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 ENGERT, PETER Y. CHUNG, DAVID J. BROPHY, CHARLES R. BLAND, JEFF TERRILL, VIRTUAL RADIOLOGIC CORPORATION, EAGLE MERGER SUB CORPORATION, and PROVIDENCE EQUITY PARTNERS, L.L.C. Defendants.	)	C.A. No. 5890-VCL

BRIEF AND SUBMISSION OF THE VIRTUAL RADIOLOGIC DEFENDANTS

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INTRODUCTION

During the status conference on December 17, 2010 and in the Court's letter to the parties on December 22, 2010 (the "Special Counsel Letter"), the Court requested the parties to address in general the conundrum of parallel, multi-forum litigation and to respond in particular to five questions raised by the Court. On behalf of Virtual Radiologic Corporation, Eagle Merger Sub Corporation and Providence Equity Partners L.L.C. (collectively, "vRad"), we first set forth below the facts, as we understand them given our clients' position as the acquirer and alleged "aider and abettor." Next, we provide the Court with three overall observations or principles illuminating our response. Finally, we address each of the questions raised by the Court.[1]

BACKGROUND

The Transaction

On September 27, 2010, the five-member NightHawk Radiology Holdings, Inc. ("NightHawk" or the "Company") Board, including its four non-management members, unanimously approved, and NightHawk publicly announced, the Company's acquisition by vRad in a cash transaction valued at approximately $170 million (the "Transaction"). The consideration for the Transaction ($6.50 per common share) represented a 100% premium over NightHawk's closing share price on September 24, 2010 (the last trading day prior to September 27), a 122% premium over

[1] Along with this Submission, we have also submitted a Report of Stephen Gillers, Professor of legal ethics at New York University School of Law. *See* Exhibit ("Ex.") 1 hereto. Professor Gillers likewise addresses the issues raised by the Court during the December 17 status conference and in the Special Counsel Letter.

NightHawk's average share price for the 30 days prior to September 27, and a 132% premium over NightHawk's average share price for the 90 days prior to September 27. On December 22, 2010, with no other bidder having emerged for NightHawk in the three-month interim (including during a 30-day "go shop" period), an overwhelming majority of its stockholders voted to approve the Transaction, which was then consummated later that same day.

Following The Announcement Of The Transaction, Numerous Litigations Are First Commenced In Arizona State Court

NightHawk is a Delaware corporation, but is headquartered in Arizona. On September 28, 2010, Sanjay Israni ("Israni"), purportedly a NightHawk stockholder, commenced a putative class action in the Superior Court of the State of Arizona, in and for Maricopa County (the "Arizona Court"), against NightHawk, its directors and vRad. Israni sought to enjoin the Transaction and alleged, among other things, that NightHawk's directors breached their fiduciary duties to NightHawk's stockholders by agreeing to sell the Company for inadequate and unfair consideration and pursuant to an inadequate and unfair process, and that vRad supposedly aided and abetted such breaches. There were no disclosure claims asserted. *Israni v. NightHawk Radiology Holdings, Inc., et al.*, Case No. CV2010-025059 (Ariz. Super. Ct.).[2] Between September

[2] With respect to its process claims, the *Israni* Complaint alleged, among other things, that "the Proposed Acquisition is subject to a number of impediments that will act to further limit NightHawk's shareholder value," which it described as "the restrictive Go Shop; No Solicitation provision and the termination fee that penalizes NightHawk's shareholders up to $6.6 million if the Company's [sic] enters a superior proposal," and which supposedly "will effectively prevent any superior offers from materializing;" and that "[NightHawk Chief Executive Officer] Engert will remain as an advisor to the board

29 and October 7, 2010, five additional putative stockholder class actions were commenced: all were brought in the Arizona Court; and all alleged price and process claims, but no disclosure claims.[3]

Also on October 7, 2010, plaintiff in the *Israni* action filed a motion to expedite discovery (the "*Israni* Motion to Expedite" (Ex. 3 hereto)), contending, among other things, that "[t]hrough an unfair process, specifically failing to 'shop' or seek an

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if the Proposed Acquisition closes in the first quarter as anticipated." *Israni* Complaint (Ex. 2 hereto) ¶¶ 35, 12.

[3] *See Lalone v. NightHawk Radiology Holdings, Inc., et al.*, Case No. CV2010-028112 (Ariz. Super. Ct.) (filed on September 29, 2010); *Watts v. Engert, et al.*, Case No. CV2010-028127 (Ariz. Super. Ct.) (filed on September 30, 2010); *LaTorre v. NightHawk Radiology Holdings, Inc., et al.*, Case No. CV2010-028176 (Ariz. Super. Ct.) (filed on September 30, 2010); *Newman v. Engert, et al.*, Case No. CV2010-028262 (Ariz. Super. Ct.) (filed on October 1, 2010); and *Yu v. Engert, et al.*, Case No. CV2010-028403 (Ariz. Super. Ct.) (filed on October 7, 2010). The *Israni*, *Lalone*, *Watts*, *LaTorre*, *Newman* and *Yu* actions are referred to collectively herein as the "Arizona State Court Actions," and the complaints in the Arizona State Court Actions are attached as Ex. 2 hereto.

The process claims in these additional five actions alleged, among other things, that: (i) "certain Individual Defendants will receive valuable change-in-control payments, vesting of stock options, restricted stock, and/or secure prestigious and lucrative positions in the post-Proposed Acquisition company" (*Lalone* Complaint ¶ 4); (ii) "the proposed go-shop period of thirty days is not enough time for another suitor to perform the due diligence, negotiate, and make a superior offer to acquire the Company" (*id.* ¶ 30); (iii) "the Merger Agreement provides that, in order to take part in the go-shop process and obtain confidential Company information, an interested party must agree to enter into an onerous 'standstill' provision. . . ." (*Watts* Complaint ¶ 6); (iv) "[t]he go-shop period is limited in duration to only 30 days" (*id.* ¶ 28); and (v) "[t]he Board agreed to deliver the Company to Virtual in order to secure material benefits for themselves," including "continuing employment for Company insiders such as NightHawk President and CEO Engert, who will remain with the combined company post-merger as an advisor to the Virtual Board of Directors" (*id.* ¶ 27). *See also LaTorre* Complaint ¶¶ 4, 5, 24 (similar); *Newman* Complaint ¶¶ 5, 6, 27, 28 (similar). vRad considers the process issues to be meritless and considers any aiding and abetting claim to be meritless, as well.

auction to obtain the highest price, as well as failing to conduct adequate diligence on vRad, NightHawk's Board of Directors . . . and officers are seeking to divest the shareholders of the Company's valuable business for inadequate consideration." *Id.* at 3. Pursuant to the Arizona Court's local rules, responses to the *Israni* Motion to Expedite were not due until October 27, 2010.

