been criticized). *See id.* at 1323. Several objectors argued that the original settlement was "woefully deficient," and the court found that settling counsel's acceptance of the objectors' comments in a revised settlement agreement was not enough. *See id.* ("Class Counsel started out in a position of weakness, and their effectiveness at improving a defective product is the result of the strenuous and well-presented arguments of

the objectors, rather than an informed arms-length process undertaken by well-positioned counsel."). The court denied the parties' request that it approve the settlement. *Id.* at 1329.

The Seventh Circuit scrutinized the negotiation of a settlement (by certain state Attorneys General as plaintiffs) that was "negotiated without the permission of the other class counsel in the federal action as required by the court's first pretrial order." *Gen. Motors*, 594 F.2d at 1126. The court noted certain facts suggesting that "the representation of the class during the negotiations was less than vigorous":

> The class settlement was reached relatively early in the course of the action. . . . Although discovery had commenced, [the defendant's] answers to many of the requests were less than completely responsive. Moreover, . . . the range of possible damages to class members was unclear. It is not possible to tell from the record how fully informed the Attorneys General may have been about the value of the claims they were surrendering.

Id. at 1128 (footnote omitted). The settlement agreement also obligated the plaintiffs "to seek settlement of the entire class action even though the agreement obligated [the defendant] to offer payments to only part of the certified class." *Id.* Further, the agreement included the defendant's promise to compensate the Attorneys General for their expenses. *Id.* at 1129. Ultimately, the court held that "the trial court abused its discretion by failing to undertake a careful examination of the conduct of the settlement negotiations and by preventing the plaintiff-objectors from showing that the negotiations prejudiced the best interests of the class." *Id.* at 1131.

Other courts have used a variety of factors and tests to probe for collusion:

- Some courts "engage[] in what can be described as the 'proof is in the eating' test. In essence, under this test, if the terms of the proposed settlement are fair, then the court may assume that the negotiations were proper."[11] *Bowling*, 143 F.R.D. at 152.

[11] That court still, "out of an abundance of caution," analyzed but did not find any collusion. Among the factors the court considered were that no representative of the defendant communicated with plaintiff or his counsel before the suit was filed; the matter was actively [Footnote cont'd]

- "The timing of a settlement in relation to the start of litigation is an important indicator in determining whether collusion occurred." *Vollmer*, 248 F.3d at 708.

- "Evidence suggesting collusion may include significant differences in the relief received by different groups within the class or the simultaneous negotiation of attorney's fees and class claims." *Weiss v. State*, 939 P.2d 380, 399 (Alaska 1997).

- Another court reviewed the following arguments raised by objectors, finding no evidence of collusion: lead counsel allegedly (1) resolved six cases other than the primary case concurrently with that case; (2) simultaneously negotiated class relief and attorneys' fees; (3) reached the settlement agreement without objectors' consent; (4) agreed to decrease the monetary relief for the class during the negotiation process; and (5) negotiated a less favorable fee award for objectors' counsel. *Holden v. Burlington N., Inc.*, 665 F. Supp. 1398, 1424-31 (D. Minn. 1997).

- The Fourth Circuit approved the following factors to determine whether a settlement was "reached as a result of good-faith bargaining at arm's length, without collusion, on the basis of (1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of securities class action litigation." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991).

- Another court noted that "storm warnings indicative of collusion are a lack of significant discovery and [an] extremely expedited settlement of questionable value accompanied by an enormous legal fee." *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 94 (D. Mass. 2005) (alteration in original) (internal quotation marks omitted).

- One court found no evidence of collusion where settlement discussions were broached after the "action was already pending and discovery had already been served" and where defendants "did not have lawyers in the cases bid against one another, and counsel for [another action] were successful in enhancing the proposed settlement here." *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1316 (S.D. Fla. 2005).

- Finally, another court noted that "there exists a special danger of collusiveness when the attorney fees, ostensibly stemming from a separate agreement, were negotiated simultaneously with the settlement." *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 308 (3d Cir. 2005).

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litigated, and both parties sought discovery; and plaintiff moved for class certification. *Bowling*, 143 F.R.D. at 153.

