



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ANASTASIA WOLST,

Plaintiff,

v.

MONSTER BEVERAGE CORPORATION F/K/A/  
HANSEN NATURAL CORPORATION, a Delaware  
Corporation

Defendant.

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: Civil Action  
: No. 9154-VCN  
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Chambers  
417 South State Street  
Dover, Delaware  
Friday, May 16, 2014  
2:00 p.m.

- - -

BEFORE: HON. JOHN W. NOBLE, Vice Chancellor

- - -

TELECONFERENCE

DEFENDANT'S MOTION TO COMPEL AND THE COURT'S RULING

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

1 APPEARANCES: (via telephone)

2 BLAKE A. BENNETT, ESQ.  
3 Cooch and Taylor, P.A.

4 -and-

5 W. SCOTT HOLLEMAN, ESQ.  
6 of the New York Bar  
7 Johnson & Weaver, LLP  
8 for Plaintiff

9 GREGORY V. VARALLO, ESQ.  
10 KEVIN M. GALLAGHER, ESQ.  
11 Richards, Layton & Finger, P.A.

12 -and-

13 MICHAEL G. CUTINI, ESQ.  
14 of the New York Bar  
15 Schulte Roth & Zabel LLP  
16 for Defendant

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1                   THE COURT: Good afternoon. This is  
2 Vice Chancellor Noble. Could I have a roll call,  
3 please.

4                   MR. VARALLO: Good afternoon, Your  
5 Honor. Greg Varallo and Kevin Gallagher for the  
6 defendants from Richards Layton & Finger; and with us  
7 on the phone is Michael Cutini from Schulte Roth &  
8 Zabel in New York.

9                   MR. BENNETT: Good afternoon, Your  
10 Honor. This is Blake Bennett from Cooch and Taylor on  
11 behalf of the plaintiff, Anastasia Wolst. With me on  
12 the line is Scott Holleman from Johnson & Weaver, who  
13 will be speaking on behalf of Ms. Wolst today.

14                   THE COURT: Mr. Varallo, you don't  
15 want to go to Chicago?

16                   MR. VARALLO: Your Honor, I'd love to  
17 go to Chicago if my friends will bear the freight, but  
18 they had a little bit of an issue with the cost of  
19 sending me there.

20                   Let me, if I can, just at the outset,  
21 put the matter in context. There are a couple of  
22 unusual things about this case. One is certainly the  
23 timing.

24                   This story begins with the dismissal

1 with prejudice of a derivative case brought by the  
2 same plaintiff back in May of 2011. In February 2012,  
3 the plaintiff makes a demand on the company's board  
4 that it investigate. The board convenes a special  
5 committee, hires outside counsel, and eventually  
6 rejects the demand in October of 2012. And then a  
7 demand to inspect books and records that is the  
8 subject of this case isn't actually sent to the board  
9 until late March of 2013, about six months after the  
10 demand to sue was rejected. And the company then  
11 provides documents in May and July of 2013. For  
12 reasons that are just not clear, no case was filed  
13 until December 2013, more than eight months after the  
14 books and records demand and 14 months after the  
15 derivative demand refusal.

16 But, Your Honor, it's not only the  
17 timing that makes this case a little bit unusual. The  
18 stated purpose for the demand, which is to evaluate  
19 whether the board wrongfully refused the litigation  
20 demand which would allow the plaintiff to prosecute  
21 the claims derivatively is, we would contend, futile  
22 on its face since more than six years, in fact, almost  
23 seven years has passed since the time of the wrongs  
24 alleged in the underlying derivative case; and,

1 therefore, we can't see how this could be a proper  
2 purpose.

3           But turning to the motion before the  
4 Court today, we've got trial set for June 2nd, Your  
5 Honor. A notice of deposition was filed on April 21st  
6 seeking a May 1st deposition in Wilmington, and  
7 plaintiff's counsel advised that he opposed that  
8 notice. And when we proposed to take the deposition  
9 in Chicago provided that plaintiff pay our expenses,  
10 that offer was also rejected. Naturally, as you might  
11 expect, this motion followed.

