

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LOUISIANA MUNICIPAL POLICE EMPLOYEES'	:	
RETIREMENT SYSTEM,	:	
	:	
Plaintiff,	:	
	:	
v	:	Civil Action
	:	No. 7996-ML
THE HERSHEY COMPANY,	:	
	:	
Defendant.	:	

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Chancery Courtroom No. 12C  
New Castle County Courthouse  
500 North King Street  
Wilmington, Delaware  
Tuesday, March 18, 2014  
2 p.m.

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

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RULINGS OF THE COURT FROM ORAL ARGUMENT ON EXCEPTIONS  
TO THE MASTER'S FINAL REPORT

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CHANCERY COURT REPORTERS  
New Castle County Courthouse  
500 North King Street - Suite 11400  
Wilmington, Delaware 19801  
(302) 255-0524

1 APPEARANCES:

2 MICHAEL J. BARRY, ESQ.  
3 JUSTIN K. VICTOR, ESQ.  
4 Grant & Eisenhofer, P.A.  
for Plaintiff

5 SRINIVAS M. RAJU, ESQ.  
6 ROBERT L. BURNS, ESQ.  
7 MICHAEL D. ALLEN, ESQ.  
Richards, Layton & Finger, P.A.  
for Defendant

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2                   THE COURT:  As you can probably tell  
3 from the argument, I've thought about this a lot.  I  
4 think it's a very interesting situation across  
5 multiple dimensions.  The first is the underlying  
6 problem, namely, the horrific reality, which is  
7 undisputed for purposes of today, of the use of child  
8 labor and effectively child slave labor in the cocoa  
9 trade.  The second much more mundane dimension is the  
10 credible basis standard for possible wrongdoing that  
11 is necessary to use Section 220.  And the third and  
12 most pedestrian issue, although one that I think  
13 ultimately is dispositive, is the procedural stage of  
14 the case, which is at the motion to dismiss stage.

15                   So today's hearing is for the Court to  
16 consider the plaintiff's exceptions to a final report  
17 in Louisiana Municipal Police Employees Retirement  
18 System versus The Hershey Co.

19                   The plaintiff takes exception to the  
20 Master's recommendation that the complaint be  
21 dismissed at the pleading stage because the  
22 plaintiff's request to obtain additional books and  
23 records under Section 220 fails to establish a  
24 credible basis from which the Court could infer

1 possible mismanagement or wrongdoing at The Hershey  
2 Company.

3           Under DiGiacobbe versus Sestak, the  
4 Delaware Supreme Court's decision, I am not permitted  
5 to give any deferences to the Master's ruling. I have  
6 to consider the issue de novo. I will give you my  
7 answer now and then elaborate.

8           I reach a different conclusion than  
9 the recommendation and I am denying the motion to  
10 dismiss.

11           The parties are Louisiana Municipal  
12 Police Employees' Retirement System, which everyone  
13 refers to affectionately as LAMPERS, which is a  
14 nonpartisan, nonprofit organization that provides  
15 pension benefits for the employees at municipal police  
16 departments in the State of Louisiana. Hershey, the  
17 defendant, is a Delaware corporation, with its  
18 principal offices in Hershey, Pennsylvania. It is the  
19 largest producer of chocolate in North America and a  
20 global leader in the chocolate and sugar confectionary  
21 industry, selling chocolate in approximately 70  
22 countries worldwide.

23           The complaint seeks an order  
24 permitting LAMPERS to inspect and make copies of

1 certain books and records set forth in its demand  
2 letter. Essentially, the complaint seeks more  
3 information.

4           Here, what I view as the key factual  
5 allegations of the complaint: Hershey controls  
6 42 percent of the market for chocolate products in the  
7 United States and is a major player in the chocolate  
8 industry worldwide. Cocoa is the key ingredient used  
9 to manufacture chocolate. West African countries,  
10 including Ghana and the Ivory Coast, supply 70 percent  
11 of the world's cocoa. Hershey's major sourcing  
12 countries include Ghana and the Ivory Coast, as well  
13 as other West African nations.