Of course, commentators have also mentioned factors evidencing the presence of potential collusion. Macey and Miller list three "yellow flags":

> First is the situation in which the judge observes evidence of a reverse auction settlement. Markers of a reverse auction include the presence of overlapping class actions involving similar claims against the same defendant; settlement discussions initiated by the defendant; settlement bargaining limited to one of the competing groups of plaintiffs' attorneys; settlement with the group of attorneys who present a less substantial threat of carrying the case forward to trial; lack of an extended process of settlement bargaining; agreements that promote the award of lucrative and potentially justified attorneys' fees; and sudden expansion of the scope of the settled case (for example, by converting the action from a statewide to a nationwide class).
>
> Another yellow flag arises when a case settles very early in the litigation. . . .
>
> . . .
>
> A third yellow flag is the presence in the settlement of significant elements of nonpecuniary relief, especially "coupon" or "voucher" settlements.

Macey & Miller, 1 J. Legal Analysis at 191-94 (footnote omitted). Finally, a guide for judges lists three indicators of a reverse auction: "an imbalance between the cash value of the settlement to the class as a whole and the amount of attorney fees in the agreement," "a difference between the apparent value of the class claims on the merits and the value of the settlement to class members," and a settlement "with an attorney who has not been involved in litigating the class claims that other attorneys have been pursuing." Barbara J. Rothstein & Thomas E. Willging, Fed. Judicial Ctr., *Managing Class Action Litigation: A Pocket Guide for Judges* 14 (2005).

Distilling all of the above, a collusive settlement in the context of stockholder deal litigation appears to involve, at its core, an explicit or implicit agreement between counsel for plaintiffs and counsel for defendants to require less consideration for the settling class in exchange for (1) exclusive dealings with particular plaintiffs' counsel and/or (2) more consideration for plaintiffs' counsel. Factors that should give rise to heightened scrutiny for

collusiveness include the following: settlement consideration disproportionately weak in comparison to the strength of the claims asserted; settlement with a plaintiff's firm that typically does not litigate aggressively when other, more formidable, firms are involved in the litigation; and an agreement to pay attorneys' fees significantly higher than are typical given the settlement consideration.

D. Was The Settlement In This Case Collusive?

Some aspects of the negotiation in this case do give rise to suspicion. For example, the document discovery that was provided (roughly two weeks after the motion to expedite was denied) was provided to the Arizona plaintiff's counsel "solely for purposes of settlement discussions," rather than for litigation purposes. *Compare* Ex. A (NIGHTHAWK 001, without attachments), *with* Ex. B (NIGHTHAWK 112). The attorneys for the Nighthawk defendants negotiated with only one set of plaintiffs' attorneys, with whom they had a history of past dealings. *See* Ex. C (NIGHTHAWK 216, without attachment) (stating that "[a]ny distinctions you notice in the attached [draft MOU] from our prior dealings may be attributable to Weil's input"); *see also* Ex. D (NIGHTHAWK 235-55) (Arizona plaintiff's counsel's comments to the draft MOU consisting only of edits to the provision regarding attorneys' fees and to the signature block). Further, the Nighthawk defendants' counsel affirmatively chose to avoid negotiations with (or interference from) the Delaware plaintiff; the Arizona plaintiff's counsel was willing to "start negotiating the terms quickly and then give [Delaware plaintiff's counsel] the ultimatum to get on board or lose out." Ex. E (NIGHTHAWK 125). There is no independent reason to doubt the Arizona plaintiff's counsel's commitment to litigate, but they were willing to settle for disclosures similar to those that this Court had stated were not "anything colorable when compared against the description of the banker's book that was in the proxy" and were of the "I-want-to-follow-up-tell-me-a-little-more variety." Ex. F (Oct. 21, 2010 Tr.) at 23.

Nevertheless, considering the results reached by courts in the cases discussed above, Special Counsel does not believe that the facts here lead to a conclusion that the settlement in this case was collusive. Settlements in multi-jurisdictional deal litigation are nearly always reached quickly—defendants trying to preserve their transactions need to resolve potential injunction motions before the deals close. The timing of settlement here was consistent with similar cases. The amount of fees ultimately agreed to was within the range of fees generally awarded in disclosure settlements. The amount of discovery provided to plaintiffs was similarly within the bounds of discovery often shared by defendants before settling these types of cases. While this Court's comments suggested that additional discovery might be warranted, the Arizona plaintiffs did provide for post-settlement discovery, likely including depositions. *See* Ex. G (MOU) § 2.

