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

PLAINTIFF'S BRIEF IN RESPONSE
TO COURT ORDER DATED DECEMBER 17, 2010

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Pursuant to this Court's Order dated December 17, 2010, Michael Scully ("Plaintiff" or "Scully") and his counsel, Faruqi & Faruqi, LLP ("Faruqi"), hereby submit this memorandum addressing the application of *Prezant v. De Angelis*, 636 A.2d 915 (Del. 1994) to whether the execution of a Memorandum of Understanding in parallel Arizona actions (the "Arizona Actions")[1] implicates issues of forum shopping or collusion in the ultimate settlement of this action (the "Action") and whether counsel involved in the settlement committed any wrongdoing.

I.

INTRODUCTION

First, it is commonplace in transactional cases such as this Action for actions to be filed in multiple jurisdictions, each of which has jurisdiction over the claims asserted. Therefore, absent evidence of collusion, the choice of one forum over another for conducting confirmatory discovery or seeking approval of a settlement should not be inferred or interpreted as collusion.

Second, Chancery Court Rule 23, and the analogous provisions of every other jurisdiction, requires court approval of any class settlement, specific findings that class certification is proper, and provides potential objectors notice and an opportunity to object to the terms of any settlement. As demonstrated by *Prezant*, 636 A.2d at 925, these three safeguards protect the integrity of the judicial process and prevent forum shopping efforts to obtain a collusive settlement without the need for the court in the less favored forum to take any action.

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[1] *Lalone v. NightHawk Radiology Holdings, Inc., et al.*, Case No. CV2010-028112 (Ariz. Sup. Ct.); *Watts v. Engert, et al.*, Case No. CV2010-028127 (Ariz. Sup. Ct.); *LaTorre v. NightHawk Radiology Holdings, Inc., et al.*, Case No. CV2010-028176 (Ariz. Sup. Ct.); *Newman v. Engert, et al.*, Case No. CV2010-028262 (Ariz. Sup. Ct.); *Yu v. Engert, et al.*, Case No. CV2010-028403 (Ariz. Sup. Ct.); and *Israni v. NightHawk Radiology Holdings, Inc., et al.*, Case No. CV2010-025059 (Ariz. Sup. Ct.)

Third, given the inherent adversarial nature of competing counsel representing class members in multiple jurisdictions, counsel for objectors are ethically obligated to raise prior adverse rulings by this Court or any other court, to the extent that confirmatory discovery demonstrates that a proposed settlement is not in the best interests of the class.

Fourth, absent evidence of collusion, Plaintiff respectfully submits that this Court should allow and encourage counsel to participate fully in meaningful confirmatory discovery and the approval process for a settlement, whether as a proponent or an objector. If the Court determines that any misconduct has occurred, whether by forwarding counsel or Delaware counsel, such matter should be referred to the State Bar, where counsel, on a fully developed record, will have the notice and opportunity to fully address the issue.

Finally, in this Action, a Memorandum of Understanding was entered into in the jurisdiction where the greatest weight of the actions was pending, Arizona. To date, no settlement agreement has been signed, and in fact, such a settlement is expressly conditioned upon the results of confirmatory discovery. Faruqi intends to continue to participate vigorously in the confirmatory discovery, and if Mr. Scully and Faruqi deem it necessary, they will object to any settlement and proceed with a damages claim should it be deemed to be the appropriate action.

II.

PROCEDURAL BACKGROUND

On September 27, 2010, NightHawk Radiology Holdings, Inc. ("NightHawk" or the "Company") and Virtual Radiologic Corporation ("VRad") issued a press release announcing that they had entered into an Agreement for VRad to acquire NightHawk in a deal whereby NightHawk shareholders will receive $6.50 in cash for each share of NightHawk stock they own.