14           Hershey is well aware of the pervasive  
15 use of child-enforced labor in Ghana and the Ivory  
16 Coast. And I don't say that in a bad way. Part of  
17 what the allegations of the complaint show is that  
18 Hershey is engaged in steps to try to address these  
19 issues. But that said, it is established for purposes  
20 of this motion that Hershey is aware of the pervasive  
21 use of child and forced labor in Ghana and the Ivory  
22 Coast.

23           The laws of Ghana and the Ivory Coast  
24 forbid employers from forcing children to engage in

1 dangers activities such as carrying heavy loads,  
2 clearing land, things like that which require the use  
3 of sharp tools such as machetes, all things that are  
4 endemic to the production of cocoa. Those laws are  
5 routinely violated; hence, the use of child and forced  
6 labor is, indeed, pervasive.

7           In 2001 Hershey and other companies  
8 signed the Harkin-Engel Protocol, which established a  
9 goal of eliminating the worst forms of child labor in  
10 the cocoa sectors in Ghana and the Ivory Coast. There  
11 was a goal that by July 1, 2005, this consortium would  
12 develop and implement credible mutually acceptable  
13 voluntary industry-wide standards for public  
14 certification that cocoa beans and the derivative  
15 products have been grown and/or processed without any  
16 of the worst forms of child labor.

17           Note the date. 2001. Now, there's  
18 discussion in the briefing from Hershey that says  
19 "Hey, protocol's been changed. You can't allege a  
20 violation of the protocol," et cetera. That's not  
21 what the plaintiff is relying on it for. The  
22 plaintiff is citing the protocol for the fact of  
23 Hershey's long-standing awareness of this problem and  
24 unsuccessful efforts to address this problem. And,

1 again, I'm going to say this all the way through.  
2 This doesn't necessarily mean that Hershey is a bad  
3 company. What we're dealing with here is a request  
4 for more information, as I'll get to, based on the  
5 possibility of wrongdoing.

6           So the protocol I just referenced was  
7 2001.

8           On March 31, 2011, the Payson Center  
9 for International Development at Tulane University  
10 released a report on the continued prevalence of child  
11 labor in the cocoa industry. This is 10 years after  
12 the protocol. Basically the Payson Report documents  
13 all the worst ills that one could imagine about this  
14 problem. Nearly 2 million children work illegally on  
15 cocoa farms. There's evidence of widespread  
16 violations of human trafficking laws. According to  
17 the Payson Report, Ghana and the Ivory Coast are  
18 common destinations for trafficked children. Again,  
19 this is all material for which the purpose of a motion  
20 to dismiss supports the inference of pervasive use of  
21 child and forced labor in Ghana and the Ivory Coast  
22 and Hershey's awareness of the issue.

23           Now, despite the effort starting in  
24 2001 to come up with voluntary standards so that

1 people could certify that their cocoa was used without  
2 the worst forms of child labor, there's still no  
3 certification process. There's an indication that one  
4 supplier, Cadbury's, has done some form of  
5 certification. Hershey's has not. On October 3rd,  
6 2012, Hershey's announced that it would certify that  
7 its chocolate products were free of cocoa tainted with  
8 child labor and human trafficking violations by 2020.

9           As I discussed with counsel, I think  
10 from all this, it is quite reasonable to infer at the  
11 pleading stage -- and counsel ultimately does not  
12 dispute -- that right now Hershey's has to acknowledge  
13 that some of its cocoa is produced through child labor  
14 and as a result of individuals who were the victims of  
15 human trafficking.

16           If I call up, you know, my daughter's  
17 school and I say, "Can you confirm for me that there's  
18 no one on the payroll with a criminal record?" and  
19 they say to me, "We're not going to do that now, but  
20 we hope to be able to do so in 2020," I'm going to  
21 draw the inference that they can't do it right now and  
22 there's probably someone at the school with a criminal  
23 record. Now, that may or may not be a bad thing.  
24 Hopefully the person has paid their debt to society



1 and is no longer a threat, et cetera. But I'm going  
2 to draw that inference, and I think it's a reasonable  
3 inference to draw.