Given that seven cases were brought in Arizona (and were first-filed) and only one was brought in Delaware, defendants' focus on the Arizona cases was not atypical. Often, settling with the majority of plaintiffs will induce the minority to join the settlement, while the opposite is less often true. Further, the defendants had earlier—and unsuccessfully—tried to get the plaintiffs to agree on a single forum. *See* Nighthawk Br. (Trans. ID 35925603) at 17-18. When the motion to expedite was denied in this Court, defendants still faced motions for expedited discovery in Arizona. Nighthawk Br. at 19; Virtual Radiologic Br. (Trans. ID 35927201) at 24. Finally, there was no evidentiary support for the notion that the Delaware plaintiff's counsel were "pushing too hard" and thereby forcing defendants to find a "weaker" or more pliable opponent. Indeed, the Delaware plaintiff's counsel conceded that their own litigation position was weakened by their failure to seek expedition on their process claims; they did not press the claims that this Court suggested had merit. *See* Ex. H (Dec. 17, 2010 Tr.) at 7.

While the class consideration agreed to in the MOU is minimal, it is not unreasonable given the context. This Court had indicated that the Delaware plaintiff's non-disclosure claims could have some merit, but Delaware plaintiff's counsel had not sought to expedite litigation of those claims, the case was not expedited in Delaware, and defense counsel could reasonably have believed that post-closing aggressive litigation was unlikely. *Cf., e.g.*, *Police & Fire Ret. Sys. of the City of Detroit v. Bernal*, 2009 WL 1873144, at *3 (Del. Ch. June 26, 2009) ("As explained in *Lyondell Chemical Co. v. Ryan*, a plaintiff faces a significant burden in showing that a board acted in bad faith by failing to reasonably inform themselves or otherwise carry out their fiduciary duties in a sale of control. Thus, in cases such as this one, the shareholders' only realistic remedy for certain breaches of fiduciary duty in connection with a sale of control transaction may be injunctive relief." (footnote omitted)). Certainly the Arizona court needed to have been informed about this Court's rulings, but review of the parties' negotiations revealed no apparent intent to hide those rulings from the Arizona court. With the exception of the parties' move to settle away from a jurisdiction that had made merits rulings, review of the parties' negotiations revealed a fairly typical arm's-length negotiation over the substance and nature of the disclosures. Nothing in the negotiations themselves were outside the bounds of similar negotiations in similar cases.

In sum, the settlement itself was not collusive under the standards summarized above. The disclosures obtained for the class were minimal, but not disproportionately weak in comparison to the strength of the claims asserted and in consideration of the likely nature of the post-closing litigation. Even counsel for the Delaware plaintiff believed that the disclosures obtained were valuable to the Nighthawk stockholders. Plaintiff's Br. (Trans. ID 35898068) at 6; Letter from Blake A. Bennett to The Honorable J. Travis Laster (Trans. ID 34881393) at 3.

Defendants' counsel did not seek to avoid litigating against a more formidable foe by settling with a weaker one; Special Counsel's experience does not suggest that one of the plaintiffs' firms involved in this case is a far more aggressive opponent than the other. Finally, the attorneys' fees agreed to in the MOU are within the range generally awarded by this Court in disclosure settlements. For those reasons, as well as the reasons set forth above, Special Counsel does not believe that the settlement reached in this case was collusive.

Special Counsel is, of course, very cognizant of the Court's strong dissatisfaction with the settlement process employed in this case and with counsel, as expressed by the Court during the December 21, 2010 hearing. Having devoted substantial attention to the matter in considering and ruling on the motion to expedite, the Court understandably was not happy that the parties chose to present their settlement to another court. Compounding the problem was the fact that the disclosure claims on which the proposed settlement was based were claims the Court believed to be "not colorable." Ex. H (Dec. 17, 2010 Tr.) at 3. The decision by counsel to settle in that manner understandably troubled the Court. Nonetheless, as discussed above, Special Counsel believes that the decision to present a disclosure settlement to the Arizona court, while provoking justifiable judicial criticism, was not the product of collusion.

As a final thought, when multi-jurisdictional deal litigation is pending both in this Court and in courts of another state, all counsel should be aware that this Court will play some role, either in reviewing a potential settlement or in dismissing a case following a settlement approved by another court. Therefore, best practice for counsel negotiating a settlement of such litigation in a jurisdiction outside of Delaware—recognizing this Court's focus on representative settlements—would be to substantively involve Delaware counsel in the negotiations.