Faruqi was ultimately retained by Mr. Scully ("Plaintiff") to represent his interests as a NightHawk shareholder. After a review of Securities & Exchange Commission (the "SEC") filings, including a preliminary proxy statement Form 14A, press releases and analyst reports, Faruqi drafted a complaint and submitted it to Plaintiff for his review. After obtaining Plaintiff's approval and verification, including the certification that he owned NightHawk stock at all relevant times as well as a brokerage statement demonstrating proof of ownership, Faruqi caused the complaint to be filed on October 8, 2010. The same day Faruqi prepared and issued Requests for Production of Documents to Defendants. Faruqi also immediately began preparing a Motion to Expedite Discovery and Proceedings (the "Expedited Motion").

After careful review and extensive strategic discussions, Faruqi caused the Expedited Motion to be filed on October 12, 2010 seeking expedited discovery only with regards to Plaintiff's disclosure claims, since the "go shop" period was almost over and Plaintiff would shortly learn what transpired during that period. Thereafter, Faruqi continued to meet and confer with Defendants' counsel in an effort to obtain discovery and potential coordination with parallel litigation in the Arizona Actions and, if necessary, obtain discovery. On October 21, 2010, this Court denied Plaintiff's Expedited Motion, but noted during oral argument that certain claims regarding the process of the merger negotiations appeared to have more merit than the disclosure claims, which primarily focused on the financial advisor's opinion. The Court, however, noted that Plaintiff would have to explain the timing differential if Plaintiff sought to challenge the process at a later time. In particular the Court stated:

> But, look, the plaintiff doesn't want to challenge process [at this time]. That's what he said at the outset. If he wants to try to come back later after the end of the go-shop period and try to challenge process, you know, they can explain to me at that point what the timing differential is.

October 21, 2010 Expedited Motion Hearing, Transcript at page 22, lines 8-13.

Following the denial of the Expedited Motion, Faruqi again conferred with Plaintiff and began drafting an amended complaint asserting additional process claims and this was filed on October 28, 2010. During this same period, Faruqi continued to negotiate with Defendants' counsel in an effort to obtain discovery and considered again the comments regarding Plaintiff's potential uphill battle to come back to the Court on his process claims. Throughout these discussions, Defendants' counsel, David Berger ("Berger"), stressed that the weight of the cases was in Arizona and conditioned any voluntary discovery production on coordination with the Arizona Actions to avoid parallel litigation.

On October 29, 2010, Juan E. Monteverde ("Monteverde") from Faruqi received a call from Stephen Oddo ("Oddo") at Robbins Umeda, LLP, counsel for plaintiffs in the Arizona Actions, requesting that this Action defer to the Arizona litigation to avoid duplicative proceedings. After these discussions with Mr. Oddo and faced with the denial of Plaintiff's Expedited Motion and the comments from the Court thereto, Faruqi demanded receipt of the document production made in the Arizona Actions regardless of whether the parties could reach any coordination agreement. Unfortunately, on October 31, 2010, Mr. Berger informed Faruqi by e-mail that documents were being produced in the Arizona Actions and that Plaintiff in this Action could obtain them only if agreement was reached regarding coordination with the Arizona Actions where he emphasized, once again, that the weight of the Actions lay and required that Plaintiff agree that all litigation should proceed in Arizona.

Faruqi then proceeded to negotiate the terms of a protective order whereby Plaintiff could obtain the discovery produced in the Arizona Actions. Finally, on November 5, 2010, Defendants produced documents to Faruqi on an attorney's eyes only basis and for settlement

discussions only, presumably because unbeknownst to Faruqi, the Arizona Actions were in settlement discussions. Faruqi refused the designation of the documents as settlement only and demanded that the documents be produced for litigation purposes, to which Defendants' counsel acquiesced. After a thorough review of these documents, Faruqi demanded the production of additional documents going back to earlier in the merger process. These additional documents were produced on November 15, 2010.