The Instant *Scully* Action -- The Seventh -- Is Then Commenced In This Court, And A Motion To Expedite These Proceedings Is Denied

On October 8, 2010, Plaintiff Michael Scully ("Plaintiff") filed his original complaint in this Court. *See* Ex. 4 hereto. Like the predecessor complaints in the Arizona State Court Actions, Plaintiff alleged that the Transaction resulted from a "fundamentally unfair" process and provided for "unfair and grossly inadequate" consideration. *Id.* ¶¶ 3, 43; *see id.* ¶¶ 38-50 (similar); *see also, e.g., id.* ¶ 48 (alleging that, "while the Merger Agreement contains a 'go shop' provision, . . . the NightHawk board is granted only 30 days to entertain competing offers" and, "[t]hereafter, . . . is subject to strict 'no shop' provisions"). In addition, Plaintiff alleged "disclosure claims" -- that the preliminary proxy for the Transaction (the "Preliminary Proxy" (Ex. 5 hereto)), which NightHawk had filed with the U.S. Securities and Exchange Commission (the "SEC") the day before, on October 7, 2010, was materially false and misleading. *See id.* ¶ 52. Plaintiff asserted claims against the members of the NightHawk Board for breach

of their fiduciary duties to the putative class, and against vRad for supposedly aiding and abetting such alleged breaches. *See id.* ¶¶ 55-68.[4]

On October 12, 2010, Plaintiff filed his Motion for Expedited Proceedings (the "*Scully* Motion to Expedite" (Ex. 7 hereto)), which expressly took issue with *both* the process through which the Transaction was effected *and* the disclosures regarding the same. Specifically, the *Scully* Motion to Expedite contended that: (i) "rather than explore [an unsolicited offer] or other strategic alternatives, [NightHawk] entered into an exclusivity agreement with vRad;" (ii) "[d]espite the fact that the Individual Defendants failed to conduct an adequate 'market check' prior to entering into the Merger Agreement, these defendants implemented several additional preclusive and unfair deal protections to inhibit potential alternate transactions," including "an excessive termination fee and a short thirty-day go-shop period;" and (iii) "[c]ompounding the unfairness of the Merger is defendants' attempt to coerce NightHawk shareholders to relinquish their shares based on materially incomplete and misleading disclosures contained in the Proxy." *Id.* at 3; *see also id.* at 6 (arguing that "[t]he flawed sales process controlled by NightHawk's management and later approved by the Individual Defendants, *coupled with* the material omissions in the Proxy *all* raise colorable claims meriting expedited treatment") (citations omitted) (emphasis added).

[4] On October 22, 2010, an eighth (and final) putative stockholder class action was commenced in the U.S. District Court for the District of Arizona, captioned *Clayton v. Engert, et al.*, Case No. 2:10-cv-02274 (D. Ariz.). The complaint in the *Clayton* action (Ex. 6 hereto) also alleged price, process and disclosure claims, including disclosure claims under Section 14(a) of the Securities Exchange Act of 1934 (15 U.S.C. § 78n(a)).

In light of this Court's concern about "forum shopping," vRad notes that neither it nor any other defendant moved to dismiss or stay this action in favor of the multiple, prior-filed actions in the Arizona Court. Rather, on October 19, 2010, all defendants submitted oppositions to the *Scully* Motion to Expedite (*see* Exs. 8 and 9 hereto), and argued that none of Plaintiff's claims (either as to price/process or disclosure) merited expedition. On October 21, 2010, following argument (during which Plaintiff's counsel focused on disclosure issues, but made clear that Plaintiff was *not* "giv[ing] up [his] process claims," either on the merits or as a basis for expedition),[5] this Court denied the *Scully* Motion to Expedite. Ex. 10 at 20. The Court also commented that "the case presents interesting process issues about what the state of the go-shop is, particularly when you've given exclusivity early under the type of circumstances that happened here." *Id*. After elaborating, the Court invited Plaintiff to "amend or to seek some type of other relief," but stated that it "obviously [would] take into account the fact that it would be a renewed application in terms of considering whether to expedite at some future date." *Id.* at 20-22, 25.

[5] October 21, 2010 Tr. (Ex. 10 hereto) at 11; *see also id.* at 7 ("[T]he other issue that goes to process is . . . for the company to have signed an exclusivity agreement right after the resolution of this issue doesn't exactly allow for a very good and full market check. . . . And, further, the go-shop, it's pretty restrictive in time"); *id.* at 19 ("I just want to repeat that *we are not conceding the process claims*. And we -- we do want to press them, and we -- given that there is only a few days until the end of the go-shop, we -- we didn't want to come before Your Honor while -- you know, and then be accused by defendants of -- of being too early. But given what Your Honor has said and given the timing, it -- *we do believe that expedition is necessary on that basis, too*") (emphasis added). NightHawk's counsel argued during the hearing that the "process" claims had no merit. *See id.* at 12-15.

NightHawk Requests That *All* Plaintiffs -- In *Both* Arizona *And* Delaware -- Proceed In A Single Forum Of Plaintiffs' (*Not* Defendants') Choosing

Defendants did not want to be sued anywhere -- but certainly not in class actions in two courts at once, asserting what defendants believe to be meritless claims. Accordingly, on October 20, 2010, a day prior to the parties' argument on the *Scully* Motion to Expedite, NightHawk's counsel wrote to all plaintiffs' counsel, in both Arizona and Delaware, to ask that they consult among themselves and work together to proceed with this multi-forum litigation in just a single forum (regardless of which one the plaintiffs might choose). *See* Ex. 11 hereto. NightHawk's counsel's October 20 letter stated, in relevant part, as follows:

> [W]e believe there is no merit to any of these cases. Indeed, the terms and the structure of the transaction both demonstrate, as a matter of law, that there is no basis for any claims here. However, the purpose of this letter is not to dispute the merits of the litigation. Rather, *we write to focus on an issue that we believe all counsel can agree on: that if these litigations are to proceed at all -- which we believe they should not -- the litigations should proceed in a single forum.*
>
> We also recognize that there may be some dispute whether Arizona or Delaware would be the more logical forum to litigate these cases given factors such as when the respective suits were filed, the nature of the claims asserted, convenience of the parties and witnesses, etc. *However, our overriding goal is avoiding the litigation of identical claims in two different courts simultaneously. Duplicative litigation cannot serve the interests of any party and is contrary to the public interest, as it is a waste of the parties' time and money, results in the needless expenditure of judicial resources, risks inconsistent results and serves no legitimate interest.*
>
> Accordingly, we hereby ask all of you to confer among yourselves and decide on one court in which this litigation will proceed, with the other cases being dismissed. Again, while we think there may be good arguments for proceeding in one court rather than the other, our clients (and the other defendants) are willing to avoid that dispute in lieu of agreement to proceed in only one forum.