II. THE ROLES OF THE COURTS IN MULTI-JURISDICTIONAL SETTLEMENTS.

This Court has recognized in many instances that the typical patterns in multi-jurisdictional deal litigation are inefficient and problematic. *See, e.g.*, *Topps*, 924 A.2d at 957 ("The reality is that every merger involving Delaware public companies draws shareholder litigation within days of its announcement. An unseemly filing Olympiad typically ensues, with the view that speedy filing establishes a better seat at the table for the plaintiffs' firms involved.").[12] Some of the Court's remaining questions deal with potential methods for addressing the issues posed by this type of litigation.

[12] *See also, e.g.*, *In re Alberto-Culver Co. S'holder Litig.*, C.A. No. 5873-VCS, at 31 (Del. Ch. Feb. 21, 2011) (TRANSCRIPT) ("Look, I don't applaud the multiple forum stuff. I don't. I wish there was a cure for it."); *Allion*, C.A. No. 5022-CC, at 7 ("[M]y empathies and sympathies are with the defense bar because they're the ones who are caught in the midst of these multi-forum litigations. They aren't there by choice. They simply have to deal with it."); *La. Mun. Police Empls.' Ret. Sys. v. Pyott*, C.A. No. 5795-VCL, at 50-51 (Del. Ch. Jan. 21, 2011) (TRANSCRIPT) ("Litigation is costly. So if you could envision this totality of stockholders, they would not want to sue willy-nilly and impose on their company the costs of defending multiple actions in multiple fora . . . ."); *In re Burger King Holdings, Inc. S'holders Litig.*, C.A. No. 5808-VCL, at 10 (Del. Ch. Jan. 19, 2011) (TRANSCRIPT) ("It's simply a matter of making sure [the other court] has the information, because this is one of these many situations that we have these days, when there is multiforum litigation going on."); *In re Compellent*, C.A. No. 6084-VCL, at 26 ("And I think until we start trying to address what is now a problem in virtually every deal, you're going to keep having these situations."); *In re RAE Sys., Inc. S'holders Litig.*, C.A. No. 5848-VCS, at 16-17 (Del. Ch. Nov. 10, 2010) (TRANSCRIPT) ("I believe in the value of the representative litigation process for investors. It is not in the interests of diversified investors to have food fights . . . —and have litigation in three different places. It doesn't make any sense. I defy anyone to explain how it's good for investors. It's not."); *In re Burlington N. Santa Fe S'holder Litig.*, C.A. No. 5043-VCL, at 54 (Del. Ch. Oct. 28, 2010) (TRANSCRIPT) ("[W]hat we have here is a conflict between individual rationality, where plaintiffs logically benefit from filing multiple actions, and group rationality, where efficiency calls for a single forum."); *Stadium Capital Qualified Partners, L.P. v. Cerberus ABP Investor LLC*, C.A. No. 5707-VCL, at 14 (Del. Ch. Sept. 22, 2010) (TRANSCRIPT) ("The one thing that would make me concerned, and it is something that happens from time to time when you have competing jurisdictions in play, and it's not driven by the courts, it's driven by the litigants, is that folks in one proceeding want to get ahead of folks in another proceeding."); *Wyeth*, C.A. No. 4329-VCN, at 21-22 ("[T]here are competing jurisdictional issues and sometimes it's not a terribly pretty picture, but that I think is simply the . . . nature of what we're all dealing with."); [Footnote cont'd]

As an initial matter, some problems in multi-jurisdictional deal litigation are inherent in our system of federalism. True solutions may require interstate judicial cooperation, uniform laws, or similar national-level approaches. *Cf. Continuum Capital*, C.A. No. 5687-VCL, at 33 ("And it may well be that Congress acts. As we talked about, they have acted in the past. I also think that, to the extent states make responsible moves to handle this litigation appropriately, . . . they can address the problem and avoid the need for another round of Congressional legislation."); *Allion*, C.A. No. 5022-CC, at 11 ("But, fundamentally, until there is some solution to this whereby we can have judges from different states agree on who is going to go forward and who isn't going to go forward—and that's my preferred solution, if the judges of the different states would simply agree that they'll have some type of informal process whereby Delaware says, You go, or New York says, You go ahead and handle the case, just in the interest of time and efficiency. Because I'm busy, I know the New York judges have to be busy, and so we don't need to all be involved in this."); *Alberto-Culver*, C.A. No. 5873-VCS, at 32 ("[E]verybody in this world has a lot to do. And I'm a big believer in this phrase, 'Stay in your lane.'"). There is also the danger that an attempt by a single court to solve these multi-jurisdictional issues will be resisted by other courts or avoided by litigants.