4           Hershey's stockholders also have  
5 brought concerns about the use of child labor within  
6 Hershey's supply chain, as are other people who are  
7 drawing that inference. Despite these concerns,  
8 Hershey has declined to provide any details about its  
9 sources of cocoa or to disclose its suppliers or to  
10 provide information from which one can evaluate the  
11 nature of Hershey's involvement in the supply chain.  
12 As I discussed with counsel, however, one can infer at  
13 the pleading stage that it is reasonably tight because  
14 Hershey's extols the fact that it monitors its  
15 suppliers, that it has multi-part programs to ensure  
16 that its suppliers are doing the best they can to  
17 adhere to Hershey's code of conduct, which it requires  
18 suppliers to sign, and that Hershey's kicks out  
19 suppliers when it finds out about violations.

20           All those are really good things,  
21 don't get me wrong. But all those also support a  
22 reasonable inference at the pleading stage that  
23 Hershey's has deep involvement in and control over its  
24 supply chain. That is not a radical inference, given

1 the market-leading status and dominant market share  
2 that Hershey's has and commands.

3           So these are the core facts as alleged  
4 in the complaint. The question is what inferences can  
5 you draw from them.

6           As I've noted, I have to review the  
7 Master's decision de novo. I'm not entitled or  
8 permitted to give it any deference. We're here on a  
9 motion to dismiss. As the Delaware Supreme Court held  
10 in *Central Mortgage versus Morgan Stanley*, the  
11 governing pleading standard is reasonable  
12 conceivability. The Delaware Supreme Court elaborated  
13 as follows: "The trial court should accept all  
14 well-pleaded factual allegations in the complaint as  
15 true, accept even vague allegations in the complaint  
16 as well-pleaded if they provide defendant notice of  
17 the claim, draw all reasonable inferences in favor of  
18 the plaintiff, and deny the motion unless the  
19 plaintiff could not recover under any reasonably  
20 conceivable set of circumstances susceptible of  
21 proof." That's at page 536 of the Delaware Supreme  
22 Court's ruling.

23           The conceivability standard, thus,  
24 asks whether there is "a possibility" that the

1 allegations of the complaint could support relief.  
2 That's at page 537.

3           That possibility standard intersects  
4 with another possibility standard to create at this  
5 procedural stage double possibility. Section 220 of  
6 the DGCL allows a stockholder to inspect a  
7 corporation's books and records for any proper  
8 purpose. It's well-established that investigation of  
9 mismanagement is a proper purpose. One can consult  
10 many Supreme Court decisions for that. The operative  
11 test as to what a stockholder has to show to establish  
12 a basis to inspect books and records to explore  
13 possible wrongdoing is Seinfeld versus Verizon  
14 Communications. Seinfeld said the following: "A  
15 stockholder is not required to prove by a  
16 preponderance of the evidence that waste and  
17 mismanagement are actually occurring. Stockholders  
18 need only show by a preponderance of the evidence a  
19 credible basis from which the Court of Chancery can  
20 infer that there is possible mismanagement that would  
21 warrant further investigation, a showing that may  
22 ultimately fall well short of demonstrating that  
23 anything wrong occurred. That threshold may be  
24 satisfied by a credible showing through documents,

1 logic, testimony or otherwise that there are  
2 legitimate issues of wrongdoing." That's from  
3 page 122 of the Delaware Supreme Court's decision.

4 So, again, we've already got possible  
5 and inferences going to the plaintiff because of the  
6 motion to dismiss standard.

7 Then the merits standard is that, to  
8 reiterate, "A stockholder is not required to prove  
9 that waste and mismanagement are actually occurring."  
10 A stockholder need only provide a reasonable basis  
11 from which I can infer -- here I'm quoting --  
12 "possible mismanagement." And in the words of the  
13 Delaware Supreme Court, the standard for possible  
14 mismanagement requires a showing that may, ultimately  
15 fall well short" -- not my words; their words -- "well  
16 short of demonstrating that anything wrong occurred."

17 Now, sadly, I think the Master's  
18 recommendation and the defendant's brief repeatedly  
19 focus on whether actual wrongdoing has occurred. I  
20 know they say they didn't, but let me give you some  
21 quotes.

22 So page 15 of the Master's report and  
23 one of the key bases for the recommendation of  
24 dismissal, she's just reviewed some of the facts that

1 I outlined for you, and then it states this:  
2 "Notably, none of these sources or any other source  
3 identified in the complaint states that Hershey has  
4 violated the law or is under investigation for  
5 possible legal violations, nor do they identify any  
6 illegal conduct within the company." That's the end  
7 of the quote.