> If, on the other hand, plaintiffs are unwilling to agree among themselves to proceed in one forum we will have no choice but to seek judicial assistance to avoid duplicative litigation.

Id. at 1-2 (emphasis added). Before any plaintiffs responded to this letter (in fact, none of the plaintiffs ever responded), this Court denied the *Scully* Motion to Expedite.

Following This Court's Denial Of The *Scully* Motion To Expedite, The Locus Of The Litigation Shifts To Arizona

Once this Court denied the *Scully* Motion to Expedite, the Arizona Court became the only forum with immediately active (and already pending) litigation proceedings, including the *Israni* Motion to Expedite in the first-filed action (*see* pp. 3-4, *supra*).[6] Moreover, on October 21, 2010, the day this Court heard and denied the *Scully* Motion to Expedite, plaintiff in the *Lalone* action filed his own motion to expedite in the Arizona Court (the "*Lalone* Motion to Expedite" (Ex. 12 hereto)). That motion squarely addressed process claims and contended, among other things, and along lines similar to this Court's commentary during the hearing on the *Scully* Motion to Expedite, that:

> [D]efendants never actually considered running a sales process calculated to maximize shareholder value. The Company first discussed a potential acquisition of NightHawk by vRad on April 6, 2010, after which the companies immediately entered into a non-disclosure agreement. Thereafter, the sales process was tilted in favor of vRad and vRad only. Indeed, the Board approved the Proposed Acquisition even though vRad decreased the *offer price $.50 from $7.00 to $6.50*. NightHawk made no attempt to engage any potential competing bidder prior to the limited 30-day go-shop period, even though it was aware that at least two other

[6] If defendants had sought to stay the six first-filed actions in the Arizona Court, either before, or especially after, this Court denied the *Scully* Motion to Expedite, the Arizona plaintiffs no doubt would have argued -- and the Arizona Court likely would have viewed such effort as -- "forum shopping" to avoid Arizona. In short, once plaintiffs did not agree to a common forum, defendants were stuck in a Catch-22 position.

> parties were interested in pursuing a potential transaction with the Company. Rather than reach out to these competing bidders, NightHawk agreed to negotiate exclusively with vRad on August 1, 2010, and eventually agreed to sell the Company for $6.50 per share even though the initial offer that started the discussions was at $7.00 per share.

Id. at 2-3 (internal citations omitted) (emphasis in original). The *Lalone* Motion to Expedite also raised disclosure issues *different from* those raised by Plaintiff Scully, including with respect to the alleged "flawed sales process," such as, for example, the alleged non-disclosure of "the basis for the Board's decision to negotiate exclusively with vRad even though it had made no real attempt to reach out to other bidders." *Id.* at 3-4.

On October 27, 2010, the NightHawk Defendants filed an opposition to the *Israni* Motion to Expedite. *See* Ex. 13 hereto. vRad filed a joinder to that opposition, which set forth a substantive opposition to Israni's meritless "aiding and abetting" claim against vRad. *See* Ex. 14 hereto.

Plaintiff Scully's Counsel Files An Amended Complaint, But Thereafter Takes No Further Action In This Court

On October 29, 2010, Plaintiff Scully filed a Verified Amended Class Action Complaint (the "Amended Complaint" (Ex. 15 hereto)), which included the "process" issues this Court commented upon during the hearing on the *Scully* Motion to Expedite. *See id.* ¶¶ 48-65. However, following the filing of the Amended Complaint, Plaintiff's counsel here took no further action in this Court. For example, despite the Court's invitation, Plaintiff's counsel never renewed their motion to expedite, nor did they seek any "other relief." Instead, as described below, they participated in the ongoing proceedings in the prior-filed actions in the Arizona Court, including through the receipt of discovery that was there being provided by NightHawk, and, ultimately

(approximately 20 days after first receiving that discovery), joining in the parties' memorandum of understanding (the "MOU") reflecting an agreement-in-principle to resolve the litigation on the basis of certain supplemental disclosures (subject to confirmatory discovery, the negotiation and execution of a formal stipulation of settlement, notice to the putative class and court review and approval).

NightHawk Agrees To Provide Certain Discovery, The *Israni* And *Lalone* Motions To Expedite Are Withdrawn On That Basis, And The Parties Ultimately Agree In Principle Upon A Disclosure-Based Resolution

On October 29, 2010 and November 2, 2010, respectively, the *Lalone* and *Israni* Motions to Expedite were withdrawn, based, we understand, on conversations between NightHawk's counsel and counsel for plaintiffs in the Arizona State Court Actions and NightHawk's agreement to produce expeditiously to plaintiffs in the Arizona State Court Actions certain discovery relating to the Transaction, including NightHawk Board minutes and presentations by NightHawk's financial advisor. We understand that NightHawk thereafter provided that discovery to the Arizona plaintiffs on or about November 5, 2010. We further understand that on or about that same day, NightHawk produced the same materials that it had produced to the Arizona plaintiffs to Plaintiff here -- who then negotiated for and received from NightHawk certain additional discovery. On November 8, 2010, Plaintiff's counsel wrote to this Court (*see* Ex. 16 hereto), stating that:

> After the October 21, 2010 expedited proceedings hearing before Your Honor, (the "Expedited Hearing"), the parties met and conferred on several occasions to discuss Plaintiff's process claims surrounding the transaction that is the subject of this litigation. . . . In particular, the parties discussed discovery regarding the process claims. *Plaintiff would like to inform Your Honor that the parties have reached an agreement*

> *wherein Defendants have agreed to produce discovery related to Plaintiff's process claims concerning the Transaction. This agreement will facilitate the production of relevant documents without need for Court intervention and waste of judicial resources.*
>
> As Your Honor was also informed at the Expedited Hearing, there are six parallel actions challenging the Transaction pending in the Arizona Supreme [sic] Court (the "Arizona Actions"). Defendants have agreed to produce the same documents in the Arizona Actions and this Action, further *plaintiffs in the Arizona Actions and this Action have agreed to share and coordinate discovery and efforts to litigate both cases*.

Id. at 1-2 (emphasis added).[7]

On November 10, 2010, plaintiffs in the Arizona State Court Actions delivered a settlement demand letter to NightHawk's counsel (*see* Ex. 19 hereto), which proposed to resolve the Arizona State Court actions based on an increase in the Transaction consideration, changes to the merger agreement's matching rights provision and termination fee, and certain additional disclosures to be made by NightHawk.

