



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RENA A. KASTIS and JAMES E. CONROY,	:
Derivatively and on Behalf of	:
HEMISPHERX BIOPHARMA, INC.,	:
	:
Plaintiffs,	:
	:
v.	: Civil Action
	: No. 8657-CB
WILLIAM A. CARTER, THOMAS K. EQUELS,	:
ROBERT E. PETERSON, IRAJ E. KIANI,	:
WILLIAM M. MITCHELL and RICHARD C.	:
PIANI,	:
	:
Defendants.	:
	:
and	:
	:
HEMISPHERX BIOPHARMA, INC., a	:
Delaware corporation,	:
	:
Nominal Defendant.	:

- - -

Chancery Courtroom No. 12A
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Friday, August 15, 2014
10:05 a.m.

- - -

BEFORE: HON. ANDRE G. BOUCHARD, Chancellor

- - -

SCHEDULING CONFERENCE AND DISCUSSION CONCERNING
AMENDMENT OF BYLAW

CHANCERY COURT REPORTERS
500 North King Street
Wilmington, Delaware 19801
(302) 255-0521

1 APPEARANCES:

2 MICHAEL HANRAHAN, ESQ.
3 PAUL A. FIORAVANTI, JR., ESQ.
Prickett, Jones & Elliott, P.A.
-and-
4 LEE D. RUDY, ESQ.
ERIC L. ZAGAR, ESQ.
5 of the Pennsylvania Bar
Kessler Topaz Meltzer & Check, LLP
6 for Plaintiffs

7 M. DUNCAN GRANT, ESQ.
8 JAMES H.S. LEVINE, ESQ.
Pepper Hamilton LLP
-and-
9 ROBERT L. HICKOK, ESQ.
of the Pennsylvania Bar
10 Pepper Hamilton LLP
for Defendants and Nominal Defendant

11 MICHAEL P. KELLY, ESQ.
12 DANIEL A. BROWN, ESQ.
McCarter & English, LLP
13 for the Special Litigation Committee

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1 THE COURT: Good morning, counsel.

2 MR. HANRAHAN: Good morning, Your
3 Honor. Michael Hanrahan for plaintiffs. With me at
4 counsel table are Lee Rudy and Eric Zagar of the
5 Kessler Topaz Melzer & Check firm.

6 THE COURT: Good morning.

7 MR. HANRAHAN: My colleague Paul
8 Fioravanti.

9 THE COURT: Certainly. Good morning,
10 Mr. Fioravanti.

11 MR. GRANT: Good morning, Chancellor.

12 THE COURT: Good morning. How are you
13 today, Mr. Grant?

14 MR. GRANT: Doing just great. Thank
15 you very much.

16 With me at counsel table are Robert
17 Hickok, my Philadelphia office partner, who has been
18 admitted pro hac vice --

19 THE COURT: Good morning.

20 MR. GRANT: -- and James Levine from
21 our Wilmington office.

22 THE COURT: Good morning.

23 MR. GRANT: On behalf of nominal
24 defendant, Hemispherx, and the director defendants.

1 THE COURT: Very good. Thank you.

2 Good morning Mr. Kelly.

3 MR. KELLY: Michael Kelly, McCarter &
4 English, for the Special Litigation Committee. It's
5 my first appearance before Your Honor, so I would be
6 remiss if I didn't say it's great to be before Your
7 Honor. It's my privilege.

8 THE COURT: Thank you.

9 MR. KELLY: I have seated behind me
10 Dan Brown, the brains behind the operation.

11 THE COURT: Thank you.

12 There are a lot of people here for a
13 scheduling conference, Mr. Hanrahan.

14 MR. HANRAHAN: It's an important
15 scheduling conference, Your Honor, because it really
16 affects whether this litigation continues or not.

17 Plaintiffs requested a conference
18 because a new bylaw enacted by the board would make
19 plaintiffs subject to liability if they do anything to
20 continue or maintain this litigation.

21 This was a small derivative case
22 raising a straightforward legal issue as to whether
23 three agreements authorized \$2.5 million in bonuses.
24 Defendants have turned it into expensive litigation

1 focused on different issues relating to a Special
2 Litigation Committee and now this bylaw that purports
3 to impose a bond requirement and liability for
4 defendants' fees on the plaintiffs.

5 The defendants were first going to
6 move to dismiss for failure to make demand. We
7 pointed out that, among other reasons, two of the four
8 directors were recipients of the bonuses. So instead
9 of that, they embarked on a Special Litigation
10 Committee where a crony of one of the recipients of
11 the directors -- of the bonuses was appointed as a
12 fifth director. And the director who headed the
13 compensation committee that awarded the bonus was also
14 made a member of the Special Litigation Committee.

15 And what has happened in this case is
16 I think as Chancellor Brown observed years ago, that a
17 Special Litigation Committee tends to add multiple
18 layers to the litigation. There was the stay motion
19 and, of course, under -- Chancellor Strine concluded
20 that under Supreme Court precedent, a stay was
21 required. There was a four-month delay while there's
22 an investigation. Then there's a motion to dismiss
23 and a brief filed. And then the parties embarked on
24 discovery.

1 And actually, there's a disagreement.
2 We don't agree that document discovery has been
3 concluded because, among other things, the
4 materials -- the agreement and other materials
5 relating to Sage, which is an entity that demanded a
6 bonus, and that's what triggered the CEO and the
7 general counsel to say, Well, we're entitled to a
8 bonus too, well, we want to see that, and they haven't
9 produced it.

10 But right now, we can't do anything
11 about that, because if we do anything, under this
12 bylaw, it subjects our clients to liability that the
13 defendants say they've incurred hundreds of thousands
14 of dollars of fees so far. And so while we were
15 carrying out the process that Zapata mandates for
16 dismissal of a derivative case in a demand excused
17 context, this bylaw comes in and, basically, we can't
18 continue with the Zapata process.