12           Your Honor, I think we are in  
13 agreement with plaintiff's counsel that the ordinary  
14 rule is absent unusual circumstances presenting  
15 serious hardship, plaintiff gives a deposition in the  
16 forum where suit has been brought. That is, as  
17 described in the Barrett Estate case, the ordinary  
18 rule. And it is plaintiff's burden if she doesn't  
19 want to come to Delaware to give that deposition to  
20 show that it is "unreasonably burdensome" to follow  
21 the rule here.

22           My friend on the other side likens the  
23 circumstances of his client who lives and works in  
24 Chicago to the plaintiff's in the Unisuper case who

1 would have been required to fly from Australia to give  
2 a deposition in Delaware. But even in Unisuper, if  
3 you read it carefully, Your Honor, the lead Australian  
4 plaintiff there, in fact, gave a deposition in New  
5 York, not Australia. Of course, it can't be so that a  
6 rule of law that applied to flying literally around  
7 the world from Australia necessarily applies to flying  
8 90 minutes from Chicago.

9           And cases that my friend cites where  
10 the Court has been sympathetic to not requiring a  
11 plaintiff to come from either Hong Kong or Brazil,  
12 while interesting, really don't have a lot to do with  
13 this case.

14           The plaintiff's hardship argument here  
15 begins with the proposition that hardship exists  
16 because, in plaintiff's words, and I'm quoting, there  
17 is "no way" she can make a one-day round-trip flight  
18 to Wilmington because there are no direct flights from  
19 Chicago to Wilmington that would allow a one-day, thus  
20 forcing an overnight stay for what's likely to be a  
21 brief deposition. And that's directly taken from Page  
22 5 of the other side's responsive pleadings.

23           That theory is then expounded upon in  
24 Mr. Holleman's affidavit at Paragraphs 14 and 15. And

1 indeed in plaintiff's own affidavit before the Court  
2 on this very motion, she claims hardship principally  
3 because she'll have to stay overnight here. She says,  
4 "It would be extremely burdensome for me to have to  
5 travel to Wilmington, Delaware, for an overnight  
6 trip." That's at Paragraph 6.

7 I daresay that my friend, Mr. Bennett,  
8 didn't have a lot to do with these papers, because as  
9 those of us who live and work in Wilmington  
10 understand, Chicago is, in fact, an easy one-day  
11 round-trip from the Philadelphia International  
12 Airport. And those of us that have been here for more  
13 than a little while understand that the Wilmington  
14 airport really doesn't serve active commercial service  
15 to anywhere.

16 I believe we showed the Court in our  
17 papers that there are no fewer than 35 nonstop flights  
18 each day between Chicago and Philadelphia and vice  
19 versa. And I can sadly assure the Court from long  
20 personal experience that it is, in fact, a trip that  
21 is makeable and often made on a one-day basis. Thus,  
22 Your Honor, the idea that a deposition here would  
23 require necessarily an overnight stay is simply wrong.  
24 To put it charitably, it's the invention of a

1 geographically challenged imagination.

2           Plaintiff then argues that his client  
3 works for a living, has a heart ailment, and is 70  
4 years of age, but note that notwithstanding an  
5 affidavit has been filed here by the plaintiff, there  
6 is no assertion in that affidavit that plaintiff's  
7 medical condition prohibits her from traveling, nor  
8 could there be, since she will have to come to trial  
9 in just a few weeks to save her case from dismissal  
10 for nonprosecution.

11           Likewise, Your Honor, there is nothing  
12 in the affidavit of Mrs. Wolst showing that she's  
13 unable to afford the trip or, for that matter, is  
14 unable to afford to have us come to her should she  
15 prefer to do that.

16           Finally, there is no assertion that  
17 Mrs. Wolst works seven days a week. And we are more  
18 than happy to take the deposition on a Saturday or a  
19 Sunday or any other day she's not working, if  
20 necessary, so as not to cause her to have to miss  
21 work.

22           So stripped of its incorrect assertion  
23 that Mrs. Wolst can't make the trip without an  
24 overnight stay, there simply is nothing on the record



1 showing Your Honor that plaintiff has met its burden  
2 of showing unreasonable burdensomeness in any of the  
3 affidavits.