NightHawk's counsel and counsel for plaintiffs in the Arizona State Court Actions thereafter began negotiating additional disclosures. vRad's counsel did not directly participate in settlement negotiations with any plaintiffs' counsel (by telephone, email or otherwise), but were kept informed of the negotiations by NightHawk's counsel and supported attempting to resolve the actions on the basis of additional disclosures in a single forum.

[7] Also on November 8, 2010, the parties to the Arizona State Court Actions submitted a stipulation and [proposed] order to the Arizona Court regarding consolidation of the Arizona State Court Actions. *See* Ex. 17 hereto. On December 6, 2010, the Arizona Court entered the [proposed] order. *See* Ex. 18 hereto.

On November 16, 2010, Plaintiff in this action sent his own settlement demand letter to NightHawk's and vRad's respective counsel (*see* Ex. 20 hereto), stating that:

> Based on the materials reviewed to date in connection with the Merger, including the Preliminary Registration Statement filed by NightHawk with the Securities and Exchange Commission . . . on October 7, 2010 . . . and other public documents *as well as non-public documents produced thus far in the litigation*, plaintiff has identified several structural and disclosure deficiencies in the Merger. . . . *Plaintiff believes the terms below could form the basis of a resolution if addressed well in advance of the shareholder vote on the Merger*.

Id. (emphasis added). Those terms similarly included an increase in the Transaction consideration, a reduction in the termination fee and certain supplemental disclosures. vRad's counsel did not respond to this letter nor did they negotiate settlement with Plaintiff Scully's counsel.

On November 17, 2010, NightHawk's counsel provided counsel for plaintiffs in the Arizona State Court Actions with a draft MOU, which had been approved by all defense counsel. Counsel for vRad did not discuss the MOU with any of plaintiffs' counsel in either the Arizona actions or this action. On November 24, 2010, all parties (including counsel for Plaintiff Scully) signed the MOU, reflecting an agreement-in-principle to resolve the actions based on certain supplemental disclosures (to be included in a Form 8-K filed by NightHawk with the SEC)[8] -- but subject to confirmatory discovery, the negotiation and execution of a formal stipulation of settlement, notice to

[8] NightHawk filed its definitive proxy for the Transaction with the SEC on November 23, 2010. *See* Ex. 21 hereto.

the putative class and the review and approval of the Arizona Court. *See* Ex. 22 hereto. On December 8, 2010, NightHawk filed with the SEC the Form 8-K containing the agreed upon, supplemental disclosures. *See* Ex. 23 hereto.

As discussed above, between November 5, 2010, when they first received process-related documents concerning the Transaction from NightHawk, and November 24, 2010, when they signed the MOU, Plaintiff's counsel took no action in this Court -- but they had apprised the Court, in early November, of their coordination with the plaintiffs in the Arizona State Court Actions. On December 10, 2010, without the MOU yet having been submitted or disclosed to the Arizona Court, Plaintiff's counsel wrote to this Court (*see* Ex. 24 hereto), stating that they were "pleased to inform Your Honor that on November 24, 2010, the parties reached an agreement-in-principle memorialized in a Memorandum of Understanding . . . that provides for a global settlement that includes the captioned litigation, as well as the Arizona Actions." Their December 10 letter continued:

> Pursuant to the MOU the parties are currently working diligently to establish an efficient schedule and process to conduct confirmatory discovery and will proceed to prepare settlement papers promptly if the confirmatory discovery demonstrates that the settlement is fair, adequate and reasonable. Thereafter, the parties will seek Court approval of this proposed settlement in the Arizona Actions Court. If the Arizona Actions Court approves the settlement, Plaintiff will thereafter seek dismissal of this action.

Id.

DISCUSSION

A. GENERAL ISSUES INHERENT IN MULTI-JURISDICTIONAL, REPRESENTATIVE DEAL LITIGATION

1. Multi-jurisdictional deal litigation imposes substantially increased cost, disruption and transaction risk on defendants.

Deal litigation increasingly is being brought by class action plaintiffs (not by defendants, or with their input) in multiple jurisdictions, typically for their own strategic reasons, where there is no established means of coordination (*e.g.*, MDL procedure), and where transaction participants risk defending themselves (and their transactions) on multiple fronts -- with substantially increased costs, disruption and transaction risk, including the potential for inconsistent rulings. *See, e.g., In re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6085-VCL (Del. Ch.), Jan. 13, 2011 Tr. (Ex. 25 hereto) at 26 (stating that these issues are "a problem in virtually every deal").[9]

Faced with multi-jurisdictional deal litigation, defendants rationally seek to have all cases focused in a single forum for purposes of litigation and/or settlement. *See id.* at 24 ("What [defense counsel] wants is one forum. . . . That's fine. . . . The defendants have rationally taken this all-we-care-about-is-one-forum position which really punts on the question"); *see also* Special Counsel Letter at 1 ("Generally speaking,

[9] *See also id.* at 30, 34 ("It's an unfortunate thing that this happens. And it's certainly an unfortunate thing that this happens in case after case. So I really do think it's just a problem that we're all grappling with and trying to find a solution to and what the right mechanism is. . . . I regret the fact that the defendants now face proceedings in two forums. But again, this is something that is driven by the dynamics of the entrepreneurial plaintiffs bar in class action situations, rather than by what is collectively rational for the system"); *id.* at 20 ("[I]f you then go and file in another [non-Delaware] forum, you do have control of that case and then the defendants have to deal with you").

the phenomenon of parallel multi-forum litigation naturally incentivizes party behavior that is individually rational but systematically irrational"); *Louisiana Municipal Police Employees' Retirement System v. Pyott, et al.*, C.A. No. 5795-VCL (Del. Ch.), Jan. 21, 2011 Tr. (Ex. 26 hereto) at 61 ("There are no white hats. There are no black hats. There are just people acting rationally in the circumstances of the case").