19 We can't do anything because there
20 would be crippling financial liability that would
21 attach to our clients, including a bond requirement
22 and liability for all defendants' legal fees and
23 expenses if plaintiffs continue or maintain this
24 litigation and do not obtain a judgment on the merits

1 essentially for all the relief sought.

2 I've litigated many cases on behalf of
3 stockholders in my 36 years at the bar, and very few
4 result in a judgment on the merits. Fewer still a
5 judgment on the merits for plaintiffs. And of those
6 few, my firm has had some success in obtaining actual
7 judgments on the merits in favor of stockholders. But
8 even in that handful of cases, we would not have met
9 the success standard of the Hemispherx bylaw.

10 For example, in Weinberger versus UOP,
11 we lost at trial before the initial Supreme Court
12 panel before we won a partial victory on liability
13 before the Supreme Court en banc. On remand, we
14 contended there should be rescissory damages or that
15 compensatory damages should be at least \$3 a share;
16 but the Chancellor awarded \$1 per share.

17 So while we did obtain a judgment on
18 the merits, it did not provide in substance and amount
19 the full remedy sought. It would not have satisfied
20 the Hemispherx-style bylaw. And so the plaintiffs in
21 Weinberger, a landmark victory for the stockholders,
22 would have been obligated to pay the defendants' fees
23 and expenses. And ironically, in Weinberger, we
24 requested that the majority stockholder and its

1 designees to the UOP board be required to pay the
2 fees. That was denied, even though they breached
3 their duty of loyalty. And instead, it was, Well, any
4 fees had to come out of the recovery for the class.

5 But now, we have a bylaw that,
6 basically, even if you succeeded in a significant way,
7 you could be liable for hundreds of thousands if not
8 millions of dollars of legal fees.

9 And the same principle would apply 25
10 years later in Southern Peru. We recovered \$2 billion
11 in a derivative judgment but it didn't provide the
12 full rescissory relief or the full damages relief
13 sought. Moreover, though the Chancellor ultimately
14 found the performance of the Southern Peru special
15 committee was atrocious, the special committee
16 directors were granted summary judgment under Section
17 102(b)(7).

18 THE COURT: Can I interrupt you for a
19 few minutes?

20 MR. HANRAHAN: Yes.

21 THE COURT: The reason I made the
22 comment I did at the outset is we're in sort of a
23 perplexing posture, as I see it. What are you
24 expecting the Court to do today?

1 MR. HANRAHAN: Your Honor, what we
2 would like the Court to do is to set a brief schedule
3 and schedule a hearing on our motion. And let me --

4 THE COURT: Because -- let me just
5 make sure I sort of --

6 MR. HANRAHAN: Mm-hmm.

7 THE COURT: Everything you've said in
8 terms of the background is consistent with what I've
9 read through the papers thus far in general terms. I
10 used those words advisedly at the beginning because,
11 as I understood it, there's only been one complaint in
12 this case. Right?

13 MR. HANRAHAN: That's correct.

14 THE COURT: Okay. They filed a motion
15 to dismiss, formed an SLC. You got stayed. There
16 were reports coming out recommending dismissal.
17 You're now in SLC discovery. The bylaw comes down.
18 And then you send me a motion and a 15-paragraph,
19 10-page speaking motion saying, Please schedule
20 something. I schedule a scheduling conference.

21 Next thing I know, I have two briefs
22 that start delving very deeply into the beginning
23 parts of the merits of an underlying challenge, but I
24 don't view that as really the right way to deal with

1 an underlying challenge. So that's the reason I asked
2 you what it is you're asking the Court to do.

3 But let me ask a few other questions.
4 It's correct, isn't it, that you haven't amended your
5 complaint to make a challenge to this bylaw? Is that
6 right?

7 MR. HANRAHAN: Your Honor, the problem
8 is --

9 THE COURT: I think that's a yes or
10 no.

11 MR. HANRAHAN: We have not amended it,
12 Your Honor. And the reason we have not amended it is
13 that the bylaw is drafted so as to paralyze
14 plaintiffs. Anything we do would be to continue or
15 maintain the litigation, and at that point, liability
16 attaches to our clients. And they -- no rational
17 stockholder could do that. I couldn't ask them to do
18 that.

19 THE COURT: Why could this claim be
20 ripe without you amending?

21 MR. HANRAHAN: Excuse me, Your Honor?

22 THE COURT: How could I rule
23 substantively that the bylaw is invalid without a
24 claim and a pleading challenging the bylaw? How could

1 I do that?

2 MR. HANRAHAN: Well, Your Honor,
3 because we're not in a position where we can file an
4 amended complaint. And this is a court of equity.

5 THE COURT: Well, you could. You have
6 to make some decisions.

7 MR. HANRAHAN: They've purported to
8 change the rules of the litigation. And I mean, this
9 is the problem with this type of bylaw. Normally, you
10 have -- the Court sets the rules and there's case law
11 that sets the rules. We now are in new territory
12 where this bylaw, which unlike the ATP bylaw, includes
13 the language "continues or maintains." And so we are
14 attempting to avoid doing anything that subjects these
15 plaintiffs, who are retirees --

16 THE COURT: But even if you brief the
17 motion that you're then asking me to brief, I think
18 you're already, under your own characterization of the
19 potential impact of this bylaw, in jeopardy in those
20 terms, aren't you?

21 MR. HANRAHAN: Your Honor, that's why
22 we come to this court of equity and say we're in an
23 unfair position here. We didn't put ourselves in that
24 position. But that's why perhaps, you know, our

1 motion strikes the Court as, Oh, well you could have
2 done it in a different procedural fashion, but we're
3 attempting to get the Court's attention --

4 THE COURT: Oh, you have my attention.

5 MR. HANRAHAN: -- and to get some
6 procedure. Because as Your Honor points out, we don't
7 know whether they'll take the position that the very
8 fact that -- if we dismiss the litigation, there may
9 be a claim for attorneys' fees.