8 "has violated the law." "under  
9 investigation." "any illegal conduct within the  
10 company." That's very different from "possible  
11 mismanagement," which may "fall well short of actual  
12 wrongdoing."

13 Page 16. Although the sources in the  
14 complaint -- I'm going to quote -- "detail at length  
15 very serious legal violations on many farms in the  
16 Ivory Coast and Ghana, none of the articles directly  
17 implicate Hershey in that conduct." Not the standard.  
18 "Directly implicate" is not the standard. "Possibly,"  
19 "possible wrongdoing" is the standard.

20 Page 17. "The statistical  
21 correlation, i.e. the idea that Hershey buys a lot of  
22 cocoa and lot of cocoa comes from Ghana and Ivory  
23 Coast and a lot of cocoa is tainted" -- actually, I  
24 don't think that's a statistical correlation. It's a

1 chain of inferences. But regardless, it is "vastly  
2 different from what LAMPERS offers in this case, which  
3 is little more than the logical fallacy that because  
4 some cocoa is produced using child labor and Hershey  
5 purchases a large amount of cocoa or cocoa-derived  
6 products, Hershey's must use cocoa products tainted by  
7 child labor."

8                   And it's not a "must." It's "may  
9 use," "possibly use."

10                   Right below that, the recommendation  
11 says, "Even if I could draw that inference" -- I  
12 actually think you can draw that inference at the  
13 pleading stage. "Even if I could draw that inference,  
14 LAMPERS has not alleged a credible basis from which I  
15 can infer wrongdoing."

16                   The point is not whether you can infer  
17 wrongdoing. The point is whether you can infer  
18 possible wrongdoing.

19                   Next page. "Neither the evidence nor  
20 the other sources on which LAMPERS relies provides any  
21 basis from which the Court could conclude that Hershey  
22 has violated the law." You guys are getting tired of  
23 the refrain by now. It's not "has violated the law."  
24 It's "possibly could violate the law."

1           Now, this is not something that came  
2 out of whole cloth from the Master. It's because  
3 Hershey has consistently made this argument. So even  
4 though Hershey's, like the Master's recommendation,  
5 recites the Seinfeld standard, whenever they get into  
6 the application, they always talk about whether  
7 Hershey is actually violating the law. That's not the  
8 test.

9           So on page 2 of their brief below --  
10 and I won't give you as many of these -- "The issue  
11 for the Court" -- I'm going to skip over some words --  
12 "is whether plaintiff has alleged any credible basis  
13 to believe that Hershey is violating any applicable  
14 laws, rules or regulations." Not the test.

15           Page 11. "LAMPERS fails to supply a  
16 credible basis from which the Court may infer any  
17 violation of law on the part of Hershey." Not the  
18 test.

19           "The complaint not only fails to  
20 supply a credible basis to believe that Hershey's  
21 directors or officers allowed any wrongdoing, its  
22 allegations and documents it incorporates  
23 affirmatively demonstrate the active role that the  
24 board takes in the oversight and concern for Hershey's

1 legal compliance." "allowed any wrongdoing." Not the  
2 test.

3 Page 12. "What is missing from the  
4 complaint is any credible basis to infer that Hershey  
5 as opposed to certain cocoa farmers in Ghana and the  
6 Ivory Coast or others has violated any federal, state  
7 or foreign law or that Hershey officers or directors  
8 engaged in any mismanagement." Not the test.

9 "The complaint, which relies solely on  
10 press coverage, the Payson Report and statements by  
11 Hershey, does not supply any credible basis to infer  
12 that Hershey has violated any law or used any child  
13 labor." Not the test.

14 Page 14. "Missing from these reports  
15 is any allegation that Hershey itself has violated any  
16 applicable law or uses child or forced labor." Not  
17 the test.

18 Page 22. "LAMPERS supplies no  
19 credible basis from which to infer any violations of  
20 law were committed by Hershey." I think you know what  
21 I'm going to say.

22 That was in the briefs before the  
23 Master. Similar statements appear in the briefing in  
24 front of me on page 4, on page 14, and in other



1 places.