Also relevant to a defendant's predicament in multi-forum litigation is the Supreme Court of Delaware's jurisprudence dating back to *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, 263 A.2d 281 (Del. 1970), as well as similar law in other jurisdictions. *McWane*, reaffirmed in *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143 (Del. 2010), and *Lisa, S.A. v. Mayorga*, 993 A.2d 1042 (Del. 2010), established that "Delaware courts should exercise discretion in favor of a stay where a prior action, involving the same parties and issues, is pending elsewhere in a court capable of doing prompt and complete justice." *Ingres*, 8 A.3d at 1145 (citing *McWane*, 263 A.2d at 283); *see also Prezant v. De Angelis*, 636 A.2d 915, 919 (Del. 1994) ("Delaware courts, in the interests of comity and judicial economy, will normally stay after-filed suits when previously-filed suits stating similar claims are pending in another court").[10] In other words, *McWane* "generally confines litigation to one forum" and,

[10] *See also Glen Rose Petroleum Corp. v. Langston*, C.A. No. 5387-CC, 2010 WL 2734621, at *2 (Del. Ch. July 7, 2010) ("I see no reason on why any complexity of parties or issues around that core merits a decision to disregard the spirit of *McWane* or the comity Delaware courts and judges feel for the capable courts and judges of our sister states and commonwealths, *even when questions of Delaware law are in play*. . . . Delaware may be heralded . . . for its expediency, efficacy, and efficiency, but Delaware is not the lone star") (citing *Diedenhofen-Lennartz v. Diedenhofen*, 931 A.2d 439, 446 (Del. Ch. 2007) (Strine, V.C.)) (emphasis added).

thus, "serves the public's interest in the orderly administration of justice by discouraging forum shopping and by reducing the risk of conflicting verdicts." *Ashall Homes Ltd. v. ROK Entm't Group Inc.*, 992 A.2d 1239, 1251 (Del. Ch. 2010) (Strine, V.C.) (citing *Lisa*, 993 A.2d at 1047).[11]

As the Supreme Court of Delaware recently explained in *Lisa*:

> Where the Delaware action is the first-filed, the plaintiff's choice of forum will be respected and rarely disturbed, even if there is a more convenient forum to litigate the claim. . . .
>
> Conversely, where the Delaware action is *not* the first filed, the policy that favors strong deference to a plaintiff's initial choice of forum requires the court freely to exercise its discretion in favor of staying or *dismissing* the Delaware action (the "*McWane* doctrine"). The[] two *forum non conveniens* doctrines -- overwhelming hardship and *McWane* -- operate consistently and in tandem to discourage forum shopping and promote the orderly administration of justice "by recognizing the value of confining litigation to one jurisdiction, whenever that is both possible and practical."

993 A.2d at 1047 (citations omitted) (emphasis in original); *see also Chadwick v. Metro Corp.*, 856 A.2d 1066 (Table), 2004 WL 1874652, at *2 (Del. Aug. 12, 2004) (pursuant to the *McWane* doctrine, "a duplicative action that is substantially or functionally identical to an earlier suit may be dismissed or stayed").

[11] *See also Ashall*, 992 A.2d at 1251 (noting that, "[u]nder *McWane* and other analogous doctrines, the . . . [p]laintiffs ought to be bound for fairness and efficiency's sake to litigate in one place, and not force the defendants to unnecessarily expend resources on what would essentially be the same defense in multiple venues"); *Choice Hotels Int'l v. Columbus Hunt Park DR. BNK Investors, L.L.C.*, C.A. No. 4353-VCP, 2009 WL 3335332, at *7 (Del. Ch. Oct. 15, 2009) (the *McWane* doctrine protects "against the possibility of conflicting rulings," which could result "if both actions were allowed to proceed simultaneously") (citations omitted).

We are, of course, mindful of this Court's decision in *In re Topps Co. Shareholders Litigation*, 924 A.2d 951 (Del. Ch. 2007) (Strine, V.C.). However, *Topps* does not necessarily alleviate the burdens faced by defendants when deal litigation is first filed in a non-Delaware forum, only to be followed by a subsequent Delaware case. Indeed, in this situation, principles of comity and due deference to non-Delaware jurisdictions severely limit defendants' ability to move to stay non-Delaware proceedings in favor of a later-filed Delaware action. *See, e.g.*, *Tonnemacher v. Touche Ross & Co.*, 920 P.2d 5, 8 (Ariz. Ct. App. 1996) ("When actions are filed in different states, invoking the authority of independent sovereigns, neither sovereign is required to yield to the other") (citations omitted);[12] *see also* n. 6, *supra*.

In light of these realities, and as this Court has recognized, both the courts and litigants should try to "craft a solution." *Compellent* (Ex. 25) at 25; *see also id.* at 30 ("[I]t's just a problem that we're all grappling with and trying to find a solution to and what the right mechanism is"); *id*. at 31 ("[W]hat doesn't make any sense is to have multiple jurisdictions all trying to deal with these things without some type of clear landmarks in terms of what people are going to do"); *id*. at 34 ("[C]ourts have to start being clear how they think these things need to be approached"). In response to the

[12] *Accord Miller v. Kearnes*, 45 P.2d 638, 639 (Ariz. 1935) ("[I]t is practically universally held that a suit which is pending in the court of another state cannot be pleaded in abatement of an action subsequently commenced, even though the later action is between the same parties and in the same cause, and the court of the state in which the prior suit is pending has complete jurisdiction").

Court's questions in the Special Counsel Letter, we address some potential solutions in Point B.4, *infra*.

2. In representative litigation, it is class plaintiffs' counsel's (and, secondarily, the courts') obligation to protect the interests of absent class members; defense counsel's obligation is to obtain the best resolution for their clients.

It is well-settled that, "by asserting a representative role on behalf of a proposed class, representative plaintiffs and their counsel voluntarily accept a fiduciary obligation towards members of the putative class." *In re M & F Worldwide Corp. S'holders Litig.*, 799 A.2d 1164, 1174 n.34 (Del. Ch. 2002) (Strine, V.C.); *Tooley v. AXA Fin., Inc.*, C.A. No. 18414-CC, 2009 WL 1220624, at *3 n.14 (Del. Ch. Apr. 29, 2009) (same); *see also In re Gen. Motors Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) ("Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed"). And, while the "attorneys and parties seeking to represent the class assume fiduciary responsibilities," the courts also "bear[] a residual responsibility to protect the interests of class members." *M & F*, 799 A.2d at 1174 & n.34 (citation omitted). *See also In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 955 (Del. Ch. 2010) (Laster, V.C.) ("'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'") (citation omitted); *accord In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001) (stating that the court "acts as a fiduciary guarding the rights of absent class members") (citation omitted). As explained by the

U.S. Court of Appeals for the Fourth Circuit in *Shelton v. Pargo*, 582 F.2d 1298 (4th Cir. 1978):

> [C]ourt[s] should have both the power and the duty, *in view of [their] supervisory power over and [their] special responsibility in actions brought as class actions*, as set forth in 23(d), to see that the representative party does nothing, whether by way of settlement of his individual claim or otherwise, in derogation of the fiduciary obligation he has assumed, which will prejudice unfairly the members of the class he seeks to represent. Apart, then, from the question whether 23(e) provides authority for judicial control over settlements and compromises by representative parties or not, the . . . *[c]ourt[s] would appear to have an ample arsenal to checkmate any abuse of the class action procedure, if unreasonable prejudice to absentee class members would result, irrespective of the time when the abuse arises*.