Armed with the discovery and after further review of the SEC filings, on November 16, 2010, Faruqi prepared and served a demand letter on Defendants related to process disclosure violations. The next day, Mr. Monteverde conferred with Mr. Oddo who insisted that this Action support the disclosure settlement proceeding in the Arizona Actions or be left out of the process and face the distinct possibility of stay or dismissal in Delaware. Also, on November 17, 2010, Mr. Berger informed Mr. Monteverde that a disclosure settlement was going to be reached in the Arizona Actions with or without this Action. Further, Mr. Berger refused to share the content of such disclosures unless he received Mr. Oddo's consent. Faruqi then carefully considered the pros and cons of signing onto a disclosure only settlement in Arizona which would still allow Faruqi to participate in confirmatory discovery in Arizona or choose to not participate in the disclosure only settlement. In light of the Court's comments on October 21, 2010, Faruqi believed that if the latter choice was made there was a distinct possibility that this Action would be stayed or dismissed, thus leaving Faruqi unable to protect Plaintiff and the Class through confirmatory discovery and verification that the disclosure settlement was sufficient, fair, adequate, and reasonable. With their back to the wall and limited options to protect the Class, Mr. Monteverde contacted Mr. Oddo and agreed to coordinate efforts with the Arizona Actions, but only if Faruqi could have meaningful participation in confirmatory discovery in order to

determine if the settlement was fair to which Mr. Oddo agreed. Faruqi's plan at the time was to sign on to the settlement in order to be able to marshal evidence, and if it did uncover process claims, then Faruqi would blow up the settlement and pursue post-close litigation regarding the process claims. Subsequently, Mr. Oddo provided Faruqi with the disclosures that would form the basis of the settlement.

Messrs. Monteverde and Shane Rowley ("Rowley") from Faruqi then conferred again with Mr. Oddo and requested that he press Defendants for additional disclosures more focused on the process, which had been previously requested in Faruqi's November 16, 2010 demand letter from Mr. Berger who rebuffed the request. In response, Mr. Oddo refused and informed Faruqi that no more disclosure language was possible and that a Memorandum of Understanding (the "MOU") would be negotiated. Mr. Oddo then provided the final disclosure language to be included in the final proxy statement (the "Definitive Proxy").

Faruqi then consulted with Plaintiff and reviewed the additional disclosures which would form the basis of the MOU. After consultation, Faruqi and Plaintiff determined that the additional language in the Definitive Proxy, while not addressing Plaintiff's specific requests, was still of value to NightHawk shareholders in that it improved their ability to cast an informed vote and that agreeing to the MOU would allow Plaintiff to actively participate in confirmatory discovery and thereby fully evaluate the benefits of the settlement and/or marshal sufficient evidence to blow up the settlement and litigation post-close claims. On November 24, 2010, Defendants' counsel circulated the MOU for execution and it was signed by all parties. After circulating a draft to Defendants and incorporating their suggestions and changes, Faruqi submitted a letter to this Court regarding the MOU on December 10, 2010.

At the hearing on December 17, 2010, Plaintiff's counsel stated that the true value of the

settlement here was to permit Plaintiff's counsel to have an active role in confirmatory discovery. Plaintiff and Plaintiff's counsel had great doubt that the court in the Arizona Actions would otherwise permit Plaintiff and Plaintiff's counsel to participate in such confirmatory discovery as a potential objection. Additionally, Plaintiff and Plaintiff's counsel determined that in light of the Court's comments at the hearing on October 21, 2010 and the recent decisions from this Court staying parallel litigation it was in the best interest of Plaintiff and the Class for this case to join in the settlement and participate in confirmatory discovery to ensure a legitimate settlement process. Finally, only after the Arizona court has determined that the settlement is fair, reasonable and adequate, will Faruqi join in any application for attorney's fees and expense.

Since this Court's hearing in this matter on December 17, 2010, confirmatory discovery has not yet commenced in the Arizona Actions. Nevertheless, Faruqi intends to be actively involved in the confirmatory discovery process. To date it is planned that confirmatory discovery in this action will consist of sworn depositions of principals from NightHawk, VRad and Morgan Stanley, the Company's financial advisor. Furthermore, in addition to the documents already voluntarily produced by Defendants, Plaintiff will demand all documents necessary to evaluate the strengths and weaknesses of Plaintiff's claims in order to properly evaluate the settlement. Moreover, if necessary, Faruqi will come before this Court to compel the documents essential for such an evaluation. Only after this confirmatory discovery and consultation with Plaintiff will Faruqi sign any ultimate settlement agreement. Finally, if Plaintiff and/or Faruqi deem it necessary, they will object to any settlement and proceed with a damages claim should that be deemed appropriate.