10 THE COURT: Right.

11 MR. HANRAHAN: That's the problem with
12 this bylaw.

13 THE COURT: Right. So let's assume
14 for the sake of these questions that I were
15 sympathetic to your plight; that I understand all the
16 dynamics that you're pointing out that create a very
17 difficult situation for you. Tell me the legal
18 authority, though, that would allow me to effectively
19 render a declaratory judgment on a bylaw without a
20 claim in a case being brought challenging such a
21 bylaw.

22 MR. HANRAHAN: Well, Your Honor,
23 there's motion practice in cases that deals with
24 particular situations. And depending on how the Court

1 wants to characterize it, I mean, we have a procedural
2 situation where we are in, to use the words of Zapata,
3 procedural gridlock. That is, they've put us in a
4 position where we can't do anything.

5 Now, if the Court wants to tell them,
6 Hey, you can't do that -- that's really what we want,
7 is the Court to say, You can't do that. They're
8 entitled to go forward at least to challenge this
9 bylaw. Because alternatively, if the Court tells us,
10 No, you can't challenge the bylaw without incurring
11 liability for the plaintiffs, then we have to dismiss
12 the case. It is just not reasonable to expect any
13 stockholder --

14 THE COURT: What's the difference
15 between the following two scenarios: Scenario one,
16 what you're proposing -- which is I gather what you're
17 proposing -- is fully brief a facial challenge to this
18 bylaw based on your current pleading and see how that
19 shakes out, versus scenario two, amend your pleading,
20 put the claim in, and assert a facial challenge.
21 What's the difference?

22 MR. HANRAHAN: Well, Your Honor, at
23 least as we see it, our motion says we'll either
24 dismiss, or if the Court is willing to consider a

1 challenge to the bylaw and it's not going to result in
2 liability to our --

3 THE COURT: The second part, you're
4 not going to get either way until the end of that
5 process, the second part being that challenging the
6 bylaw is not going to expose you to liability. You
7 wouldn't get it until you briefed the issue anyway.

8 MR. HANRAHAN: Well, we thought we
9 might get it from the defendants, who might say, Well,
10 wait a minute. Because it is just colossally unfair
11 to put in this bylaw and then say, But if you try to
12 challenge it, then you're going to be liable for all
13 our fees.

14 THE COURT: Right. But suffice to say
15 I take it you didn't get it, at least sufficiently for
16 your purposes, from the defendants so far. Right?

17 MR. HANRAHAN: No, we haven't, Your
18 Honor. And I think that's --

19 THE COURT: Then what was that issue
20 about, We're not seeking to hold the lawyers liable;
21 we're just seeking something --

22 MR. HANRAHAN: They're just seeking to
23 hold the plaintiffs liable. Well, that's what they
24 say but that's not what the bylaw says.

1 THE COURT: I recognize that.

2 MR. HANRAHAN: And this is a further
3 problem because the rules keep changing. And one of
4 the other problems with going forward is, well, are
5 they going to change the rules again two months from
6 now? Six months from now? After the Court's decision
7 on the merits comes down? How would you ever know?
8 But you can't put people at risk of losing their
9 retirement savings in that situation.

10 So I think what has to happen here is
11 either there's a procedure that we can follow without
12 incurring liability for the plaintiffs or the bylaw
13 will have accomplished exactly what it was intended to
14 do. Intended to cause a dismissal of this litigation
15 not because of the merits but because they placed such
16 a tremendous financial obligation on the plaintiffs
17 that no rational stockholder is going to do that. So
18 that's why we're here.

19 And I know that we did a motion that
20 was ten pages long to give the Court the background
21 and what we -- we got back a response of 18 pages that
22 raised a lot of -- and we felt we needed to show the
23 Court there are issues of validity here that were not
24 touched upon in ATP; that there is a context here as

1 to whether or not this bylaw operates equitably in
2 this particular set of circumstances.

3 And I think one of the ways it
4 operates inequitably is the very problem Your Honor
5 has put your finger on. It puts plaintiffs in a
6 no-win situation where, under the bylaw, you can't
7 even be sure that dismissing the case doesn't trigger
8 a claim for attorneys' fees against you.

9 On that basis alone, I think a court
10 of equity has the power to say, Okay, we're going to
11 have a proceeding here, and plaintiffs' participation
12 in that proceeding is not going to trigger liability.
13 You know, if that's the way defendants want to play
14 it, then I think the Court should say, No, not going
15 to -- you know, this is still a court of equity. And
16 we've gone down a road where now cases are going to,
17 apparently, increasingly be run according to bylaws
18 that boards put in. And they all are putting in
19 different ones. Some say the corporate benefit
20 doctrine doesn't apply anymore.

21 And so now you're going to have this
22 kind of Whack-A-Mole problem where they're just going
23 to be popping up all over. The Court is going to
24 spend a huge amount of time. One of the things that

1 hasn't been touched on is this dumps in Your Honor's
2 lap at the end of cases, now we're going to have this
3 huge proceeding over fee awards and over whether the
4 plaintiffs are liable for the fees and what was the
5 degree of success and all. All of this, boards can do
6 by passing bylaws? It seems odd.

7 But in this situation, at least, we
8 think we're entitled to get an assessment of, is this
9 bylaw valid and enforceable? Because alternatively,
10 if a bylaw may apply to these plaintiffs, they
11 cannot -- and virtually no stockholder can,
12 particularly in a derivative case. You have no direct
13 interest in any recovery and your indirect interest is
14 going to be minimal. That's why there are derivative
15 cases, is because the Delaware courts have recognized
16 that, otherwise, people would not bring a case
17 challenging a corporate action because they wouldn't
18 have a sufficient economic interest. It's only if you
19 can bring it on a representative basis.

20 So what they've done is essentially
21 undercut the whole theory of the derivative case that
22 has been around since before this Court existed as a
23 principle of equity.

24 So we would ask that the Court

1 schedule a hearing and allow us to go forward to it
2 without a fret of liability. I think we're at least
3 entitled to that.