To some extent, the power that a single court can exert over multi-jurisdictional deal litigation rests in its ability to certify a class and proceed as an actual class action. First, Rule 23(c)(1) "contemplates that class certification proceedings occur early in the litigation." *Prezant*, 636 A.2d at 921. A certified class in one jurisdiction has consequences for suits in other

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[Footnote cont'd]
In re Netsmart Techs., Inc. S'holders Litig., C.A. No. 2563-N, at 18 (Del. Ch. Dec. 20, 2006) (TRANSCRIPT) ("[T]he reality is that defendants get sued over the same matter in . . . several places and they have to grapple with that. The judicial process has historically tried to minimize that."); *cf. Dutiel v. Tween Brands, Inc.*, 2009 WL 3494626, at *4 (Del. Ch. Oct. 28, 2009).

jurisdictions. *See id.* at 923 ("If a class is certified after proceedings held early in the litigation, all class members would have their claims extinguished if the complaint is subsequently dismissed in a Rule 12(b)(6) or similar context."); *see also Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 379 (1996) (noting that class members are bound by judgments in a class action). Indeed, this Court has suggested before that it could cut the Gordian knot of multi-jurisdictional deal litigation by entertaining class certification at an early stage. *See, e.g.*, *RAE*, C.A. No. 5848-VCS, at 26 ("I have to do what is right for the class. I've said to people before, and I will say, there is no reason why a motion for class certification couldn't be brought on, frankly, jointly by the parties here, and certify a class. It creates a situation. Could another court—would my California colleague certify a class in the face of an already certified class? I think probably not."); *id.* at 34; *In re Dollar Thrifty S'holder Litig.*, C.A. No. 5458-VCS, at 11 (Del. Ch. July 9, 2010) (TRANSCRIPT) ("I will reluctantly allow the plaintiffs, if they want to move for anything like class certification, or something like that, on the same day, if we have to certify one class and simply put in place an extreme order—I don't want to do that, but this is a situation—I do not like this. I do not enjoy this. But I have yet to see anything that says why this case shouldn't be tried in the state whose law is at stake."); *cf. Compellent*, C.A. No. 6084-VCL, at 27-28 (scheduling a preliminary injunction hearing, even with a similar hearing scheduled in another forum, and requiring prompt briefing on class certification). Further, prompt class certification would likely serve to reduce—or even eliminate—the "reverse auction" phenomenon. *See* Coffee, 95 Colum. L. Rev. at 1378-80 (arguing that settlement classes facilitate collusion).

A. <u>What Role Should The Non-Settlement Forum Have?</u>

In multi-jurisdictional deal litigation, the different courts will typically play quite different roles. Usually, only one court engages with the merits. Almost always, only one court

reviews the settlement. Once the parties reach an agreement in principle to settle their case, the non-settlement forum rarely plays any role beyond dismissing the case after the settlement is approved elsewhere. The Court has, however, asked what role, if any, the non-settlement forum should play in multi-jurisdictional deal litigation.

First, the non-settlement forum should ensure that all courts involved in the multi-jurisdictional case are operating on the same information. *See, e.g.*, *In re ICx Techs., Inc. S'holder Litig.*, C.A. No. 5769-VCL, at 4 (Del. Ch. Feb. 2, 2011) (TRANSCRIPT) ("I do think that in this brave new world of multijurisdictional proceedings, that the respective courts need to be kept informed about what's going on."); *Pyott*, C.A. No. 5795-VCL, at 59 ("Now, what I do strongly believe needs to happen when we have these multijurisdictional proceedings is that the Courts know what is going on in each proceeding."); *Burger King*, C.A. No. 5808-VCL, at 10 ("But I do think to avoid any type of risk of forum shopping in terms of fee awards, it's important for [the Florida judge] to be aware of how Delaware would price this. . . . It's simply a matter of making sure she has the information, because this is one of these many situations that we have these days, when there is multiforum litigation going on. I think it's important in these situations that all the judges keep each other informed about what is going on, so that the possibility of forum shopping and jurisdictional arbitrage is minimized."). As noted in the context of this case, the parties have a heightened obligation to provide information to all courts involved when rulings have been made on the merits. If the non-settlement forum were to require, as a matter of course, that the common litigants (typically the defendants) provide to the settlement forum copies of all pleadings, significant case documents, and rulings or transcripts, the settlement forum would then have a full set of information on which to review the proposed settlement. As Chair of the Court of Chancery Rules Committee, Special Counsel intends to