4           Counsel asserts that we should be  
5 ordered to take the deposition by remote video. And,  
6 Your Honor, in candor, while it's certainly possible,  
7 there's no basis on which to force that result on the  
8 defendant in this case.

9           Those of us who try cases for a living  
10 know that there's simply no substitute for sitting in  
11 the same room with a witness, seeing how they react  
12 and respond in person, and, importantly, having the  
13 ability to move one way or the other in dealing with  
14 exhibits and using exhibits on a real-time basis.

15           A video conference deposition is a  
16 pale dispute for the real thing, especially where  
17 we're taking the testimony of the plaintiff here and  
18 likely the only witness on the other side of our  
19 upcoming trial.

20           Your Honor, in these circumstances, we  
21 shouldn't be made to give up our right to confront and  
22 examine the witness in person. So at the end of the  
23 day, I think the question really comes down to who  
24 pays for the travel: the plaintiff who brought the

1 suit and is putting us to the expense of defending  
2 what we contend is almost certainly a time-barred  
3 books and records action or the defendant who has in  
4 fact provided documents in response to the demand even  
5 though it was obvious to us from the outset that  
6 plaintiff had and can have no proper purpose here.

7           Plaintiff's initial argument was that  
8 my co-counsel at Schulte Roth had a Chicago office and  
9 one of Schulte's Chicago-based lawyers should take the  
10 deposition, avoiding the need for anyone to pay for  
11 travel. But like the argument that you can't get here  
12 from Chicago, that, sadly, too is geographically  
13 challenged as neither Schulte nor Richards has now or  
14 has ever had a Chicago office. It's just not true.

15           In closing, Your Honor, we're  
16 sensitive to Ms. Wolst's needs and we'll be happy to  
17 schedule around any medical appointments she has,  
18 schedule around her work schedule, and do everything  
19 we can to conclude this deposition as expeditiously  
20 and as efficiently as possible. I'll take it myself  
21 or my colleague, Mr. Gallagher, will be taking it, but  
22 in any event, we'll do it, and I can assure Your Honor  
23 that it will be done effectively and efficiently.

24           But at the end of the day, there is

1 simply no showing before the Court for why plaintiff  
2 is unable to come to Delaware or, should she take us  
3 up on the offer to come to Chicago, unable to pay for  
4 us to do so.

5           Your Honor, with that, I'll rest; and  
6 it's our contention that the ordinary rule ought to be  
7 followed.

8           THE COURT: Mr. Holleman.

9           MR. HOLLEMAN: Yes, Your Honor.

10          THE COURT: Your thoughts.

11          MR. HOLLEMAN: Our thoughts are that  
12 the plaintiff is 70 years old. She works part time at  
13 Outback Steakhouse. She has a heart condition. And  
14 let's not forget that this is a deposition that  
15 they're seeking in a 220 action. It's going to be  
16 very short. I'm not exactly sure what types of  
17 materials that the defendants hope to get into, but  
18 it's not going to be a lengthy deposition; and we  
19 think that it should go forward in Chicago.

20                 And in the alternative, we think that  
21 a video deposition would be an excellent substitute.  
22 And I don't understand what the defendants would hope  
23 to get from an in-person deposition that they can't  
24 already get from a video deposition, particularly

1 given that they have already propounded discovery  
2 requests and we've responded to other such discovery  
3 requests that might give evidence that they might seek  
4 to introduce at trial.

5           And again, this is still just at the  
6 discovery stage. Our client, who brought the suit in  
7 Delaware because, frankly, there is no other place  
8 that she could have brought suit, will be more than  
9 happy to show up in Delaware for trial if her presence  
10 is required or advised, but in terms of this  
11 deposition, we believe it's unreasonable to force her  
12 to travel to Philadelphia, hop on a train or a bus or  
13 a car to get down to Wilmington, for what shouldn't be  
14 longer than an hour or so deposition. We just think  
15 that that's an unreasonable burden to place upon this  
16 client simply for exercising her right to inspect  
17 books and records.

18           I think most of the other items that I  
19 have to say, we already touched in our briefs, and I  
20 won't bore the Court in repeating everything that  
21 we've already submitted.