4 Thank you, Your Honor.

5 THE COURT: Thank you.

6 Mr. Grant.

7 MR. GRANT: Thank you, Your Honor.

8 To address the purpose for which you
9 convened this hearing, we think in terms of
10 scheduling, that the most orderly way to proceed is
11 for any remaining discovery to be completed relative
12 to the Special Litigation Committee's motion to
13 dismiss, briefing on the SLC motion to dismiss,
14 argument and decision. And Mr. Kelly, I think, will
15 support that position.

16 The SLC motion to dismiss has been
17 pending for seven months. We now have a new motion
18 injected into the case, but we think --

19 THE COURT: Well, injected by virtue
20 of your clients' rather extraordinary actions --

21 MR. GRANT: That's fair.

22 THE COURT: -- in the middle of the
23 case.

24 MR. GRANT: That's fair. But we think

1 that's the orderly way to proceed.

2 Now, to touch just briefly on the
3 merits -- and I don't propose to dive deeply into
4 them. I don't think that's why we're here. You've
5 read our papers. We agree with you that if the bylaw
6 is going to be challenged, the proper way to do it is
7 with an amendment to the complaint.

8 THE COURT: That's interesting you say
9 that because that was certainly an observation I had,
10 but that's not in your papers.

11 MR. GRANT: It's not, but I was
12 inspired by your comment. I mean, we do say ripeness.
13 We say it's not ripe because --

14 THE COURT: For a different reason.

15 MR. GRANT: Yeah, for a different
16 reason, because there's the threat of harm but there
17 is no actual tangible harm. And we've also pointed
18 out that for that harm to become tangible, there are
19 multiple stages at which you would become involved and
20 rule whether we can go forward. Has there been
21 substantial success on the merits by plaintiffs? May
22 we apply the bylaw to these plaintiffs? Is the
23 amount, if we seek to apply it, is the amount that
24 we're seeking in reimbursement fair and reasonable?

1 So it's not as if the company can just roll over the
2 plaintiff. There would be judicial intervention.

3 THE COURT: Is the company prepared or
4 not to make a commitment that it won't seek to enforce
5 this bylaw insofar as it would concern litigation over
6 the validity of the bylaw or whether it was adopted
7 inequitably? Yes or no, at this point?

8 MR. GRANT: So I will answer yes or
9 no. Just to be sure I understand, so in effect, the
10 proposed briefing and argument on the bylaw, is
11 that --

12 THE COURT: Is the company prepared to
13 commit -- and we can take it in stages -- one, to
14 allow -- whether we put it in a pleading or not, we'll
15 get to that separately -- litigation over the facial
16 validity of a bylaw to occur without seeking to
17 impose, if it goes unfavorably for the plaintiffs, the
18 application of the bylaw against the plaintiff --
19 anybody -- the plaintiff, plaintiff's counsel,
20 anybody?

21 MR. GRANT: For that phase of
22 litigation, yes.

23 THE COURT: All right.

24 MR. GRANT: We commit that the work

1 done on that briefing and argument and so forth, we
2 will not seek to impose the bylaw against plaintiff.

3 And as to their counsel, I mean, we
4 have committed --

5 THE COURT: You've already given --

6 MR. GRANT: -- that counsel are not on
7 the hook.

8 THE COURT: Okay. But it won't apply
9 to anybody for a facial validity challenge to the
10 bylaw.

11 MR. GRANT: Correct.

12 THE COURT: Okay. Now let me take it
13 to the next step. How about will it apply to anybody
14 for purposes of making a factual record and bringing
15 on a claim -- a Schnell claim, basically -- that it
16 may have been adopted for an improper purpose? Is the
17 company prepared to commit that it won't seek to apply
18 the bylaw in that circumstance if it works out g for
19 the plaintiff?

20 MR. GRANT: When you say "anybody,"
21 you mean a different plaintiff?

22 THE COURT: No, no, no. In this case.
23 In this case. Let's assume Mr. Hanrahan amended his
24 complaint, sought declaratory judgment that the bylaw

1 is invalid, asserted a breach of fiduciary duty claim
2 or whatever claim he wants to bring saying it was
3 adopted for an inequitable purpose. I hear you saying
4 that on Count I, declaratory judgment, facially
5 invalid, the company is not going to enforce this
6 bylaw to litigate that issue. I appreciate that
7 concession, if you will.

8 What I'm asking you now is for
9 purposes of Count II, if he litigates over whether it
10 was adopted for an inequitable purpose, takes
11 discovery surrounding the circumstance of the adoption
12 of the bylaw, litigates that issue, is the company
13 prepared to commit or not that it will seek to enforce
14 that bylaw against anybody?

15 If you don't have a -- look, I'm not
16 going to like tear something out of you you're not
17 prepared to commit, but it would help me sort through
18 things if I knew your position on that.

19 MR. GRANT: Understood, and I
20 appreciate that.

21 The company's position on that
22 question, Your Honor, is if the amount of discovery
23 required is reasonably cabined so we're not talking
24 about 20 depositions, then, yes, we will commit not to

1 seek to apply the bylaw against plaintiffs for an
2 as-applied or is-it-equitable type of challenge.

3 Now, if -- I don't think they need 10
4 or 20 depositions, but if it became a huge discovery
5 program, I'd like the opportunity to consult with our
6 client before giving a firm answer.

7 THE COURT: I appreciate that. Thank
8 you.

9 I imagine there will be some document
10 discovery in that process if we ever go there as well,
11 but --

12 MR. GRANT: Yes, of course.

13 THE COURT: Right.

14 MR. GRANT: But I think, principally,
15 they would be interested in depositions and ask the
16 question, why did you adopt this bylaw?

17 THE COURT: Okay.

18 MR. GRANT: And I think they would
19 find out that this Kastis litigation is not the
20 principal reason. I think they'll find out that
21 there's securities litigation in the Eastern District
22 of Pennsylvania which is really the central reason for
23 adoption of the bylaw.

24 THE COURT: I see. Okay.

1 I didn't mean to cut you off from the
2 other points you want to make.

3 MR. GRANT: No. I just -- I'm
4 reluctant to ignore the merits after the detail you've
5 heard.

6 THE COURT: Sure.

7 MR. GRANT: Just very briefly, we
8 think under ATP that the bylaw is facially valid.
9 There is a three-part test. Is it authorized by
10 statute? Is it authorized by the corporation's
11 charter? And is it otherwise prohibited by law?
12 We've presented in our papers the reasons why we think
13 it satisfies that test.

