IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE ORACLE CORPORATION : CONSOLIDATED
DERIVATIVE LITIGATION : C.A. No. 2017-0337-SG

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Court of Chancery Courthouse
Courtroom No. 1
34 The Circle
Georgetown, Delaware
Friday, June 7, 2019
11:00 a.m.

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BEFORE HON. SAM GLASSCOCK III, Vice Chancellor

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ORAL ARGUMENT ON THE SLC'S MOTION TO EXTEND STAY and RULINGS OF THE COURT

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0523

APPEARANCES:

JOEL FRIEDLANDER, ESQ.
JEFFREY M. GORRIS, ESQ.
Friedlander & Gorris, P.A.
-and-
RANDALL J. BARON, ESQ.
of the California Bar
Robbins Geller Rudman & Dowd LLP
for Plaintiffs

KEVIN R. SHANNON, ESQ.
Potter, Anderson & Corroon LLP
-and-
JONATHAN M. WAGNER, ESQ.
ARTHUR H. AUFSES, ESQ.
of the New York Bar
Kramer, Levin, Naftalis & Frankel LLP
for the Special Litigation Committee

ELENA C. NORMAN, ESQ.
RICHARD THOMAS, ESQ.
Young, Conaway, Stargatt & Taylor LLP
-and-
BLAIR CONNELLY, ESQ.
of the New York Bar
Latham & Watkins LLP
for Defendants Lawrence J. Ellison, Safra A. Catz, Mark V. Hurd, Jeffrey O. Henley, Michael J. Boskin, Jeffrey s. Berg, Hector Garcio-Molina, Naomi O. Seligman, George H. Conrades, Bruce R. Chizen, Leon F. Panetta, Renee J. James, and H. Raymond Bingham

SUSAN M. HANNIGAN, ESQ.
Richards, Layton & Finger, P.A.
for Nominal Defendant Oracle Corporation

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THE COURT: Good morning, Mr. Shannon. Pleasure to see you, as always.

MR. SHANNON: Good morning. Thank you, Your Honor. I'm here on behalf of the special litigation committee of the board of directors of nominal defendant Oracle. I'd like to introduce, at the beginning, my cocounsel, Jonathan Wagner and Arthur Aufses from Kramer Levin.

MR. AUFSES: Good morning, Your Honor.

MR. SHANNON: Your Honor, I will try to be brief.

THE COURT: All right.

MR. SHANNON: As explained in the motion, the SLC requests an order extending the stay in this derivative action for an additional 90 days, through August 15. And the requested stay is to allow the SLC time to pursue settlement negotiations, including a mediation scheduled with defendants for July 2 with Judge Layn Phillips.

Your Honor, although the recent submissions by defendants and plaintiff suggest they have very differing views on the T. Rowe Price deposition, that is not an issue that's relevant to the SLC's motion today. And importantly, as to that

motion --

THE COURT: And let me just cut to the chase on the motion to strike, because I had forgotten that was even outstanding.

To the extent it's of any comfort to the proponents of the motion to strike, when I started reading the brief and it said what its content was going to be, I quit reading it. I don't really care. I understand people want to make a record and don't want allegations they feel are unhelpful and untrue to be outstanding, but in terms of this motion, which is what I was focused on, I really didn't care.

And so I didn't consider it. I'm not going to strike it. I'm not going to consider it. It's, as far as I consider it, a moot issue, something of nullity, and I'm denying the motion to strike for the reasons I've just stated.

So we can move on to the lift stay motion.

MR. SHANNON: Thank you, Your Honor. And I think that's the important point, which is as to the motion, actually, the parties are largely in agreement. There's really no dispute that it's appropriate for the SLC to pursue a negotiated

settlement, nor is there any dispute that the mediation should proceed as scheduled on July 2. And I don't think there's any real disagreement that the litigation should continue to be stayed pending those settlement discussions.

In fact, as the Court is aware, the parties rarely litigate this issue, and that's for good reason; that Delaware law is clear that the SLC should be given sufficient time to complete its work and determine what is in the best interests of the company.

Your Honor, again, there doesn't appear to be any dispute on the controlling law here. And therefore, it's not surprising that the plaintiff actually does not oppose the requested stay. To the contrary, the first paragraph of plaintiffs' response expressly states that plaintiffs support the requested stay.