22           Does Your Honor have any specific  
23 questions with respect to our opposition to the  
24 defendant's position?

1           THE COURT: I do. And Mr. Varallo  
2 touched upon what I was going to ask him and you. He  
3 anticipated my questions.

4           But as I look at this, this is not the  
5 run-of-the-mill 220 action. It's got more historical  
6 baggage than most. This is not the equivalent of a  
7 shareholder saying, "I want to value my shares."  
8 There's a time-bar issue. There's a unique interface  
9 with what a special committee did or didn't do. And  
10 I'm wondering if just the difference, in this case,  
11 from the typical 220 action justifies perhaps a  
12 greater concern about the in-person deposition as  
13 opposed to, for example, a video deposition.

14           MR. HOLLEMAN: I certainly think that  
15 the procedural posture of the case and the historical  
16 context may very well have some additional comments in  
17 the parties' pretrial briefs and perhaps even in  
18 argument at trial, but in terms of being able to  
19 actually extract testimony from Ms. Wolst, I simply  
20 don't see the difference in an in-person deposition  
21 versus a video deposition.

22           The research that we had done prior to  
23 commencing this 220 action informed our belief that it  
24 is timely and whatever relief we're seeking is being

1 sought in a timely fashion and whatever might follow  
2 from the outcome of this 220 action would be timely as  
3 well.

4           It's been a while since we've done  
5 research on those -- those issues weren't really  
6 raised in defendant's opening papers, so we, of  
7 course, did not respond to those in our opposition.  
8 But I see this as nothing more than a discovery issue  
9 limited to whatever testimony they might try to get  
10 from our client. And we just don't think that she  
11 should be burdened with traveling all the way to  
12 Delaware in her condition to be able to give that  
13 testimony.

14           THE COURT: I have no other questions,  
15 but I don't mean to cut you off.

16           MR. HOLLEMAN: I have nothing else to  
17 say other than we think that the Court has a practical  
18 and reasonable approach to resolving such issues in  
19 having the deposition either in Chicago or by video,  
20 which would conserve everybody's costs and would be  
21 the most efficient, effective way to go about doing  
22 this. And if, for some reason, a video deposition  
23 proves insufficient and the defendants can identify  
24 some reason why they might need further in-person

1 testimony, then we can cross that bridge when we get  
2 there. But in terms of a practical solution that  
3 would conserve costs and respect the burdens that  
4 might be placed on different parties, we would submit  
5 that a video deposition provides that compromise.

6 THE COURT: One of the thoughts that I  
7 had was try the video deposition and if the defendant  
8 can point to something specific as to why the video  
9 deposition was not adequate, everybody could reconvene  
10 in person. One of the problems with that is timing.  
11 There's not a whole lot of time left between now and  
12 the trial date.

13 Another problem is I think we all  
14 probably have differing views on the utility of video  
15 depositions. I've had some lousy experiences -- and  
16 I'm not accusing anybody on this call of it,  
17 obviously -- but with lawyers, in essence, coaching  
18 the video-deposed witness.

19 So Mr. Varallo is right that in-person  
20 is different from video. The question is whether  
21 in-person is different enough from video in this  
22 context to justify the costs and inconvenience. And  
23 going from Philadelphia to Chicago is not necessarily  
24 fun, but as travel goes in this day and age, it's

1 probably among the easier routes one can take.

2 I don't know, Mr. Holleman, if that  
3 prompted a response from you or not. If not, that's  
4 fine.

5 MR. HOLLEMAN: I certainly think that  
6 there are certain situations where an in-person  
7 deposition may very well be the most appropriate, but  
8 I certainly think that in this context, I would invite  
9 defendants to, after we've tried a video deposition,  
10 to really try to pinpoint what additional testimony  
11 they might hope to get or what additional information  
12 they might be able to get from an in-person  
13 deposition.

14 I just don't see, in this context, in  
15 this case, how they can justify the expense and the  
16 burden of forcing either our 70-year-old client to  
17 travel to Wilmington or for them to make us bear their  
18 cost to travel to Chicago.