2                   So let's apply the actual test,  
3 whether there's a possibility of mismanagement and  
4 whether it's conceivable, based on the allegations of  
5 the complaint, that there is a possibility of  
6 mismanagement, because, recall, we're here on a motion  
7 to dismiss.

8                   What that means, I think, is if there  
9 are two competing inferences from the allegations in  
10 the complaint at this stage, the plaintiff gets the  
11 inference. Moreover, the inference that the  
12 allegations have to support is not that there is  
13 actual wrongdoing, but that there is possible  
14 wrongdoing. The point of this lenient standard, I  
15 believe, is to drive Section 220 to a prompt merits  
16 hearing where the Court can actually make  
17 determinations about the sufficiency of the evidence  
18 and do the type of balancing that Hershey says is  
19 required by the credible basis standard.

20                   Our Chief Justice, while he was  
21 Chancellor, has authored several opinions saying that,  
22 "Look, motion to dismiss practice in Section 220  
23 actions is really inefficient for precisely these  
24 reasons." I think I may have said it a couple times,

1 too. We're not the only ones. This case is a prime  
2 example of that. This complaint was filed on  
3 November 1, 2012, 16, 17 months ago. As a summary  
4 proceeding, this should have gone to a merits hearing  
5 in 60 days and been resolved. Instead, we're here  
6 still plodding along through motions to dismiss.

7           In my view, the allegations in the  
8 complaint, read in the doubly plaintiff-friendly  
9 manner that is required in this procedural posture,  
10 support a reasonable inference of possible violations  
11 of law in which Hershey may be involved. And those  
12 possibilities are sufficient, in the words of our  
13 Supreme Court, "to warrant further investigation."

14           It may, indeed, prove that the  
15 documents that Hershey produces show that they are not  
16 involved in violations of law at all. That's part of  
17 the purpose of a Section 220 investigation, so that a  
18 lawyer like Mr. Barry and his client can get the  
19 information, evaluate it and say, "You know what. We  
20 had suspicions. We had reasonable suspicions, but we  
21 were wrong." That's one of the reasons you have  
22 Section 220.

23           So what is the credible basis for  
24 wrongdoing? As I've said, the allegations of the

1 complaint support a reasonable inference that  
2 Hershey's products contain cocoa and cocoa-derived  
3 ingredients that were the result of child labor and  
4 human trafficking. There's also a reasonable  
5 inference, one possible inference, that the board  
6 knows some of its cocoa and cocoa-derived ingredients  
7 are sourced from farms that exploit child labor and  
8 use trafficked persons. The laws of Ghana prohibit  
9 exploitative child labor and human trafficking. The  
10 Children's Act prohibits the use of exploitive child  
11 labor, defining children as persons below the age of  
12 18. The Human Trafficking Act prohibits the use of a  
13 trafficked person and also includes a duty to inform.

14           One possible inference from the  
15 complaint is that Hershey's cocoa sustainability  
16 efforts, which admittedly and necessarily put Hershey  
17 in contact with farmers in West Africa, results in  
18 Hershey knowing of instances involving the use of  
19 trafficked children on cocoa farms in Ghana that would  
20 have triggered the duty to inform. That is not the  
21 only possible inference, but it's one possible  
22 inference. And at this procedural stage, I have to  
23 credit it.

24           Hershey has not provided any

1 information about its suppliers. One possible  
2 inference -- not the only inference, but one possible  
3 inference is that Hershey's relationships with its  
4 suppliers could support a finding of the use of labor  
5 for an aiding and abetting claim. Not the only  
6 possible inference, but one possible inference.

7           The laws of the Ivory Coast similarly  
8 prohibit exploitative child labor and human  
9 trafficking. And courts in the United States, most  
10 notably in the recent Doe v Nestle decision recognized  
11 that it is possible for a U.S. corporation to be held  
12 liable for aiding and abetting violations of  
13 international law, such as the principle, hopefully  
14 universally acknowledged, against the use of child  
15 labor and human trafficking.