III.

LEGAL ARGUMENT

A. The Legal Safeguards Which Protect the Integrity of the Judicial Process and Prevent the Possibility of Collusion

Chancery Court Rule 23(e) and the requisite procedures for the approval of settlements of class actions provide safeguards to protect the integrity of the judicial process and prevent both forum shopping and collusive settlements.

1. General Safeguards Protecting the Integrity of the Judicial Process in the Settlement of Class Actions

It has long been the policy of both Delaware and Arizona courts to favor "the voluntary settlement of contested issues." *Rome v. Archer*, 197 A.2d 49, 53 (Del. 1964); *see also Dansby v. Buck*, 92 Ariz. 1, 11 (Ariz. 1962) ("It has always been the policy of the law to favor compromise and settlement."). Simultaneously, courts from both states have recognized that due to both statutory provisions and "the fiduciary character of a class action, the court must participate in the consummation of a settlement to the extent of determining its intrinsic fairness." *Rome*, 197 A.2d at 53; *City of Phoenix v. Fields*, 219 Ariz. 568, 572 (Ariz. 2009) (discussing importance of an "undiluted" and "scrupulous" review of settlement where no class has yet been certified); Ch. Ct. Rule 23(e); Ariz. R. Civ. P. 23(e) (both modeled on Fed. R. Civ. Pro. 23(e), requiring court approval of the settlement or dismissal of class actions).

Nevertheless, courts have recognized also that "[w]hile the parties to a class action start out in an adversarial posture, once they reach the settlement stage, incentives have shifted and there is the danger of collusion." *Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003), *citing In re General Motors Corp.*, 55 F.3d 768, 778 (3d Cir. 1995) (noting that class actions can become a vehicle for collusive settlements); and Deborah R. Hensler et al., *Class Action Dilemmas:*

Pursuing Public Goals for Private Gain, 27 (RAND Institute for Civil Justice, 2000) (same). Specifically, courts have noted that "[c]lass counsel, for instance, might settle claims for significantly less than they are worth, not because they think it is in the class's best interest, but instead because they are satisfied with the fees they will take away." *Vollmer*, 350 F.3d at 660, *citing Rand v. Monsanto Co.*, 926 F.2d 596, 599 (7th Cir. 1991) ("The representative and counsel may be tempted to sell out the class for benefits to themselves.").

To preserve the integrity of the judicial process, Delaware courts, and other courts applying analogous provisions of Chancery Court Rule 23(e) or corresponding rules, have recognized three important safeguards to prevent collusion. First, under Rule 23(e) any settlement must be approved by the appropriate court. *Rome*, 197 A.2d at 53-54 ("Approval of a class action settlement requires more than a cursory scrutiny by the court of the issues presented."); *In re Cox Communs., Inc. S'holders Litig.*, 879 A.2d 604, 638-639 (Del. Ch. 2005) (recognizing that the review of any attorneys' fees awarded serves as one of the "disincentives for collusive settlements.").

Second, as a part of the approval of a settlement, the approving court must make a specific finding that the action satisfies all of the requirements for class certification. *Prezant*, 636 A.2d at 925 ("Therefore, we hold that, *in every class action settlement*, the Court of Chancery is required to make an explicit determination on the record of the propriety of the class action according to the requisites of Rule 23(a) and (b).") (emphasis in original); *Nottingham Partners v. Dana*, 564 A.2d 1089, 1094 (Del. 1989); *see also City of Phoenix*, 219 Ariz. at 572.

Finally, by giving the absent class members notice of an opportunity to be heard prior to the approval of a settlement, the adversarial process is reintroduced through the opportunity for class members to object to the settlement. *Brinckherhoff v. Tex. E. Prods. Pipeline Co., LLC*,

986 A.2d 370, 397 (Del. Ch. 2010) ("Meaningful objections can help ensure the fairness of settlements in representative actions."); *Vollmer*, 350 F.3d at 660 (objectors "counteract any inherent objectionable tendencies by reintroducing an adversarial relationship into the settlement process and thereby improving the chances that a claim will be settled for its fair value.").