seek the guidance of the Court as to whether the Court would be amenable to consideration by the Rules Committee of a rule requiring such disclosure to the settlement forum where the Court of Chancery is the non-settlement forum.

Similarly, the non-settlement forum could maintain an open line of communication with the settlement forum. Thus, the non-settlement forum could request from the common parties (again, likely the defendants) contact information for the judge presiding over the settlement action, and vice versa. In that way, both courts could play a more active role, if necessary, in ensuring that the proposed settlement is reviewed on a full record and on complete information.

The non-settlement forum could also require the common parties to provide it with copies of the settlement documents filed in the settlement forum. In this manner, the desirable end of both courts being informed as to the status of the litigation would be served. Considerations of comity and judicial efficiency weigh in favor of the non-settlement forum not interfering with or second-guessing the consideration of a settlement by the settlement forum. Nonetheless, Special Counsel believes that the non-settlement forum should be informed of the terms of the proposed settlement being presented to the settlement forum.

B. How Should Any Informational Disadvantages Of The Settlement Forum Be Handled?

The Court asked about the optimal method by which any informational disadvantages of the settlement forum could be addressed. As noted above, the non-settlement forum could require the common litigants to provide pleadings, significant documents, and rulings to the settlement forum. Such a procedure should ensure that the settlement forum would have a full record on which to consider a proposed settlement.

III. REMEDIES FOR COLLUSIVE SETTLEMENTS.

A. What Remedies Are Appropriate For Counsel Found To Have Engaged In A Collusive Settlement?

The Court has also asked what remedy—if the settlement in this case were to be found collusive—would be appropriate. For the reasons noted above, Special Counsel does not believe that the settlement was collusive. Nevertheless, the question is addressed below.

1. Consequences Of Collusive Behavior.

In some of the cases discussed above, courts found that the parties had reached a settlement improperly. In none of those cases did the courts appear to revoke the attorneys' *pro hac* status. Typically, after finding that a settlement was not the product of arm's-length negotiation, the courts declined to approve it and declined to award attorneys' fees. *See, e.g.*, *Figueroa*, 517 F. Supp. 2d at 1329 (stating that the court could not "make the requisite written finding under Rule 23(c) . . . that the Third Amended Settlement Agreement is procedurally or substantively fair, adequate, or reasonable" and denying both the parties' request to approve the settlement agreement and the plaintiffs' counsel's application for fees); *Polar*, 187 F.R.D. at 121 (similar); Elliot J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 Vand. L. Rev. 1797, 1861 n.196 (2004) ("If the court concludes that a settlement is the product of tacit collusion between plaintiffs' attorneys and defendants, it probably should refuse to approve the settlement."); *cf. De Angelis*, 641 A.2d at 841 (approving the settlement but declining to award attorneys' fees to plaintiffs' counsel: "While there is no direct evidence that [a collusive settlement] occurred here, this Court cannot look favorably upon litigants who unnecessarily create such risks.").

At least one court has gone further, however, and removed class counsel upon a finding of impropriety. *See Reynolds*, 260 F. Supp. 2d at 695 ("For each of these reasons, I decline to