19 THE COURT: Mr. Varallo.

20 MR. VARALLO: Thank you, Your Honor.  
21 I'll be very brief. Let me just start with Your  
22 Honor's question of a moment ago.

23 Your Honor, I don't know Mr. Holleman,  
24 so I certainly mean no disrespect when I suggest that,



1 like Your Honor, I've had experience in the past where  
2 the other end of the video deposition perhaps wasn't  
3 quite behaving in the same way you might expect that  
4 lawyer to behave if you were in the room with them.

5           Scott, I don't in any way mean to  
6 suggest for a moment that you would be anything other  
7 than entirely appropriate in the conduct of the  
8 defense of that deposition, but that is always a  
9 concern.

10           But perhaps more practically and  
11 pragmatically in this particular circumstance, I think  
12 Your Honor has really put your finger right on the hot  
13 button, and that is that there is a long history here.  
14 It goes back, as I mentioned just a moment ago, to  
15 2011 or thereabouts. Unlike the typical 220  
16 deposition when your sole exhibit might be the demand,  
17 this is a case where we're certainly not going to have  
18 hundreds of documents but I'd be surprised if we  
19 didn't have nine or ten different documents to use at  
20 the deposition in light of that history.

21           And there is something very  
22 impractical about having to ship the documents to  
23 Mr. Holleman for administration and use during the  
24 deposition. And honestly, Your Honor, it makes it

1 much more difficult to use the documents effectively  
2 in cross-examination if opposing counsel has the  
3 benefit of, you know, sitting there with the documents  
4 in advance of the deposition.

5           Again, I don't mean to suggest for a  
6 moment that anything will be done improperly, but even  
7 with everyone playing by the rules, as they are  
8 broadly understood, it is still suboptimal for me to  
9 try to examine a witness over, effectively, the  
10 television with the documents in a different place  
11 being handled by somebody else.

12           Where we have local counsel in a  
13 matter, that counsel often, in a videotape deposition,  
14 will handle the documents for us. And I can say to  
15 local counsel, you know, Forget Folder 2. Let's go  
16 right to Folder 4, and we can jump around, depending  
17 upon where the witness wants to take us. But the  
18 point is we don't have local counsel here, Your Honor,  
19 because this is a Delaware company, and Schulte Roth  
20 and Richards are working it, and neither of us have  
21 Chicago offices. So it's going to be somewhat stilted  
22 and more difficult.

23           And Your Honor has it exactly right.  
24 This is not simply a deposition where the question is,

1 Is this your 220 demand and is this really your  
2 purpose, and let me ask ten clever questions to try to  
3 get at whether this is really your purpose. The  
4 documents are more full-bodied. They are more  
5 numerous.

6           And I think my friend may be  
7 understating it when he suggests it's an hour. It's  
8 certainly not going to be a day, but it's going to be  
9 at least a couple hours and it's going to involve, my  
10 guess is, the best part of a dozen documents. And  
11 that is meaningfully different than, you know, a  
12 one-topic deposition or a one-line deposition.

13           And as Your Honor points out, when  
14 you've done this for a long time, there is something  
15 different about being in the room. I get Your Honor  
16 when you say the question is, is that different enough  
17 to justify an in-person deposition, but we start from  
18 the proposition not that I have to justify it, but,  
19 under the law, that my friend has to show  
20 extraordinary burden from the deposition.

21           And he's told us that his witness will  
22 come to Delaware for trial, so it can't be that  
23 there's extraordinary burden in coming to Delaware  
24 because she's got to come anyway. So the question

1 really comes down to who pays and whether she comes  
2 here, because there really isn't a burden other than  
3 that cost. And the cases have made clear that the  
4 simple cost itself isn't a sufficient burden to vary  
5 the ordinary rule.

6           So Your Honor has been very kind to  
7 give us more time than this probably deserves, but I  
8 have nothing further unless Your Honor has questions.