16           Now, as I've already said, Hershey's  
17 response has been to argue that plaintiff hasn't  
18 proved wrongdoing. That's not the test. Hershey's  
19 has also said that there's no evidence related  
20 directly to it, i.e., directly to Hershey's  
21 involvement. I think you can draw the inference from  
22 Hershey's inability to represent that it currently  
23 uses only certified cocoa and its undertaking to do so  
24 by 2020.

1           I think you can draw the inference of  
2 knowledge from Hershey's cocoa sustainability efforts,  
3 which include its eight "on-the-ground programs"  
4 through which Hershey has contact with farmers in West  
5 Africa and high-level visits, such as visits by  
6 Hershey's chairman.

7           You can draw the inference from a  
8 decision referenced in the complaint by Whole Foods to  
9 stop carrying Hershey's Scharffen Berger brand because  
10 of Hershey's inability to certify.

11           Again, what you don't need for 220 --  
12 and certainly not at the motion to dismiss stage -- is  
13 a report that says Hershey itself has violated this  
14 applicable law. It's the possibility, which, as our  
15 Delaware Supreme Court said, falls well short of  
16 actual wrongdoing.

17           Finally, I'll address LAMPERS versus  
18 Lennar. I respectfully disagree with that outcome. I  
19 do not get how applying a plaintiff-friendly standard  
20 and the well-short credible basis standard, that you  
21 wouldn't at least get to trial. Lennar, I mean, would  
22 make complete sense as a trial-stage decision because  
23 at a trial, a court can weigh competing inferences and  
24 figure out if the plaintiff has pled enough.

1                   What I think I have to do is follow  
2 Seinfeld. Seinfeld is the Delaware Supreme Court.  
3 That's why I have to follow him. Seinfeld talks about  
4 a showing "well short of actual wrongdoing." Seinfeld  
5 explains that that showing can be supported through  
6 documents, logic, testimony, or otherwise.

7                   So for the reasons I've discussed, I  
8 decline, unfortunately, to adopt the recommendation of  
9 the Master's final report. It would be much easier  
10 for me to adopt the recommendation of the final  
11 report. Nevertheless, for the reasons I've stated,  
12 the motion to dismiss is denied.

13                   Part of what I think my obligation  
14 under these circumstances is is not to dump work back  
15 on the Master as a result. Therefore, unfortunately,  
16 I will hear the case through a merits hearing. This  
17 should have been a summary proceeding. It still is a  
18 summary proceeding. It needs to go to a hearing in 60  
19 days. So the parties need to contact chambers, obtain  
20 a date for a one-day trial within 60 days.

21                   Let me reiterate some guidance in  
22 terms of Section 220. The plaintiff can't get merits  
23 discovery in a Section 220 case. In other words, you  
24 can't get discovery into the underlying conduct. You

1 can't get the documents that you actually are seeking  
2 through your 220 request. Discovery is limited to  
3 things like what types of documents exist, how  
4 burdensome would it be, the types of issues that are  
5 pertinent to the question of ultimate relief, because  
6 it very well could be that even if relief were granted  
7 in this case -- and I'm not saying it will be -- that  
8 the scope of the documents that would be produced  
9 would be much more rifled to use the Security First  
10 term, than what the demand asks for.

11           The plaintiffs, of course, are subject  
12 to discovery as to what they'll do to prove their case  
13 in terms of fact witnesses, or if they're going to  
14 call experts, experts. I'll have a trial. At the  
15 trial I'll actually be able to assess these documents,  
16 weigh competing inferences. I'm not telling you  
17 inspection is going to be granted. I'm just saying I  
18 can't dismiss it at this stage of the case.

19           Mr. Barry, any questions?

20           MR. BARRY: No, Your Honor. Thank  
21 you.

22           THE COURT: Mr. Raju, any questions?

23           MR. RAJU: No, Your Honor.

24           THE COURT: Great. Thank you,

1 everyone, for coming in today. I really appreciate  
2 it. We stand in recess.

3 (Court adjourned at 3:37 p.m.)

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CERTIFICATE

I, NEITH D. ECKER, Chief Realtime Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through contain a true and correct transcription of the RULings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 19th day of March 2014.

/s/ Neith D. Ecker

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Chief Realtime Court Reporter  
Registered Diplomate Reporter  
Certified Realtime Reporter  
Delaware Notary Public