approve the settlement proposed to this court. Settlement counsel will not be permitted to continue to represent the class in this case."). As noted above, adequacy of the class representative—including adequacy of the class representative's counsel—is one of the key findings this Court must make under Rule 23 before approving a settlement. *See supra* Section I.A.3; *see also Reynolds*, 260 F. Supp. 2d at 694 (finding "counsel for the settlement plaintiffs [to] have been inadequate representatives of the plaintiff class"); *Polar*, 187 F.R.D. at 118 ("An important component of a court's fairness determination is a determination of the adequacy of class counsel, which includes an examination of whether the negotiating process leading up to the settlement was conducted at arm's length, and whether class counsel have engaged in sufficient discovery of the claims. . . . The Court . . . cannot conclude that the class has been adequately represented."); *Meek v. Gem Boat Serv., Inc.*, 620 N.E.2d 983, 985 (Ohio Ct. App. 1993) ("In addition, when a class action suit has been filed, courts have long recognized that an additional responsibility exists for the trial court to first ensure pursuant to [Rule] 23(A)(4), which requires a finding that 'the representative parties will fairly and adequately protect the interests of the class,' that the named counsel for the class is capable of adequately representing the class during the proceedings."); 5 *Newberg on Class Actions* § 15:26. Other courts have noted their ongoing duty to scrutinize the adequacy of class counsel. *See, e.g.*, *Meek*, 620 N.E.2d at 985 ("After making an initial determination that the named attorneys for the class are capable of adequately representing the class, the court assumes a continuing duty to 'scrutinize the class attorney to see that he is adequately protecting the interests of the class. If, at any time, the trial court realizes that class counsel should be disqualified, it is required to take appropriate action. It must either enter orders eliminating the problem or decertify the class.'"); *N. Am. Acceptance Corp. Sec. Cases*, 593 F.2d 642, 645 (5th Cir. 1979) (same); *In re Fine Paper Antitrust Litig.*,

617 F.2d 22, 27 (3d Cir. 1980) ("Under Rule 23, the trial judge has a constant duty, as trustee for absent parties in the class litigation, to inquire into the professional competency and behavior of class counsel. The district court must renew its stringent examination of the adequacy of class representation throughout the entire course of the litigation." (citations omitted)). If, in the performance of this duty (including in the review of a proposed settlement), this Court were to find that class counsel is not providing adequate representation, removal of class counsel is a tailored and appropriate remedy.[13] *See, e.g.*, *Revlon*, 990 A.2d at 960 (noting the "ability and willingness of this Court to replace representative counsel who engage in conscious shirking, who appear to be doing little more than prematurely harvesting a case as part of their overall inventory, or who otherwise are not providing adequate representation"); *see also Meek*, 620 N.E.2d 983 (affirming removal of class counsel). Further remedy for any alleged breach of fiduciary duties to the class should be left to the class itself.

Disapproval of the proposed settlement and removal of class counsel does not, of course, affect defendants' counsel directly. Under the policies and procedures governing representative actions, the imbalance is appropriate. First, the proposed settlement will be rejected, along with any potential release that the defendants might have secured—defendants' counsel will therefore have to answer to their own clients for this loss. Further, the Court is bound by Rule 23 to scrutinize the adequacy of class counsel, while defendants' counsel are not governed by a similar rule. Finally, class counsel are held to a higher standard due to their representation of absent class members; defense counsel are not. Defendants' counsel have no fiduciary relation to the class. Indeed, their relation is the opposite; they are bound by their professional obligations to

[13] This remedy should apply to Delaware and non-Delaware counsel alike. *See Revlon*, 990 A.2d at 964 (replacing Delaware and non-Delaware class counsel).

reach the best result for their own clients, in opposition to the class. *Cf.* Del. Lawyers' R. Prof'l Conduct pmbl. [2] ("As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others."). Nevertheless, if the class could somehow demonstrate that defendants' counsel aided and abetted class counsel's breach of fiduciary duties—a showing that should be as difficult as it is in the corporate context[14]—the class could seek remedies directly against defendants' counsel. Moreover, it should be clear that, if defendants' counsel make any misrepresentations or display dishonesty to the Court, the Court has *all* its remedies available, including revocation of an attorney's *pro hac* admission or referral to disciplinary proceedings. *See* Section III.A.2 *infra*.