9           THE COURT: I do not.

10           Mr. Holleman, do you have anything  
11 further?

12           MR. HOLLEMAN: The only thing that I  
13 have to respond to is it seems like defendant's main  
14 concerns about conducting a video deposition are the  
15 practical concerns of whether I might be able to get  
16 an unfair advantage by peeking at the exhibits they've  
17 already shipped over, which I don't think that their  
18 unfounded suspicions is enough to say that we can't  
19 have a video deposition, that that won't work in the  
20 context here.

21           And just in terms of the circumstances  
22 underlying the demand, that was something that wasn't  
23 addressed in their opening papers. And so had this  
24 been addressed in their opening papers, we would have

1 further addressed it in our opposition. So we don't  
2 think that that's pertinent for the Court's  
3 consideration here.

4 I think that one other thing that we  
5 had noted in our opposition is that -- and this  
6 touches on a point that Your Honor had made a few  
7 moments ago, the timing issue -- that we're here at  
8 May 16th, and we have trial scheduled for barely three  
9 weeks from now. I think that was, in part, a result  
10 of defendant's own actions that perhaps two and a half  
11 or three weeks after the trial date was set, that's  
12 when they noticed the deposition of our client. So I  
13 think that that's somewhat a result of their own  
14 doing.

15 I think that a video deposition should  
16 offer them whatever testimony they might hope to get  
17 or want to get out of our client and with conserved  
18 resources; and it would be the most practical  
19 solution, given our client's age and her work and her  
20 health and, again, the cost that every party is going  
21 to have to account for.

22 But other than that, I have nothing  
23 else, Your Honor. Thank you for your time.

24 THE COURT: Thank you.

1           I am sympathetic to the cost and  
2 inconvenience of travel. Airline travel is not how I  
3 remember it. Perhaps it's just a matter of my memory  
4 is not as good as it was. It is inconvenient and it  
5 is somewhat costly.

6           But I start with Wolfe and Pittenger  
7 at Section 6.05(a). As a general matter, the  
8 deposition of a plaintiff is taken in Delaware, the  
9 plaintiff's choice of forum. I need to find some  
10 justification for not directing the deposition take  
11 place in Delaware.

12           I'm sympathetic to age. I'm  
13 sympathetic to work issues. But nothing I have heard  
14 reaches the level that would justify deviating from  
15 the general rule.

16           I have a somewhat different view of  
17 Section 220 actions because, frequently, discovery in  
18 a 220 action, discovery of the plaintiff, is not all  
19 that important. And it may turn out in this case that  
20 it is not all that important. But as I looked at the  
21 complaint in getting ready for this argument and  
22 looked at the demand, it seemed to me that this is  
23 just not a 220 action that is a garden-variety 220  
24 action. There's something different about it.

1           And that something different carries  
2 with it the need for a -- I use the word "need"  
3 loosely, obviously, but it certainly would be within  
4 defendant's counsel's judgment -- of a fairly thorough  
5 deposition in a way that ordinarily is either not  
6 warranted in a 220 action or is just a glorified waste  
7 of everybody's time. And that's not what we're  
8 dealing with here.

9           We're dealing with an issue which, at  
10 the outset or from my distance, looks like there might  
11 be something to it. And for that reason, I'm  
12 reluctant to deny the defendant that opportunity to  
13 take an in-person deposition.

14           Mr. Varallo has indicated a degree of  
15 flexibility in this, and I would expect that  
16 flexibility to survive. And if you all want to  
17 revisit the question of counsel going to Chicago and  
18 costs being paid, as one would anticipate they would  
19 be paid, that's certainly an option that's still  
20 available to you. I don't mean to foreclose any of  
21 that. But given the issue that's in front of me, the  
22 deposition will take place in Wilmington, and I will  
23 leave it to you all to schedule a time that works as  
24 best as it can for everybody.

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I think that's all I can do this  
afternoon. With that, I thank you all very much.

MR. VARALLO: Thank you, Your Honor.

MR. HOLLEMAN: Thank you, Your Honor.

MR. BENNETT: Thank you.

(Conference adjourned at 2:29 p.m.)

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CERTIFICATE

I, JEANNE CAHILL, RDR, CRR, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 24 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, Delaware, this 20th day of May, 2014.

/s/ Jeanne Cahill  
-----  
Official Court Reporter  
of the Chancery Court  
State of Delaware