14 We were, frankly, a little confused
15 until we saw the reply brief whether they were trying
16 to make an as-applied or inequitability type of
17 argument. I don't believe they are, but as to your
18 question about discovery, I think that's the right way
19 to go for any proper as-applied challenge and we're
20 prepared for that.

21 And I think, just the final point, I
22 think this case intersects very well with Chief
23 Justice Strine sitting as Chancellor in the
24 Boilermaker case where there were four counts in the

1 complaint. He took on Counts I and IV, which were the
2 facial challenges: one, is it authorized by the
3 statute; and secondly, is it a breach of the contract
4 among corporate constituents. And at that time, he
5 did not take on Counts II and III, which were, in
6 effect, as-applied challenges.

7 And he specifically said, Look,
8 plaintiffs, you have a problem with this mandatory
9 venue provision in the bylaws but you haven't gone out
10 to some other forum and pursued a claim and had a
11 motion to dismiss filed on ground of the venue bylaw,
12 so you haven't really been, in effect, harmed. It's
13 not ripe.

14 And we think that's what we have here
15 as well, for reasons you can -- you've seen in our
16 papers. We haven't sought to apply the bylaw to them
17 and we're not sure we ever would.

18 THE COURT: All right. Anything else?

19 MR. GRANT: That's all, unless you
20 have questions.

21 THE COURT: Not at this time. Thank
22 you, Mr. Grant.

23 Mr. Kelly.

24 MR. KELLY: Thank you, Your Honor.

1 Michael Kelly for the Special Litigation Committee.
2 This is a status conference to address the motions.

3 THE COURT: It has become very
4 free-wheeling, as you can see.

5 MR. KELLY: My application, Your
6 Honor, is that, as you know, the Special Litigation
7 Committee filed a report back in December, on
8 December 20, 2013, and we issued -- sorry -- we filed
9 a motion to dismiss back on January 20, 2014.

10 So my application is that -- Your
11 Honor already hit upon some of the procedural
12 irregularities that I was going to comment upon in
13 this case. Particularly given the fact that the
14 General Assembly is going to be addressing the ATP
15 issue this coming fall, my application is let's
16 proceed in the normal course and have this Special
17 Litigation Committee motion to dismiss decided, and
18 then we can talk about fees later.

19 It just seems odd to me that we're
20 putting the whole fee issue and whether plaintiffs'
21 firm should proceed at risk first. Our motion was
22 filed almost eight months ago. I took some notes. We
23 produced over 1900 pages of documents. We met and
24 conferred with plaintiffs' counsel. There is no

1 motion to compel outstanding.

2 There was talk about depositions. And
3 July 15, we sent a letter saying, Now that we've
4 produced documents, we have had a meet and confer,
5 which people do you want to depose? And then we got
6 into this whole bylaw thing.

7 So my application is I think discovery
8 is close to being over. I don't know of any document
9 issues. If they want to depose somebody, let's have
10 it happen soon and let's have this thing decided. And
11 they can file a brief in response to our motion to
12 dismiss, since it's been out there since January, and
13 let's decide that, and then, you know, move to the fee
14 issue later. Maybe the defendant won't move for fees.
15 Who knows? If they do, then we can challenge them.

16 THE COURT: So if you were in
17 Mr. Hanrahan's shoes, you would take that risk and
18 litigate the rest of the SLC case with no concern
19 about the potential effect of the fee-shifting bylaw.
20 Is that right?

21 MR. KELLY: Look, I think the world of
22 Mr. Hanrahan and I don't want to cause him to have any
23 undue stresses, extra stresses in life, but there's
24 two sides of the coin. The other side of the coin is

1 that, hey, by prolonging and keeping the delay on the
2 Special Litigation Committee, we're sitting out there
3 and my client is incurring costs, not moving forward,
4 while we get sidetracked on this whole bylaw issue.

5 We're going to have to still be
6 involved. And I think just -- I haven't been in the
7 bar 36 years. I know I look a lot older than
8 Mr. Hanrahan. But I've never seen a case in this
9 procedural posture where we're going to put the
10 decision of fees and the risks -- I mean, they filed
11 the complaint. There's always risk. But I don't see
12 how that can't be decided later, if there is an
13 application for fees, and we can talk about all that.
14 We're holding up the merits of the case. So my
15 application is let's get that done; worry about fees
16 later.

17 THE COURT: Thank you, Mr. Kelly.

18 MR. KELLY: Thank you, Your Honor.

19 THE COURT: Mr. Hanrahan, I've done
20 part of your work for you, so, hopefully, you can
21 focus on where we are.

22 MR. HANRAHAN: Your Honor, on the
23 Special Litigation Committee aspect of it, we can't
24 take discovery. We can't move to compel. That would

1 be continuing the -- and the Special Litigation
2 Committee procedure is what has delayed the merits.
3 And the merits are somewhat considered in the Special
4 Litigation Committee process, but it's not the
5 decision on the merits anyway.

6 So -- and as far as depositions, yeah,
7 they sent us a letter saying, Go ahead and do
8 depositions, like a week after the bylaw was adopted.
9 So I don't know whether they were trying to sucker us
10 into taking depositions and then they'd turn around
11 and go, Aha, you're now liable for all the fees.

12 THE COURT: I looked at the docket.
13 Depositions notices I think went out in February,
14 early February, at the time of the document requests.
15 I'm sure it took a little time to get the documents,
16 but --

17 MR. HANRAHAN: It took a lot of time
18 to get the documents, Your Honor. There were problems
19 with -- and there are still issues with them. I've
20 mentioned, one key area where we haven't gotten the
21 documents yet. So, you know, they take four months or
22 more for their investigation and then they file a
23 brief a month later, and then, all of a sudden, they
24 say, oh, it's our fault that there's delay. Well, we

1 asked for documents. We didn't get them right away.
2 There's been a lot of back and forth trying to get
3 them, and we're still trying to get them.