As summarized by the Delaware Supreme Court in *Prezant*:

> When competition among different sets of plaintiffs' counsel exists, as it does here, there is the ever present danger than unscrupulous counsel may "sell out" the class in order to receive a fee. *See Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co. of Chicago*, 7th Cir., 834 F.2d 677, 681 (1987). However, we believe 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.

636 A.2d at 922, citing *Nottingham Partners*, 564 A.2d at 1102.

2. *Prezant* Demonstrates the Manner in Which These Safeguards Prevent Collusion

The Delaware Supreme Court's decision in *Prezant* illustrates the manner in which these three safeguards prevent collusion in class action settlements. In *Prezant*, nine class actions were filed in Illinois federal court alleging violations of the federal securities laws. *Prezant*, 636 A.2d at 918. Preliminary settlement negotiations in the Illinois federal action broke off when the plaintiffs rejected a settlement offer of $1.2 million. *Id.* Over one month later, counsel for Joseph De Angelis ("De Angelis") filed a related class action in Pennsylvania federal court, which he subsequently dismissed after discovering the action would likely be transferred and consolidated with the already pending actions in Illinois. *Id.* Then, more than two and one-half months after the first Illinois action was filed and after settlement negotiations were terminated, counsel for Mr. De Angelis filed an action in the Delaware Court of Chancery asserting only state law claims, without consulting plaintiff De Angelis. *Id.* Mr. De Angelis' counsel then

commenced settlement negotiations within two weeks of filing the action, and without obtaining any opinion from a damages expert or conducting any formal discovery. *Id.* at 918-919. Without the aid of any formal discovery or expert analysis, Mr. De Angelis' counsel reached an agreement in principal to settle the class claims for $1.225 million in just over three months. *Id.*

Four months later, a Stipulation of Settlement was filed with the Delaware Court of Chancery. *Id.* at 919. The Illinois plaintiffs conducted discovery to submit valid objections to the settlement. *Id.*[2] The Delaware complaint stated that Mr. De Angelis bought his stock in the IPO and held it through the end of the class period, an allegation which proved false after objectors deposed Mr. De Angelis and learned that he sold his shares well before the end of the class period. *Id.* To remedy this problem, Mr. De Angelis' counsel amended the complaint -- *without leave of the court* -- to name a different representative plaintiff and to add claims alleging violations of Sections 11 and 15 of the Securities Act of 1933, *after the filing of the Stipulation of Settlement*. *Id.*

Four of the Illinois plaintiffs objected to the settlement and application for attorneys' fees, claiming that the settlement was grossly unfair to the class and that the process by which the settlement was reached was fatally tainted and that, if the settlement was approved, it would encourage plaintiffs' attorneys to engage in impermissible "forum shopping" in order to

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[2] After learning of the settlement negotiations in the Delaware action, certain of the Illinois plaintiffs also filed suits in the Delaware Court of Chancery and immediately moved to consolidate their Delaware actions with the *De Angelis* action and sought to have their attorneys designated as the lead counsel for all the suits, including the *De Angelis* action. On appeal, the Delaware Supreme Court noted "[t]his maneuver was patently designed to block any settlement negotiations between De Angelis and the defendants so that defendants would be compelled to negotiate with plaintiffs in the Illinois action. The Court of Chancery, while consolidating the cases for trial, refused to order the cases merged or to designate lead counsel for the consolidated cases, thereby thwarting the attempt of the Illinois plaintiffs to control the Delaware actions as well." *Id.* at 919.

negotiate a "low-ball" settlement and obtain a quick fee award. *Id.* Additionally, the objectors challenged Mr. De Angelis' adequacy as a class representative. *Id.* Even though the Court of Chancery found that several aspects of the litigation and settlement process were "highly suspicious," the Court approved the settlement over the objections of the Illinois plaintiffs. *Id.* at 920.