THE COURT: Why don't you address, then, the conditions that they --

MR. SHANNON: Sure.

THE COURT: -- purport to apply to that consent.

MR. SHANNON: Sure. And as Your Honor

noted, plaintiffs ask that any stay be conditioned on two things: first, plaintiffs' participation in the mediation; and then, second, the SLC's prior production to the plaintiff of certain documents relating to the investigation.

I'll note, Your Honor, that it's not surprising that plaintiff doesn't cite any case in which the Court ordered those sorts of things as a condition to extending the stay so the SLC could negotiate the settlement. Again, that is for good reason. Delaware law provides that the SLC, not the plaintiff, gets to determine what is in the best interests of the company and how to handle the claims at this point.

Your Honor, here, it's important to emphasize, the SLC is composed of three independent directors of significant stature who, along with counsel, have conducted an investigation for ten months. The SLC is clearly best suited to assess the strengths and weaknesses of the case and, Your Honor, also to take into account what is in the best interests of Oracle with regard to these claims.

As noted in the parties' submissions, we don't dispute that in some cases, the SLC has

included plaintiffs in discussions, and other cases, the SLC has not. And that decision is, naturally, based on what the SLC believes to be in the best interests of the corporation, because that's the SLC's charge.

Your Honor, it's important to emphasize one thing that's unusual in this case, as well, is it's not just the plaintiff that's asking to participate in the mediation. We also have company counsel who has asked to participate in the mediation and, as noted in our reply, we have a letter from another stockholder who made a demand who has asked to participate in the mediation.

Now, importantly, all of those people seek to participate in the mediation to represent Oracle's interest. That is the role of the special litigation committee. But in any event, Your Honor, the record is clear, on May 9, the SLC met to consider and discuss the mediation and to expressly consider the request by plaintiff and company counsel to participate in the mediation. After discussion of the pros and cons, the SLC members decided, in the exercise of their business judgment, that it was not in the interests of the company to do it, and that

only the SLC and its counsel should participate in the mediation on July 2, and that documents should not be produced to plaintiff at this time.

Your Honor, in its submission, plaintiff fails to offer any factual or legal basis why the Court should reject the SLC's informed and reasoned determination in this regard. Instead, what plaintiff argues, Your Honor, is that it is entitled to review key documents and participate in the settlement because the SLC has supposedly reached a post-investigation determination.

Your Honor, the motion itself made clear that the SLC has not reached a final determination and was still pursuing its investigation and evaluation of the claims. At this juncture, what the SLC has determined is that it's in Oracle's interests to pursue a negotiated settlement.

Now, the other thing that is mentioned in plaintiffs' submission is that plaintiffs' counsel states that we advised him, shortly before filing the motion, that the SLC intended to request a stay in order to pursue mediation. That is true. What we did not say is that a final determination had been made in any regard, because one had not and has not been made.

But, Your Honor, just to cut to the chase, plaintiff fails to cite any case in which this Court has ordered the SLC's documents to be produced before the SLC has completed its work and filed its report. And even the *Zynga* case they rely upon, in which the plaintiff did participate for some period of time in negotiations, it's very clear from the record, none of the documents were provided to the plaintiff in that case until after the committee had completed its work and filed its report with the Court recommending the settlement.

There is no case in which this Court has conditioned a stay on requiring that the plaintiff participate in the mediation or requiring they get documents before the report and the conclusions are done. As we set forth in our papers, in our view, Your Honor, any such ruling is contrary to Delaware law. And that's especially true here, because you have a situation in which an independent SLC has expressly considered the matter. And they've determined that not just plaintiffs, but the other two parties who sought to participate in the mediation on behalf of Oracle should not participate.

And why is that, Your Honor? It's

because in order, in their view, to negotiate the best settlement for Oracle, if that can be achieved, it's important that Oracle speak with one voice. And that is a voice of the SLC, which is empowered to handle the claims at this point in time. They are independent, they are qualified, and they should be allowed to handle it without interference by others.

And, Your Honor, I said I would be brief. Unless you have questions, really, we're just simply asking that the stay -- which I think everyone agrees should remain in effect -- remain in effect without any of the conditions that plaintiffs seek to impose.