2. Revocation Of *Pro Hac Vice* Admission.

Generally, this Court is not empowered to enforce the disciplinary rules. *See, e.g.*, *In re Appeal of Infotechnology, Inc. S'holder Litig. Disqualification of Counsel*, 582 A.2d 215, 220 (Del. 1990) ("In Delaware there is the fundamental constitutional principle that [the Delaware Supreme] Court, alone, has sole and exclusive responsibility over all matters affecting governance of the Bar."). Nevertheless, the Court of Chancery has "full power to employ the substantive and procedural remedies available to properly control the parties and counsel before it, and to ensure the fairness of the proceedings." *Id.* at 221. This includes the power to revoke the *pro hac vice* admission of attorneys appearing before the Court "where necessary to preserve the integrity of judicial proceedings." *See, e.g.*, *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Stauffer Chem. Co.*, 1990 WL 197864, at *1 (Del. Nov. 9, 1990) (ORDER); *cf. Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 56 (Del. 1993) (noting that consideration would be given to "whether or not it is appropriate and fair to take into account the behavior of

[14] *See, e.g.*, *Malpiede v. Townson*, 780 A.2d 1075, 1096-98 (Del. 2001).

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").

While revocation of an attorney's *pro hac* status for engaging in a collusive settlement is not consistent with *Prezant* or Rule 23, for completeness this brief addresses the standards that the Delaware courts have used in deciding to take such an action. *See Crowhorn v. Nationwide Mut. Ins. Co.*, 2002 WL 1274052 (Del. Super. May 6, 2002). The *Crowhorn* Court noted that, in Delaware, "the only circumstance under which a trial court would have jurisdiction to entertain an application for revocation of an admission *pro hac vice*, is where the party seeking disqualification can show, by clear and convincing evidence, that the behavior of the attorney in question will affect the fairness of the proceedings in the case before it." *Id.* at *4 (alterations, internal quotation marks, and omission omitted). That is, the "only question this Court may consider is whether or not the challenged conduct prejudices the fairness of the [current] proceedings, such that it adversely affects the fair and efficient administration of justice." *Id.* (alteration in original) (internal quotation marks omitted); *see also Kaplan v. Wyatt*, 1984 WL 8274, at *6 (Del. Ch. Jan. 18, 1984) (stating that "a trial court should disqualify counsel from appearing *pro hac vice* only where the acts of the attorney are contemptuous of the court or where they adversely affect the conduct of the trial").

Determining that the plaintiff had not shown by clear and convincing evidence that the behavior of the attorney in question had "affected the fairness of the proceedings before [the] Court, or that in the future such conduct will continue," the *Crowhorn* Court rejected the revocation application. 2002 WL 1274052, at *4. The Delaware courts have, however, revoked *pro hac* admissions in rare cases. For example, the Superior Court has revoked a *pro hac* admission where counsel made specific misrepresentations to that Court. *Nat'l Union Fire Ins.*

Co. of Pittsburgh, PA v. Stauffer Chem. Co., 1990 WL 161704, at *3-4 (Del. Super. Oct. 16, 1990), *aff'd*, 1990 WL 197864, at *1 (stating that the Superior Court "properly acted within [its] discretion to invoke appropriate sanctions where necessary to preserve the integrity of judicial proceedings"). It has also revoked a *pro hac* admission where an attorney knowingly violated "the Court's order limiting pretrial publicity" and also "Rule 3.6 of the Delaware Lawyers' Rules of Professional Conduct." *State v. Grossberg*, 705 A.2d 608, 613 (Del. Super. 1997); *see also id.* at 614 ("There is an overriding interest here, namely the practice of law before this Court with the requisite candor, compliance with its orders, and adherence to the Delaware Lawyers' Rules of Professional Conduct.").

B. What Remedies, If Any, Are Appropriate Here?

Given the conclusion that no collusion occurred here (and given the role of Rule 23 under *Prezant*), Special Counsel does not believe that the parties' actions have prejudiced the fairness of this proceeding. Therefore, Special Counsel would not recommend that this Court revoke the *pro hac vice* admissions of any attorney involved in this case. Further, given the conclusion that no collusion occurred in this settlement, Special Counsel would not recommend that this Court take any other remedial action besides—as it already has—requiring that the parties keep each forum informed of proceedings in the other.

In that regard, the corporate litigation bar—both plaintiffs' and defense counsel—is very much aware of the recent rulings and statements of the Court expressing, in certain circumstances, dissatisfaction with settlements and the processes leading to those settlements. Counsel know that this Court will closely examine settlements and, where warranted, will take steps to investigate possible collusion. Special Counsel believes that much self-policing among the bar has already occurred and will continue to occur, supplemented by the continued careful consideration of settlements by this Court pursuant to Chancery Court Rule 23.

CONCLUSION

For the reasons set forth above, Special Counsel does not believe that this Court should impose any remedy on any attorney in this case.

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