4 THE COURT: Okay.

5 MR. HANRAHAN: So that's where that
6 stands.

7 There are a couple of interesting
8 things that were said. As far as discovery -- first
9 of all, we do, plainly -- this whole facial validity,
10 as-applied distinction that has grown up --

11 THE COURT: It's a pretty meaningful
12 distinction, don't you think? I mean, even --

13 MR. HANRAHAN: Well --

14 THE COURT: -- in the Schnell case, we
15 had --

16 MR. HANRAHAN: -- the discovery talks
17 about validity --

18 THE COURT: Excuse me. I'm not sure
19 you let me finish my sentence.

20 MR. HANRAHAN: I'm sorry, Your Honor.

21 THE COURT: So I would appreciate
22 that.

23 I think it's a pretty meaningful
24 distinction because how could you make a Schnell

1 application without a factual record?

2 MR. HANRAHAN: Your Honor, we think
3 there is a factual record here, starting with the
4 bylaw itself, how it was adopted. Now, what I think
5 the defendants want to do is put in a lot of
6 self-serving things from the directors saying, Oh,
7 we're good people and we did this. But I don't think
8 that can change what the bylaw says, when it was
9 adopted.

10 They talk about the timing of the
11 bylaw. Well, the timing of the bylaw, as Your Honor
12 noted, is in the middle of this litigation, in the
13 middle of the review of the Special Litigation
14 Committee process.

15 They've said that the purpose of the
16 bylaw is to deter litigation. Now, he said today,
17 Mr. Grant said that the securities litigation is the
18 central reason. That's very interesting, Your Honor,
19 because we got the letter threatening that this bylaw
20 was going to apply to our clients, and we were advised
21 to let our clients know that if they continued this
22 litigation, that they would be obligated for
23 defendants' attorneys' fees unless they were basically
24 100 percent successful. No such letter was sent in

1 the securities litigation. So to say that, Oh, we
2 were just the tail end doesn't quite add up.

3 In any event, it's clear that one of
4 the purposes of this bylaw was to end this litigation.
5 And they say now, Oh, we haven't decided yet whether
6 the bylaw will be applied. They sent us a letter that
7 said it was going to apply.

8 And this is -- you know, I think
9 Boilermakers, it's interesting, with the forum
10 bylaw -- and they said, well, oh, we didn't file in
11 some other forum and raise the challenge there. And I
12 guess that was our mistake. We thought that maybe it
13 was fair that the Delaware Court of Chancery have the
14 first opportunity to consider how the bylaw would
15 actually work.

16 But in the forum context, okay, if you
17 file an underlying claim in the other forum, then you
18 can get at the outset a determination of whether the
19 bylaw requires that you proceed elsewhere. We have an
20 underlying claim here, an underlying fiduciary duty
21 claim. They've put in this bylaw that they say
22 applies to our case. You look at the terms of the
23 bylaw and it's different from ATP because it's got the
24 words "continues or maintains" in there. So it was

1 drafted specifically to apply to this litigation. And
2 so the issue is ripe here.

3 And to say, Well, no, go ahead. Your
4 client should put themselves at risk -- they've
5 already said that the fees are in the hundreds of
6 thousands already. It's probably pretty likely it's
7 going to be significantly more than that if the
8 litigation proceeds. You cannot tell stockholders
9 that in order to challenge the bylaw, you have to
10 first put your retirement savings and your house at
11 risk. No one is going to do that. Mr. Kelly wouldn't
12 do it. I wouldn't do it. No one would do it.

13 THE COURT: He was going to use Logan
14 House as collateral.

15 MR. HANRAHAN: Well, maybe -- I don't
16 know what that's worth these days, Your Honor. Maybe
17 it's enough to cover.

18 THE COURT: I'm sorry, Mr. Kelly. I
19 owe you a public apology for even bringing that up.

20 MR. KELLY: Any publicity is welcome,
21 Your Honor.

22 MR. HANRAHAN: And Mr. Kelly's
23 reference to the General Assembly I think is what --
24 maybe what this, Oh, there ought to be a lot of

1 discovery -- and by the way, we didn't ask for
2 discovery. The defendants are saying there should be
3 discovery. So we didn't ask for 20 depositions. We
4 didn't ask for any depositions.

5 THE COURT: It does strike me as
6 odd -- look, I understand the timing dynamics of what
7 may or may not happen legislatively with respect to
8 this issue. It hasn't happened yet. It may not
9 happen next year. Who knows. But it does strike me
10 as odd to be so resistant to not wanting to fire all
11 your bullets at this bylaw and take a discovery
12 record, especially when you keep insinuating
13 circumstances surrounding its adoption you think are
14 suspicious without developing that record. Because if
15 you don't, you will be at risk of a facial validity
16 challenge being determined just that way, just as a
17 facial challenge.

18 MR. HANRAHAN: Well, Your Honor, I
19 think the insinuations are supported by the record.
20 We have a letter. I don't think anything could be any
21 clearer than that letter.

22 THE COURT: But there's no substitute
23 for internal e-mails, minutes, depositions --

24 MR. HANRAHAN: But again, Your Honor,

1 our view going into this was we can't do that.

2 THE COURT: Okay.

3 MR. HANRAHAN: Because if we try to do
4 it, if we send out a document request and amend the
5 complaint and do all these things --

6 THE COURT: Well, it sounds like,
7 though, I heard -- and you can get the transcript
8 later, but I heard a concession that I'll put it as
9 reasonable discovery on that issue, the bylaw won't be
10 asserted against you. So it sounds like you could do
11 it if you wanted to. And that would be your decision.