Id. at 1306 (emphasis added). *See also Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279-80 (7th Cir. 2002) (recognizing "the judicial duty to protect the members of a class in class action litigation from lawyers for the class who may, in derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead of that of the class").

In contrast, it is equally well-settled that defense counsel's role in the adversarial system is to secure the best possible outcome (including, *e.g.*, the lowest possible settlement) for their clients (consistent with all ethical and legal obligations) -- and *not* to take up the mantle of class plaintiffs' counsel.[13] *See* Del. Rules of Prof'l Conduct, Preamble [2] (providing that a "lawyer's responsibilities" include "zealously

[13] This is especially true for vRad's counsel here, which, as the representatives of the acquirer and alleged "aider and abetter" in this action and in the Arizona State Court Actions, had one main objective: to secure a resolution of the litigation that enabled the Transaction to go forward.

assert[ing] the client's position under the rules of the adversary system" and "seek[ing] a result advantageous to the client but consistent with requirements of honest dealings with others"). Indeed, defendants and their counsel can and must act antithetically to the interests of absent class members. For instance, defendants often oppose class certification, which, if successful, and *irrespective of the merits of the underlying claims*, likely ends the litigation. Defendants similarly have no obligation to point out arguments or evidence favorable to the class (just as plaintiffs have no obligation to point out an overlooked legal or factual defense). Simply put, in order to fulfill their ethical obligations to their clients, defense counsel *must* vigorously advocate in opposition to the interests of the class (including by obtaining the most advantageous settlement) -- *regardless* of the merit of the claims advanced.

3. No settlement has been entered into by the parties or presented to any court for approval.

Although we believe that the MOU executed by the parties reflects an agreement that ultimately should be approved, here, because the parties have not yet reached or documented a formal settlement, there is still ample opportunity for this Court and the Arizona Court to confer and coordinate with respect to the future course of these proceedings. Indeed, Plaintiff's counsel promptly informed this Court of the parties' signing of the MOU (*see* Ex. 24; *see also* p. 13, *supra*), thus affording the Court the opportunity (well in advance of a settlement being presented for any court approval) to make its views known to the Arizona Court.

Moreover, the MOU reflects only an *agreement-in-principle* (and *not* a settlement) that remains subject to, in the first instance, confirmatory discovery -- after

which *any* of the Delaware or Arizona plaintiffs can decide *not* to enter into a settlement.[14] *See*, *e.g.*, *Revlon*, 990 A.2d at 942 (noting that the Court's "comments on the settlement [we]re necessarily preliminary, because confirmatory discovery ha[d] not yet taken place, and the settlement ha[d] not been formally presented to [the Court] for approval"); *see also R.S.M. Inc. v. Alliance Capital Mgmt. Holdings L.P.*, 790 A.2d 478, 490 (Del. Ch. 2001) (Strine, V.C.) (although an MOU "was . . . signed in contemplation of settlement, which was subject to confirmatory discovery," the "prospect of peace ultimately did not bear fruit"). And, in the event a settlement agreement were to be negotiated and executed (following the completion of confirmatory discovery), any such settlement still would require court approval[15] -- the importance of which, particularly in the class action context, the Supreme Court of Delaware has long emphasized:

[14] *See* Ex. 22 at ¶ 2 (providing that "[c]ounsel for Plaintiffs shall coordinate and conduct such reasonable additional discovery . . . as is appropriate and necessary and as agreed to by the parties to confirm the fairness and reasonableness of the terms of the settlement set forth herein"); at ¶ 8 ("This MOU shall be null and void and of no force and effect if Plaintiffs' counsel in the Actions determine, following completion of Confirmatory Discovery as referred to above, that the Settlement is not fair and reasonable.").

[15] *See* Ex. 22 at ¶ 6(b) & (c) (providing that any settlement would be "conditioned upon . . . the entry of a final judgment in the Arizona State Court Actions approving the Settlement . . . [and] approval by the Delaware Court and the Arizona Federal Court of the voluntary dismissals with prejudice of the Delaware Action and the Arizona Federal Court Action, respectively").

> [T]he settlement of a class action is unique because the fiduciary nature of the class action requires the [c]ourt . . . to participate in the consummation of the settlement to the extent of determining its intrinsic fairness. The court's function 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. . . .

Prezant, 636 A.2d at 921 (citations omitted); *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1283-84 (Del. 1989) (same); *Polk v. Good*, 507 A.2d 531, 536 (Del. 1986) (same); *see also Off v. Ross*, C.A. No. 3468-VCP, 2008 WL 5053448, at *6 (Del. Ch. Nov. 26, 2008) (stating that, in reviewing proposed settlements, "Delaware courts may consider [such] additional factors . . . as the diligence of plaintiff in investigating the claims, and whether the proposed settlement is supported by mutual consideration") (citations omitted).[16]

[16] Furthermore, as discussed at greater length below (*see* p. 28, *infra*), and although, again, we believe that any ultimate settlement should be approved, this Court is not powerless in the event of a proposed settlement that it believes should not be approved -- even if that proposed settlement is presented to and approved by the Arizona Court. *See, e.g.*, *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 258 (2d Cir. 2001) (stating that a "'[j]udgment in a class action is not secure from collateral attack unless the absentees were adequately and vigorously represented'") (citation omitted), *aff'd in part per curium, rev'd in part on other grounds*, 539 U.S. 111 (2003); *see also Patrowicz v. Transamerica Homefirst, Inc.*, 359 F. Supp. 2d 140, 151-52 (D. Conn. 2005) (noting that *Stephenson*'s "broad language . . . suggests that collateral review might not be limited solely to adequacy of representation"); *but see, e.g.*, *Prezant*, 636 A.2d at 925 ("Defendants will be protected from a possible collateral attack on the validity of the settlement by a class member claiming the settlement did not meet the requirements of Rule 23").

B. RESPONSE TO THE COURT'S QUESTIONS

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?

"Forum shopping" for purposes of securing an advantageous settlement is not improper under existing law. Parties -- plaintiff and defendant -- "forum shop" all the time, based on the advice of competent, ethical counsel and zealous advocacy. The avoidance of malpractice requires that counsel provide such advice. Indeed, part of the job of defense counsel is to advise their clients regarding -- and, if possible, steer their clients towards -- the most advantageous forum, whether it be to defend or settle litigation.[17] For example, in federal court litigation, motions to transfer venue pursuant to 28 U.S.C. § 1404(a) and motions to dismiss for *forum non conveniens* (whether purely on convenience grounds or, *e.g.*, to avoid a particularly plaintiff-friendly forum) are commonplace; as are motions to stay, including on abstention grounds in favor of another forum (such as on the basis of the "*Colorado River* doctrine").

