



COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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VICE CHANCELLOR

New Castle County Courthouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

December 22, 2010

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RE: *Scully v. Nighthawk Radiology Holdings, Inc., et al.*, C.A. No. 5890-VCL

Dear Counsel:

Absent objection, I intend to appoint Gregory P. Williams of Richards, Layton & Finger, P.A. to serve as special counsel to assist me in determining how to proceed in this matter. The reasonable fees and expenses incurred by special counsel will be taxed as costs.

As I discussed during the status conference on December 17, 2010, I believe that appointing special counsel is necessary to provide additional briefing on the issues raised by the current situation. Generally speaking, the phenomenon of parallel multi-forum litigation naturally incentivizes party behavior that is individually rational but systemically irrational. Additionally, in this particular case, the parties and their counsel have unique interests in the pending settlement and the process by which it was reached. Unlike in a traditional adversarial proceeding, I do not believe that the parties' varying interests balance out in a manner that would allow for a full presentation of relevant issues.

The role of special counsel will be to provide briefing from the point of view of what is in the public interest. In doing so, special counsel will address the appropriate role of the courts of this State in light of our multi-jurisdictional system as a whole.

The parties are scheduled to submit briefing on February 11, 2011. Special counsel will respond on March 11. Special counsel will address the same issues that I asked the parties to address, except that special counsel understandably will not be able to shed light on the events leading to the December 17 status conference. To elaborate on my comments during the conference, the issues addressed will include the following:

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?
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?

I have asked Mr. Williams to serve as special counsel because he is a distinguished Chancery practitioner with extensive experience handling representative action settlements and multi-jurisdictional litigation. He is also Chair of the Court of Chancery Rules Committee, and one possible path forward would be to attempt to provide for situations of this kind by rule. In light of his experience with the Rules Committee, Mr. Williams will be well positioned to provide input as to the viability of that alternative.

Mr. Williams has advised me that he and his firm do not have a conflict with respect to the proposed engagement. He notes that his firm previously represented Weil Gotshal & Manges LLP in litigation, coincidentally in a matter that was before me, and

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that his firm works as co-counsel with Weil and Wilson Sonsini Goodrich & Rosati. Mr. Williams also notes that he and his firm regularly work cooperatively with Morris Nichols Arsht & Tunnell and Connolly Bove Lodge & Hutz, including frequently with the Chancery practitioners involved in this case.

None of these disclosures surprised me. I suspect that other leading Delaware attorneys to whom I might turn for this unique assignment would be in a similar position.

If you have any objections to Mr. Williams serving as special counsel or my proceeding in this fashion, please express them by letter on or before December 31, 2010, so that I may take them into account. If you have no objection, please advise me promptly by letter so that Mr. Williams can start work.

I also have attached a letter that I received from Mr. Berger. The letter reinforces my concern that in the ordinary course, the Arizona Superior Court would not be adequately informed about my criticism of the process during the hearing in the Delaware action, the fact that the motion to expedite the process claims was denied only because the Delaware plaintiff made the litigation decision not to move for expedition at that time, or that the settlement consideration consisted of resolving a claim that this Court regarded as not colorable.

Sincerely yours,



J. Travis Laster
Vice Chancellor