On appeal, the Delaware Supreme Court recognized that courts approving the settlement of a class action have a unique responsibility because of the fiduciary nature of a class action requires the Court of Chancery to participate in the consummation of the settlement to the extent of determining its intrinsic fairness. *Id.* at 921. The Court then conducted a thorough analysis of the propriety of the certification of a settlement only class. Based upon this analysis, and the Constitutional implications thereof, the Court held "that, *in every class action settlement*, the Court of Chancery is required to make an explicit determination on the record of the propriety of the class action according to the requisites of Rule 23(a) and (b)." *Id.* at 919. The Court went on to explain:

> The court may make such a finding on the basis of a record containing sworn testimony, by affidavit and/or deposition of the appropriate persons. When, as here, the settlement is challenged as not complying with one of the Rule 23 requirements, the Court of Chancery shall articulate on the record its findings regarding the satisfaction of the Rule 23 criteria and supporting reasoning in order to facilitate possible appellate review.

Id. at 925. Ultimately, the Court held that the Court of Chancery, in approving the settlement, had failed to make the requisite findings, particularly with regards to the adequacy of representation, and therefore remanded the action for further proceedings consistent with its opinion. *Id.* at 926. Because of the Court's failure to make the necessary findings on class certification in light of the facts and the evidence adduced by the objectors, the Court found it

unnecessary to reach the argument of improper forum shopping. Thus, *Prezant* illustrates the manner in which court approval, class certification and the presence of objectors serve to maintain the integrity of the judicial process and prevent collusive settlements without the need for the court in the less favored forum, *i.e.* Illinois, to take any action whatsoever. Just as in *Prezant*, these same structural safeguards obviate concerns of forum shopping or collusion in any eventual settlement reached in this Action, whether it is submitted to this Court or the Arizona court for approval.

B. Application of *Prezant* Demonstrates That There Has Been No Collusion by the Execution of the Memorandum of Understanding in the Arizona Action

It is commonplace in transactional cases such as this for actions to be filed in multiple jurisdictions, each of which has proper jurisdiction over the claims asserted. *See, e.g.*, *In re The Topps Co. S'holders Litig.*, 924 A.2d 951, 955 (Del. Ch. 2007). Consequently, often the first motion confronted by the courts before whom these actions are filed are competing motions to stay in favor of the other jurisdiction, and in some instances each court decides to retain jurisdiction over the action. *See Id.* at 955-56. Inevitably, when confronting such a motion, the courts are presented with accusations of "forum shopping" from the competing counsel. *See, e.g.*, *Marie Raymond Revocable Trust v. Mat Five LLC*, No. 3843-VCL, 2008 Del. Ch. LEXIS 77, at *9 (Del. Ch. June 26, 2008).

Confronted with actions pending in multiple jurisdictions, parties must select one of the multiple jurisdictions in which to seek approval of any settlement.[3] In the present case, after this Court denied Plaintiff's request for expedited discovery regarding disclosure claims, Plaintiff's

[3] If all other factors are equal, Delaware courts have recognized that as an "objective tie-breaker," preference should be given to the jurisdiction having the "first filed action," which in this case is Arizona. *Teachers' Ret. Sys. of La. v. Scrushy*, No. 20529, 2004 Del. Ch. LEXIS 18, at *17 (Del. Ch. Mar. 2, 2004).

Counsel learned that Defendants intended to enter into the MOU with the plaintiffs in the Arizona Actions. Mindful of this Court's comments regarding the potential merits of Plaintiff's process claims, and balancing Defendants' assertions regarding the weight of the cases in Arizona and the possibility of this action being stayed, Plaintiff's counsel, after careful consideration and consultation with Plaintiff, executed the MOU in order to allow for meaningful and active participation in the confirmatory discovery process. Faruqi will have the ability to provide input regarding the parameters of confirmatory discovery to be governed by the traditional notions of discovery. Without active participation in the confirmatory discovery process Plaintiff's counsel will not have the opportunity to secure evidence of the process issues this Court raised at oral argument on expedited discovery and therefore would not have the opportunity to evaluate properly and, possibly, pursue such claims or object to the settlement. Moreover, Plaintiff's counsel secured the express consent from Defendants' counsel that all such discovery was not merely for settlement purposes but also for litigation if the evidence so warranted.