12 MR. HANRAHAN: If that's the position,
13 Your Honor, then I think we can talk to them.

14 THE COURT: Okay.

15 MR. HANRAHAN: I don't think a lot of
16 discovery is really going to be necessary. But
17 certainly, to the extent it makes the defendants and
18 the Court more comfortable with the circumstance, we
19 can do that. We think it is important to get a prompt
20 determination here. And that, really, what's
21 happening is this company and a number of others have
22 put in these bylaws for their in terrorem effect but
23 then they don't want to stand behind them. They don't
24 want a prompt consideration of whether these bylaws

1 are any good or not. They say, Oh, well, no, maybe
2 you could raise a facial validity challenge.

3 Now, the statute, Section 111, doesn't
4 say "facial validity." It says "validity." And we
5 think facial validity is a very narrow concept because
6 the Supreme Court in ATP said, Oh, well, a bylaw can
7 be facially valid even though in certain circumstances
8 it would conflict with the statute, with the common
9 law, with the certificate.

10 And the standard that's been applied
11 has been, well, if there's any circumstance in which
12 the bylaw could apply without conflicting with the
13 statute or case law or the certificate, then the bylaw
14 is facially valid even though, under some
15 circumstances, it might conflict with a statute, with
16 common law.

17 So we think validity is not so narrow
18 a concept. Validity ought to be decided in the
19 context of this case. It's a derivative case. The
20 derivative vehicle was created judicially. It's been
21 regulated judicially. And one exception was Section
22 327 by legislation. It's never been the case that
23 derivative litigation was controlled by bylaws passed
24 by the board so that you have one side of the

1 litigation basically making up the rules.

2 Which, of course, you know, if I play
3 a game with my nine-year-old and he gets to make up
4 the rules, I'm going to lose virtually every time.
5 And that's what's going on here. And that's the
6 dilemma we're in. And we're trying to find a way, on
7 a prompt and not too cumbersome basis and without
8 subjecting our clients to liability, to find out
9 whether these bylaws are valid, not just facially
10 valid but valid under the circumstances here, where
11 you're applying it to a derivative action, where
12 you're imposing liability on a stockholder.

13 Are they applicable here in an
14 existing case when the board -- and are they
15 enforceable? In a situation where I think we've shown
16 that the ATP bylaw was reciprocal. ATP represented it
17 was. This plainly isn't.

18 So there are circumstances here where
19 we think validity, applicability, and enforceability,
20 are all issues that the Court ought to address, and
21 the Court has to address them now. Otherwise, to say,
22 Oh, well, someday you might be able, if you were
23 willing to risk a six- or seven-figure liability for
24 your client, you could challenge them at the end of

1 the case, is the same thing as just saying
2 stockholders really have no ability to enforce their
3 rights anymore.

4 Thank you, Your Honor.

5 THE COURT: Thank you, Mr. Hanrahan.

6 Mr. Grant, something prompted you to
7 want to add something else at this point?

8 MR. GRANT: Something did.

9 "Cool Hand Luke" comes to mind because
10 I think plaintiffs and we, following your questions
11 about circumstances in which we would not enforce the
12 bylaw against them, are having a failure to
13 communicate. We are willing, if you think it's the
14 right direction for this to go, to have reasonable and
15 limited discovery on the essentially Schnell issue, on
16 the equitable aspects of the bylaw.

17 But what prompted me to stand up is I
18 have a suggestion for us all to consider for a
19 different direction in which to go. Going back to my
20 initial comment that we think the next step should be
21 resolving the SLC motion to dismiss, we can make the
22 same representation again with let's call it
23 reasonable discovery, that we will not enforce the
24 bylaw against plaintiff for time spent on the defense

1 side for reasonable discovery, briefing and argument
2 on the SLC motion to dismiss. And I think that then
3 protects them.

4 And we think, procedurally, that going
5 first to the SLC motion to dismiss is the right way to
6 go. I think, you know, we are hopeful and we believe
7 it should resolve the entire litigation. And they
8 won't be at risk for that, for that work that we
9 perform. And we think that's the right way to do it.

10 Just one comment on the timing of the
11 bylaw. While the assertion is that we adopted it in
12 the -- the client adopted it in July to apply to them,
13 the timing was that after ATP came out and the
14 Legislature then did not act, only then did our client
15 adopt the bylaw.

16 And as for the letter that
17 Mr. Hanrahan mentioned that we sent them, there was no
18 letter in the securities litigation but there was a
19 supplemental initial disclosure under Federal Rule 26
20 in the securities litigation. So in effect, notice
21 was given to the plaintiffs in the securities
22 litigation through different means.

23 THE COURT: I see. Thank you.

24 Mr. Kelly, did you have anything else?

1 MR. KELLY: Just 30 seconds, Your
2 Honor.

3 THE COURT: Absolutely.

4 MR. KELLY: I was disappointed when
5 Mr. Hanrahan said, quote, we were suckering them into
6 depositions. As Your Honor knows, depositions were
7 noticed back in February. And Mr. Fioravanti knows we
8 had an agreement not to proceed with depositions until
9 the documents were produced. And we've been talking
10 about depositions since February, March, April. So
11 there was no suckering of anybody into depositions.

12 And secondly, the comment about the
13 General Assembly, there was nothing sinister about
14 that. I was just reminding Your Honor that, hey,
15 particularly in this procedure, I always put my --

16 THE COURT: I didn't draw anything
17 sinister from it.

18 MR. KELLY: Thank you.

19 I'm just mindful of Your Honor's
20 caseload. That there is something in this posture
21 that the Legislature is going to decide next fall.

22 Thank you, Your Honor.

23 THE COURT: Thank you.

24 Mr. Hanrahan, if you have something

1 brief to add, I'll let you --

2 MR. HANRAHAN: Your Honor, on the
3 Special Litigation Committee, see, this, I think,
4 illustrates the problem. Now the rules change. Well,
5 we won't apply it here. We won't apply it there. And
6 I think this is going to be a disaster, not just for
7 stockholders. It's going to be a disaster for this
8 Court. Because the rules change. They get invoked.
9 They don't get invoked. And it's one side of the
10 litigation basically trying to dictate to this Court
11 how litigation is going to be conducted.

