



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 and EAGLE MERGER )  
SUB CORPORATION, )  
 )  
Defendants. )

C.A. No. 5890-VCL

**DECLARATION OF GEOFFREY C. HAZARD, JR., IN SUPPORT OF THE  
NIGHTHAWK DEFENDANTS' BRIEF IN RESPONSE  
TO THE COURT'S DECEMBER 22, 2010 ORDER**

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Holdings, Inc., David Engert, Peter Y. Chung,  
David J. Brophy, Charles R. Bland and Jeff  
Terrill*

I, Geoffrey C. Hazard, Jr., declare as follows:

1. I am Trustee Professor of Law, University of Pennsylvania, and Distinguished Professor of Law, Hastings College of the Law, University of California. I am a member of the bars of Pennsylvania and California. For over 45 years I have studied, done research, taught and practiced in the fields of civil procedure and professional ethics, including substantial engagement in matters of class suits. Among other things, I was Reporter for the American Bar Association Model Rules of Professional Conduct (on which both Delaware and Arizona counterpart rules are based); a Consultant to the Standing Committee on Practice and Procedure of the Judicial Conference of the United States; and a Senior Adviser to the American Bar Association Section of Business Law. A copy of my professional biography is attached hereto as Exhibit A.

2. I have been engaged on behalf of Wilson Sonsini Goodrich & Rosati, P.C., for my opinion concerning the question of collusion in the settlement discussions and proposed Memorandum of Understanding in the litigation involving the acquisition of NightHawk Radiology Holdings, Inc. ("NightHawk"). I am being compensated on my usual basis. I understand this Declaration may be transmitted to the Special Counsel in this matter, and eventually to the Court. I have reviewed the documents listed in Exhibit B attached hereto, which were provided to me by counsel.

3. In summary, in my opinion there is no direct or circumstantial evidence of collusion between counsel on the opposite sides in this matter. On the contrary, the evidence indicates that all counsel acted ethically. There is no direct evidence of collusion and counsel for all parties firmly assert that there was no collusion. Accordingly, the issue is whether there is circumstantial evidence sufficient to support a finding of collusion. In my opinion, there was not.

4. As the basis for these opinions I assume the facts set forth in the NightHawk Defendants' Memorandum in Response to the Court's December 22, 2010 Order, pages 1-25. I

also assume certain information about the Arizona judges involved in this case, as indicated below.

5. Settlement of a legal dispute is generally favored. A settlement agreement necessarily involves cooperation between the opposing parties and their respective lawyers. The fact that an agreement was reached depends on there being substantial elements of good will and professional courtesy among the lawyers. Accordingly, in my opinion the presence of these elements is not an indicator of collusion.

6. The litigation consisted of six cases filed in Arizona state court, one in the United States District Court for Arizona, and one in the Delaware Court of Chancery.

(a) The Arizona state court cases were all assigned as complex cases to Judge Edward Burke. Judge Burke has experience going back 15 years as a regular and *pro tem* judge in the Superior Court and Arizona Court of Appeals. Before becoming a judge he had been active not only in private practice but in the Arizona bar. Those circumstances indicate a judge who is familiar with litigation practice and who is of high professional reputation.

(b) The federal case was assigned to U.S. District Court Judge Neil Wake. Judge Wake has been on the federal bench since 2004 and before that served from time to time as a judge *pro tem* on the Arizona Court of Appeal. His previous private practice was in various fields of complicated litigation.

(c) The identity and professional character of these Arizona judges in my opinion supports the inference that no collusion was involved so far as the Arizona courts have been concerned. The possibility of "reverse auction" collusion has been well recognized by all judges experienced in complicated litigation, particularly stockholder class suits.

7. The principal law firms on all sides (Wilson Sonsini Goodrich & Rosati, P.C., Weil Gotshal & Manges LLP, Robbins Umeda LLP, and Faruqi & Faruqi, LLP) are all experienced in this kind of litigation and aware of the problem of alleged collusion. The firms representing plaintiffs are established plaintiff's commercial and class suit litigation firms. The firms representing the defendants are similarly experienced. All these firms have appeared

before the Delaware Chancery Court on repeated occasions. Their professional standing in my opinion supports the inference that no collusion was involved.

8. The negotiations are substantially evidenced by documents, particularly email correspondence. Nothing in that correspondence suggests collusion, and its existence, in my opinion, is circumstantial evidence to the contrary.

9. The practical need of corporate defendants for settlement on a global basis has long been recognized. The phenomenon of parallel cases in different forums has more recently become common. Global settlement requires settlements effective in the parallel cases pending in different courts, the situation here. Of necessity, in such circumstances global settlement negotiations ordinarily must be centered in one of the courts handling the parallel cases.

(a) Here the more numerous and earlier filed cases were in Arizona, a factor indicating that the settlement could properly be centered there. It was also easier to coordinate the federal case that was pending in Arizona.

(b) All of plaintiffs' counsel were willing to focus settlement in Arizona, while some were not willing to do so in Delaware.

(c) The plaintiffs' counsel in the Arizona cases had standing and experience which apparently was collectively superior to counsel involved only in the Delaware case.

(d) In these circumstances, in my opinion, focusing settlement negotiations in the Arizona cases is fully consistent with there being no collusion.

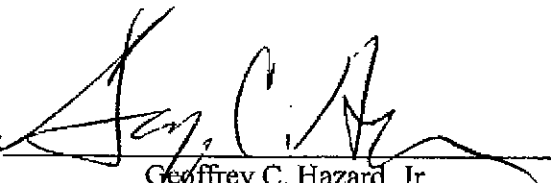
10. Delaware and its courts have a substantial legitimate interest in the legal supervision of Delaware corporations. State jurisdictions elsewhere, for example Arizona, also have a substantial legitimate interest in their legal supervision of corporations whose operations are locally centered—in this case, NightHawk.

(a) In terms of "state interest" in regularity of litigation in such situations, Arizona and similarly situated states are, in my opinion, on a par with Delaware.

(b) In these circumstances, in my opinion, no reasonable inference can be drawn that irregular conduct was involved in centering settlement negotiations in Arizona, or concerning the result of such negotiations.

11. In my opinion, the foregoing circumstances yield the conclusion that there has been no collusion.

I declare under penalty of perjury that the foregoing is true and correct. This declaration is executed on February 10, 2011.

By:   
Geoffrey C. Hazard, Jr.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing document was served on  
February 11, 2011 by LexisNexis File & Serve on the following parties:

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*/s/ D. McKinley Measley*

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