THE COURT: And remind me, through September 1, is that what you're seeking?

MR. SHANNON: August 15, Your Honor.

THE COURT: August 15.

MR. SHANNON: And I think the view is right now the mediation is July 2. I think, as I think all the parties here agree, sometimes it doesn't resolve itself at the mediation. Certainly, the parties would want to reserve themselves some time to continue discussions.

THE COURT: All right. Thank you.

MR. SHANNON: Thank you, Your Honor.

THE COURT: Mr. Friedlander, always a pleasure to see you as well.

MR. FRIEDLANDER: And it's great to see you in person, Your Honor.

THE COURT: Does this mean Mr. Baron is going to sit silent?

MR. BARON: I'm just so confused being on this side, I don't even know how to talk.

THE COURT: I assumed that was a way to gaslight the Court, but --

MR. FRIEDLANDER: I feel disoriented myself, at least for purposes of this case. But we're here on behalf of the plaintiff, the lead plaintiff.

I would agree with my friend Mr. Shannon on one point, which is that the motion appears very straightforward. The SLC asks for three months to negotiate a settlement. But we submit that, given the back and forth we've had orally and through the papers, that this request is actually -- it's unusual. It's highly unusual, and it's disconcerting, the way they're proceeding in this juncture. And because of that, in the absence of the conditions, we don't support the stay. That's why we inserted the

conditions. And we're highly troubled by what the committee is seeking to do.

Now, originally, right before the motion was filed, Mr. Shannon called me and said, "We're filing this motion." And then the next day, we had a conversation with Mr. Wagner down in Baltimore, and they both said to the same effect -- like, "Oh, you should be happy. You know, we're seeking to mediate, as opposed to dismissal. So we're on a settlement track, as opposed to a dismissal track."

And I said, "Well, are we going to be invited to the mediation?" You know, if we're going to be in a mediation, usually mediations involve all parties.

We have a lot of respect for former Judge Layn Phillips. We've had a bunch of mediations with him. He's all about resolution. You can't have resolution in a definitive way without all parties. So we made that pitch, and we heard back about a week later, which is, "No, you're not invited" and "No, we're not going to produce any documents to you."

And so -- so they told us that. And so we -- we filed our response, and we thought -- and we just relayed that conversation. They were pursuing

settlement instead of dismissal. And that was very unusual what came back. The SLC and the defendants, at the same time, filed reply papers. And before you get to all that stuff about T. Rowe Price, there's one paragraph in the defendants' papers which talks about the mediation. And it says we're wrong. We're wrong; that's not what's going on. There's been no determination by the SLC. And the SLC papers say there's been no final determination. So --

THE COURT: Well, I guess if the mediation is successful, there will be a determination at that exact point.

MR. FRIEDLANDER: Right. But literally what it says -- this is what's so highly unusual, it struck me as so highly unusual and troublesome -- is that the baseline premise for the mediation is that the SLC is reserving the right to move to voluntarily dismiss the case. So who walks into a mediation and says, hey, let's try to settle, but I've got to warn you, if you don't satisfy me monetarily, if we can't settle up, I might just dismiss my case.

Nobody, in an arm's length way, deals in that -- no matter what --

THE COURT: I get it.

MR. FRIEDLANDER: And that's, like, a baseline premise between the SLC and the defendants, that the SLC is reserving the right to voluntarily dismiss the case. So the SLC is telegraphing that to the defendants, they're telegraphing it publicly. "We may dismiss this case."

So really what it seems like, it's probably a chance to meet with insurers, but then how do you convince the insurers? The insurers -- their statement to the Court, "Give us three months, allow us to sit down with Oracle's insurers so that we can make a pitch to them that if you don't come up with insurance money, we may voluntarily dismiss the case."

That's point one. As I say, that's unusual. And we, frankly, would have no desire to participate on that basis, because our case -- this is a case that potentially is a multi-billion-dollar case, just on the basic facts alleged. Oracle paid $9.3 billion, they offered $109 a share, at a time when Cowen & Company, different analysts, initiated coverage at $70 per share.

THE COURT: I'm familiar, as you know, with the facts.