Putting aside the point that defense counsel are obligated to try to proceed in the forum most favorable to their client, there was no "forum shopping" by defendants here. Most obviously, no defendant made a motion to stay or dismiss this action. Rather, defendants engaged Plaintiff Scully on his motion to expedite. Moreover, as discussed above, NightHawk's counsel's documented effort, including via their October 20, 2010

[17] Likewise, plaintiffs' counsel, in choosing a forum for litigation, opt for the most favorable law, the most sympathetic court, the most pro-plaintiff juries, etc.

letter (*see* Ex. 11), to have plaintiffs put the litigation in a single forum of their choosing (be it Arizona or Delaware) was unsuccessful. Once this Court denied the *Scully* Motion to Expedite, the locus of the litigation shifted to Arizona, where the first case (and the next five) had been filed and where two motions to expedite were pending -- both of which continued to be litigated even *after* this Court denied the *Scully* Motion to Expedite and which contained both process and disclosure claims of their own. In other words, proceeding (and eventually negotiating a resolution) in Arizona was not an effort to avoid this Court but, instead, was the only option realistically available to defendants.

Indeed, had this Court *granted* the *Scully* Motion to Expedite, the immediate activity would have been in this Court, and defendants likely would have attempted to enlist the Court's assistance in obtaining a stay of the Arizona State Court Actions. But, with the *Scully* Motion to Expedite having been denied, the plaintiffs in the Arizona State Court Actions, who were the first-filers and were represented by sophisticated counsel who chose not to sue in Delaware in the first place, were not going to agree to move their cases to Delaware. Nor could defendants reasonably have expected the Arizona Court to stay those first-filed actions under the circumstances. *See, e.g.*, *Tonnemacher*, 920 P.2d at 8.

Finally, the principal concern in *Prezant* was that approval of the settlement there might have "encourage[d] plaintiffs' attorneys to file actions in courts other than the one in which the initial action was filed in an effort to engage in impermissible forum shopping in order to negotiate a 'low-ball' settlement and obtain a quick fee award." *Prezant*, 636 A.2d at 919. That concern is simply *not* present here.

Rather, this case stands in stark contrast to *Prezant*, given that: (i) the Arizona Court, which would be asked to approve the settlement (again, should one result), is home to the *first*-filed action; and (ii) *all* plaintiffs (in both Arizona and Delaware) are parties to the MOU. In any event, *Prezant* recognized that both "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.* at 922 (citing *Nottingham Partners v. Dana*, 564 A.2d 1089, 1102 (Del. 1989)). In other words, the proper course, were this Court or the Arizona Court to conclude that the putative class was inadequately represented, would be not to approve the settlement (should one be presented for approval). *See id.* at 924 ("[W]e do not believe that a class action settlement can constitutionally bind absent class members without a judicial determination that the adequate representation requirement of Rule 23(a)(4) has been satisfied").

* * *

With respect to the second part of this question, we proceed from the assumption that "collusion," in this context, would be, as Professor Coffey explains, a "non-adversarial" settlement or "an agreement -- actual or implicit -- by which the defendants receive a 'cheaper' than arm's length settlement and the plaintiffs' attorneys receive in some form an above-market attorneys' fee." John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Columbia L. Rev. 1343, 1367, 1373 (Oct. 1995); *see also Black's Law Dictionary*, 8th ed. (2004) (defining "collusion" as "[a]n agreement to defraud another or to do or obtain something forbidden by law").

Put simply, we are not aware of *any* facts that would support a finding of (or even suggest) collusion here -- and we definitely were *not* a party to any (*i.e.*, having not participated in even a single settlement discussion with any of plaintiffs' counsel). Moreover, Plaintiff Scully's counsel had more than ample options, if they ever felt that their obligations to the putative class compelled the continued prosecution of their case: they could have refused to sign on to the MOU (and, in turn, become an objector in the Arizona Court), or they could have renewed their motion to expedite in this Court -- again, they had *20 days* to do so after first receiving discovery from NightHawk, if they thought the documents somehow changed the settlement dynamics. They did *none* of these things, presumably because they, like the Arizona plaintiffs, had determined that signing the MOU was in the putative class's best interests.

With respect to the Court's suggestion during the December 17 status conference (*see* Ex. 27 at 22) that defense counsel could theoretically "aid and abet" a *class counsel's* breach of fiduciary duty to the putative class, nothing of the sort occurred here, and the concept itself is inconsistent with the adversarial system where there has been an arm's length (as opposed to collusive) settlement process. Here, we are aware of no facts which suggest any collusion, and it bears emphasis that: (i) none of defendants believed that *any* of the claims in this action or in the Arizona State Court Actions had *any* merit; and (ii) Plaintiff's counsel here (as well as plaintiffs' counsel in Arizona) investigated their claims and thereafter -- *i.e.*, 20 days after first receiving discovery and without renewing their motion to expedite or seeking any other relief in the interim -- agreed in principle to resolve them, subject to still further discovery. Moreover, even if a

class plaintiff's claim did have some merit, defense counsel would still be ethically obligated to obtain the best result for their client, including the best settlement (whether monetary or non-monetary). Defense counsel are hired to do exactly that; and the courts, in a class action, then must evaluate the fairness and adequacy of any settlement. Finally, assuming, *arguendo*, Plaintiff's counsel's conduct were to be construed as a breach, vRad's counsel, for the reasons stated above, certainly did *not* "knowingly participate" in that breach -- *i.e.*, by resolving, instead of litigating, claims that we believed to be meritless and that Plaintiff had the opportunity to (and did) investigate well before signing the MOU. *See, e.g.*, *Beard Research, Inc. v. Kates*, 8 A.3d 573, 603 (Del. Ch. 2010) (Parsons, V.C.) ("A third party may be liable for aiding and abetting a breach of fiduciary duty if the third party 'knowingly participates' in the breach," which "requires that 'the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach'") (citations omitted).

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?

As discussed above, we do not believe there to have been any collusive settlement here, or, for that matter, that this Court is the "disfavored" forum. To the contrary, defendants' sole intent has been to proceed with this litigation in a single forum (as stressed in NightHawk's counsel's October 20 letter (Ex. 11)), regardless of which forum that may have been (Arizona or Delaware). Accordingly, instead of moving to stay this later-filed action in favor of the Arizona Court, all defendants, willing to litigate in Delaware, opposed the *Scully* Motion to Expedite -- the denial of which pushed the

Arizona State Court Actions ahead (but the granting of which would have pushed this action ahead).