12 THE COURT: Thank you.

13 There are a lot of moving parts here,
14 but I'm going to give you my reactions from what I've
15 heard of all of this. And frankly, it sounds like,
16 from what I heard today, it would be profitable for
17 there to be more discussions between the parties to
18 see how this can be sorted out.

19 In the first instance, picking up with
20 Mr. Grant's last proposal -- and the devil is often in
21 the details of these things -- but if there is a way
22 to get the plaintiffs and you in agreement that the
23 challenge of the SLC process can be concluded without
24 jeopardy of the bylaw being applied, that seems to me

1 like something you ought to tell me you can work out.
2 Come back to me and tell me if you have worked it out,
3 and we can proceed on that basis.

4 Absent working such an arrangement
5 out, my views on the situation right now lay out sort
6 of in the following way. We're in a very odd
7 procedural context. I don't think it's appropriate
8 for me to be adjudicating a bylaw, the validity of a
9 bylaw or an as-applied challenge to a bylaw, if that
10 were ever asserted, without it actually being asserted
11 in the pleading in the first instance.

12 So the key thing that has to happen in
13 my mind is the plaintiffs have to make some decisions.
14 Now, they're going to be able to make those decisions
15 in a much better context than when they walked into
16 the courtroom I think today. But the first decision
17 the plaintiffs have to make is do they want to
18 litigate the validity of this bylaw. And if so, they
19 should amend their complaint and say they want to do
20 so and assert such a claim.

21 And leave would be granted that there
22 would not be an issue in this circumstance if that
23 were opposed, but I would expect it would be
24 unopposed. And there would be an amended pleading.

1 Then the plaintiffs have to make their
2 second decision, which is what type of claim do they
3 want to bring. Do they want to just assert a facial
4 challenge? And you've been told, and I will hold the
5 defendants to their representation, that you can
6 assert such a challenge without jeopardy of the bylaw
7 applying.

8 Or do you want to make a facial
9 challenge as well as an as-applied challenge? And
10 admittedly, the commitment of the defendants is a
11 little squishier there in terms of the reasonable and
12 limited scope of discovery to permit such a challenge.
13 But, ultimately, the plaintiffs have to have the
14 strength of their convictions and decide what kind of
15 claim do they want me to adjudicate on this bylaw.
16 With respect to whether they are willing to bring in a
17 facial challenge alone or a facial challenge,
18 as-applied challenge, and want to move forward on it.

19 And as I indicated, there will be no
20 jeopardy to the bylaw on the facial challenge based on
21 the representation today. The as-applied would appear
22 to be also an avenue to have a challenge without
23 jeopardy, but you'd have to work out the details and
24 make your own judgment -- Mr. Hanrahan, I can't make

1 them for you -- on what the plaintiffs want to do in
2 that regard. But until such a claim is actually pled,
3 I think it's premature for me to be adjudicating the
4 validity of this.

5 Now, if you assert such a claim in a
6 pleading and amend your pleading to do so, I think we
7 can brief the validity issue, if it's only the
8 validity issue, on a reasonable basis. I think a
9 normal ordinary course briefing type of schedule can
10 bring the issue to the Court's attention.

11 There are, underlying this -- and I'm
12 not prejudging anything -- many very interesting
13 issues, undoubtedly. This is a for-profit
14 corporation. This is not a non-profit corporation.
15 There are issues of retroactive application in a way
16 that was not considered by ATP that are at issue here
17 because it's purporting to have potential retroactive
18 application to underlying conduct, not just to the
19 universe of shareholders to whom it would apply. I
20 see that as a different issue. There is a bond issue
21 that's different here. There are policy implications
22 about liability to stockholders and for-profit
23 corporations that are at issue here.

24 But all those things would need to be

1 briefed thoroughly; and that has not occurred to date
2 in a way that the Court could intelligently consider
3 those issues. And it hasn't occurred in a way with
4 the defendants even really having an opportunity to
5 respond to most of those arguments because they
6 appeared in this reply brief.

7 So I would -- and to be clear, I am
8 sympathetic to plaintiffs' situation, again, absent
9 this last issue that Mr. Grant raised as to whether or
10 not there is a clear path to get this case done in
11 terms of the SLC litigation. If you can work that out
12 and want to proceed on that basis and go down that
13 track, not worry about the bylaw, we'll do that. If
14 you can work it out and you have confidence that
15 you're not in jeopardy in a way you think you can get
16 that work done, that's one track.

17 The other track is you can assert this
18 claim, but if you're going to assert it, you put it in
19 a pleading.

20 And if you're going down the second
21 track and you're not comfortable, you have comfort on
22 the first track; that is, to litigate without jeopardy
23 the SLC issues, I will hold the SLC issues in abeyance
24 while we do the litigation over the facial validity of

1 the as-applied issue on the bylaw. And if you want to
2 go the as-applied route, you can make a motion for
3 expedition, and I think it would be something that
4 should be considered promptly.

5 I'm not sympathetic to the notion --
6 and I think, largely, Mr. Grant, you diffused this,
7 and I appreciate that -- of barreling ahead either
8 simultaneously or solely with the SLC-related
9 litigation without sorting out this bylaw issue
10 because I view the bylaw issue to have been a creation
11 of the defendants in the middle of this case to change
12 the rules. And in that context, you know, the rules
13 of the game going forward, as I see, are what I've
14 laid out for you.

15 Does anybody have any questions about
16 what I am stating here? Mr. Hanrahan, you in
17 particular, do you understand what I'm saying.

18 MR. HANRAHAN: Yes, sir.

19 THE COURT: Okay.

20 Any questions from the defendants?

21 MR. GRANT: No questions from us, Your
22 Honor.

23 MR. KELLY: No, Your Honor.

24 THE COURT: Thank you. Counsel, I

1 appreciate the arguments. It's a very interesting
2 issue, and we'll see where we go.

3 (Court adjourned at 10:55 a.m.)

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CERTIFICATE

I, JEANNE CAHILL, RDR, CRR, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 47 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, Delaware, this 15th day of August, 2014.

/s/ Jeanne Cahill

Official Court Reporter
of the Chancery Court
State of Delaware