In conducting the confirmatory discovery, Plaintiff's counsel will not merely accept the documents Defendants have voluntarily produced, nor just conduct "informal interviews," as Mr. De Angelis' counsel did in *Prezant*. 636 A.2d at 918. Instead, the confirmatory discovery in this action will consist of sworn deposition of principals from NightHawk, VRad and Morgan Stanley, the Company's financial advisor. Furthermore, in addition to the documents previously voluntarily produced Plaintiff's counsel will demand all documents necessary to evaluate the strengths and weaknesses of Plaintiff's claims in order to properly evaluate the settlement. Moreover, if necessary, Faruqi will come before this Court to compel production of the documents necessary for such an evaluation.

By participating in this meaningful confirmatory discovery, Plaintiff and his counsel will be able to obtain the evidence and information necessary to evaluate the merits of both the disclosure and process claims asserted in this Action. Plaintiff and his counsel can then serve the very important role of objector if it is determined based upon the evidence that any eventual settlement is not in the best interests of the class. *See Brinckherhoff*, 986 A.2d at 397 ("Meaningful objections can help ensure the fairness of settlements in representative actions.").

C. The Execution of the MOU in the Arizona Action is Not Indicative of Collusion

No Delaware court has enunciated the factors to be evaluated to determine whether a settlement is collusive. One federal court has explained, however, that "'[i]n essence, collusion is simply fraud accomplished by two or more persons,' while fraud includes 'a breach of legal or equitable duty, which, irrespective of moral guilt . . . the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests.'" *Dacotah Mktg. & Research, L.L.C. v. Versatility, Inc.*, 21 F. Supp. 2d 570, 578, n.20 (E.D. Va. 1998), quoting *Spence-Parker v. Maryland Ins. Group*, 937 F. Supp. 551, 560-61 (E.D. Va. 1996). In the context of collusive settlements in the insurance context, other federal courts have proposed five factors that should be evaluated to determine whether a settlement is collusive: (1) the unreasonableness of the settlement amount; (2) concealment; (3) lack of serious negotiation; (4) profit to one of the parties (or counsel); and (5) attempt to harm the interest of one of the parties (or absent class members). *See Continental Cas. Co. v. Westerfield*, 961 F. Supp. 1502 (D.N.M. 1997); *MacLean Townhomes, LLC v. Charter Oak Fire Ins. Co.*, No. C06-1093BHS, 2008 U.S. Dist. LEXIS 55093, at *9-10 (W.D. Wash. July 21, 2008).

Collusion should not be inferred merely because the MOU was executed in the Arizona

Actions. Indeed, Delaware courts have recognized that claims of collusion should be viewed with suspicion and only upheld where there is actual evidence of some factors supporting such a conclusion. *See Karasik v. Pacific Eastern Corp.*, 21 Del. Ch. 81, 98 (Del. Ch. 1935) (rejecting accusations of collusion and fraud in settlement where Master "found no evidence whatever justifying the conclusion that any circumstance of that character existed," despite the "great disparity between what Jonas paid and the amount for which a decree could be rendered against him in the primary suits. . ."); *Stepak v. Ross*, No. 7047, 1985 Del. Ch. LEXIS 508, at *15 (Del. Ch. Sept. 5, 1985) ("The objector's claim that the settlement is collusive is completely unsubstantiated in the record," even though "the consolidated complaint was filed after settlement was agreed upon in principal.").

Furthermore, although this Court has "the inherent power to supervise the professional conduct of attorneys appearing before it", any action "to disqualify must contain clear and convincing evidence establishing a violation of the Delaware Rules of Professional Conduct so extreme that it calls into question the fairness or the efficiency of the administration of justice." *Dunlap v. State Farm Fire & Cas. Co. Disqualification of Counsel*, 950 A.2d 658 (Del. 2008) (discussing disqualification motion). Faruqi has no personal knowledge or clear and convincing evidence that the parties here committed any wrongdoing or that the settlement is collusive.

IV.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that this Court take no action against the settlement and/or the parties involved in the settlement.

Dated: February 11, 2011

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