Furthermore, as also discussed above, there is not yet a settlement here. In the event one is ultimately reached (*i.e.*, following the completion of confirmatory discovery), court approval will still be required. And, if any such settlement is presented to the Arizona Court for approval, or even before then, this Court can consult with the Arizona Court. In addition, any settlement approved by the Arizona Court will not necessarily be free from collateral attack in this Court (despite the presumption of full faith and credit) -- particularly if the Court were to conclude that the class has been inadequately represented. *Compare*, *Stephenson*, 273 F.3d at 257 ("If plaintiffs' inadequate representation allegations prevail, as we so conclude, the judgment . . . is not binding as to these plaintiffs"); and *Hansberry v. Lee*, 311 U.S. 32, 41 (1940) (class action judgments can only bind absent class members where "the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation"); *with Prezant*, 636 A.2d at 925; *Epstein v. MCA, Inc.*, 179 F.3d 641, 648-49 (9th Cir. 1999).[18]

[18] *See also Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973) ("To answer the question whether the class representative adequately represented the class so that the judgment in the class suit will bind the absent members of the class requires a two-pronged inquiry: (1) Did the trial court in the first suit correctly determine, initially, that the representative would adequately represent the class? and (2) Does it appear, after the termination of the suit, that the class representative adequately protected the interest of the class? The first question involves us in a *collateral review* of the . . . trial court's determination to permit the suit to proceed as a class action with [the named plaintiff] as the representative, while the second involves a review of the class representative's conduct of the entire suit -- an inquiry which is not required to be made by the trial court

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?

Again, there was no "forum shopping" here (or "disfavored" or "favored" forum); there was a good faith effort for global peace -- to end what we consider meritless but expensive litigation -- in a single jurisdiction. Nor, again, has a settlement been agreed to, much less presented to any court for approval.

As for the Court's commentary, and whether the Arizona Court will be privy to the same, as a result of Plaintiff's counsel's December 10, 2010 letter informing the Court of the MOU (Ex. 22), which letter all defendants agreed should be sent, the Court has the ability to share its thoughts directly with the Arizona Court. In addition, there are a number of other protections inherent in the situation that should further alleviate the Court's concerns:

- *First*, despite entering into the MOU, any of plaintiffs or their counsel (in either Delaware or Arizona), at any time, can choose not to enter into a settlement (*e.g.*, because of a desire to prosecute his/their process claims).

- *Second*, should a settlement ultimately be presented in the Arizona State Court Actions, to which Plaintiff is not a party, he can object to the settlement or seek other appropriate relief from this Court.

- *Third*, comity requires that the Arizona Court be trusted to properly analyze any settlement under Rule 23 (or its Arizona corollary), including with respect to the various plaintiffs' process claims.

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but which is appropriate in a collateral attack on the judgment. . . .") (emphasis in original).

- *Finally*, regardless of whether the Arizona Court approves or rejects a settlement there (should one ultimately be agreed upon), this case still cannot be dismissed (voluntarily, by stipulation or on motion) without this Court's approval -- as acknowledged in the MOU -- and, potentially, collateral review (as opposed to just a perfunctory "full faith and credit" dismissal).

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?

For the reasons discussed above (namely, that we are not aware of any evidence of, nor were we a participant in, any collusion), there should be no remedy here, as far as the individual lawyers or law firms are concerned. Defense counsel are bound by their ethical duties to the clients they represent to obtain the best resolution or settlement possible, which is what we did. Were the Court to consider the imposition of any remedy against any of vRad's counsel (which we do not believe there to be any basis for), we respectfully request notice of any challenged conduct and the opportunity to make a showing, including through additional briefing on the issue, and by putting forward appropriate witnesses and evidence, as to our and our firms' respective conduct in this case, as well as character, contributions to and standing in this Court, other courts and the community.

Separately, we wholeheartedly agree with this Court's recent comments aimed at improving the multi-jurisdictional system as it relates to class action or other representative deal litigation. *See, e.g.*, *Compellent* (Ex. 25) at 25, 30, 34 ("[T]here isn't a natural pressure to come up with a logical solution to this unless courts start focusing on

the issue and trying to craft a solution. . . . I really do think it's just a problem that we're all grappling with and trying to find a solution to and what the right mechanism is. . . . Courts have to start being clear how they think these things need to be approached"). These improvements could include, among others, the following:

- The use of corporate charter or by-law provisions providing for litigation in an exclusive forum, *e.g.*, in the state of incorporation. *See, e.g.*, *Revlon*, 990 A.2d at 960 ("[I]f boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity issues").[19]

- Rule changes or "best practices" requiring early communication and coordination among the courts, with the assistance of counsel, in multi-forum litigation -- including reciprocal obligations of disclosure to each court (*e.g.*, status reports and reports regarding significant events). For example, we have attached as Exhibit 28 protocols (including regarding court-to-court communications) approved on February 9, 2011 by the Council of the ABA Section of Litigation, which has recommended that the protocols be adopted by the ABA House of Delegates at its upcoming annual meeting in August 2011.

- Continued scrutiny by the courts of representative plaintiffs' counsel. *See, e.g.*, *Revlon*, 990 A.2d at 955 (using the tools at hand to replace plaintiffs' counsel that the Court deemed to be derelict in its obligations to the putative class: "If adequate representation is not being provided, the Court 'is required to take appropriate action [and] must either enter orders eliminating the problem or decertify the class'") (quoting *N. Am. Acceptance Corp. Sec. Cases v. Arnall, Golden & Gregory*, 593 F.2d 642, 645 (5th Cir. 1979)).

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[19] *But see Galaviz v. Berg*, Case Nos. C-10-3392-RS and C-10-4233-RS, 2011 WL 135215, at *4 (N.D. Cal. Jan. 3, 2011) (holding that "the venue provision [at issue] was unilaterally adopted by the directors who are defendants in this action, after the majority of the purported wrongdoing is alleged to have occurred, and without the consent of existing shareholders who acquired their shares when no such bylaw was in effect. Under these circumstances, there is no basis for the Court to disregard the plaintiffs' choice of forum, which Oracle does not contend is otherwise improper on any grounds, or so inconvenient as to warrant a transfer to another federal court under 28 U.S.C. § 1404(a)").

5. How should the answers to the foregoing questions be applied to the facts of this case?

The foregoing responses have attempted to answer the Court's questions both from a systemic, policy level perspective and as applied to the facts of this case. We therefore incorporate those responses into this response.

CONCLUSION

In today's environment, transacting parties are practically assured of facing litigation, usually in multiple jurisdictions, immediately upon the announcement of a deal. Accordingly, we (and the many clients we defend in these situations) share the view, as this Court recently expressed in *Compellent*, that a solution is necessary, and we look forward to working with the Court and Special Counsel to fashion one consistent with our obligations to the Court and our clients.

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2011, I caused copies of the foregoing Brief and Submission of the Virtual Radiologic Defendants to be served upon the following counsel of record as follows:

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