MR. FRIEDLANDER: Right. So just that basic background fact. We're seeking multiple billions of dollars in damages. And insurance is not going to -- and the primary beneficiary, basic background fact number one, is Larry Ellison. And I don't know what appetite insurers are going to have to say we're going to help you fund a settlement that's going to, you know, bail out Larry Ellison. So I don't see the prospects. There's always a right time and a wrong time to try to settle a case. There's a right time and a wrong way to posture a settlement negotiation.

This is bizarre. And not only is it bizarre, it's unprecedented. And I'll be clear with the precedents that they're citing, and the manner in which they're proceeding, and there's no stated rationale for it. And if I could just elaborate on each of those points. And in the context of the timing of this request, it's also highly unusual. So I'd like to just briefly hit those three points -- the timing, the unprecedented nature, and the lack of a stated rationale.

So on the timing, you know, the basic background fact there is that the SLC was created 13

months ago, several weeks after the motion to dismiss opinion. We propounded discovery. It wasn't responded to because the SLC was created, and they're taking things over.

The six-month stay was sought back in July. So 11 months ago, they sought six months. And we agreed that that could be extended out to May 15th. In the interim, we were highly surprised to see, in the status report that we had negotiated for, that they didn't get the information from T. Rowe Price. So we had to go to them and say, look, use your formal discovery powers, get that information to substantiate -- get substantiating evidence about this undisclosed, unauthorized price discussion between Ms. Catz and Mr. Nelson from NetSuite.

They put in their motion papers, collected a million documents. As of the motion, they had taken 39 interviews. As of the reply, they had done 40 interviews or more. As of the original motion on May 6, the fact investigation was approaching completion.

In the reply, there's no indication of any more work to be done by the SLC in terms of its fact investigation. They're seeking three more

months, so they're seeking to put our case on hold for 16 months, which is a long time.

In their original motion papers, they said the norm is six to ten months. They're asking for 16. There's no cited support for that duration. It's so long that we're actually going to be past three years from the time of the wrong, the alleged wrong in the summer of 2016, by the time their requested stay is completed.

So that's an unusual timing and context for this request. They're asking the Court, in its discretion, for a long time. And their stated purpose is highly unusual. They cited three cases. When we asked them about whether we could participate, they said, "No, no, no. It's standard that you don't participate." So three of those cases are *Kikis v. McRoberts*, *In Re Clear Channel*, and *Sandys v. Pincus*.

In our answering papers, we sort of dealt with the two big companies, which were *Clear Channel* and *Sandys v. Pincus*. And actually, we just didn't really pay much attention to *Kikis v. McRoberts*, which they chided us for. But actually, it's *Kikis v. McRoberts* which shows how inapt this precedent is.

If I can just hand up a couple of documents, Your Honor.

THE COURT: Sure.

MR. FRIEDLANDER: So *Kikis v. McRoberts*, it's a small company. And the request that was made -- so in the cover letter, the operative sentence is "The SLC and defendants are now actively engaged in settlement negotiations." So the premise for asking for more time is there is active negotiation going on.

A couple months later, the SLC report was filed. This is just an excerpt of the pertinent paragraph, where it says, like, back in March, as of the time they approached the Court, there had been several weeks of negotiations. There had been an initial proposal, another proposal back, and another proposal back. And as of the time the request was made, May 27th, they'd already set a date for a settlement negotiation in New York two days later. And that's when it was actually, it seems, hammered out.

So that sounds like arm's length standard negotiation. It wasn't -- and the SLC had made clear that we have to -- you have to take into

account the value of our claims. You know, it's redacted about the amounts that were being sought, but it wasn't this, "Oh, maybe. Maybe, maybe, we'll voluntarily dismiss the case if this doesn't work out." Things were pretty far down the road. And so that seemed like a pretty pro forma request, granted.

So that's *Kikis v. McRoberts*. And as the SLC acknowledges, the other two cases, *Clear Channel* and *Sandys v. Pincus*, the plaintiffs were actively involved in the different aspects of the interaction about the settlement; "voluntary exchanges with plaintiffs concerning the settlement," to use the SLC's language.

So in *Clear Channel*, the SLC said we've completed our fact investigation, handed over documents, sought input from the plaintiffs, discussed the different settlement levels about what would be acceptable to plaintiffs and what wouldn't. And on that basis, had discussions with the defendants, and a settlement was reached.

And in *Sandys v. Pincus*, the plaintiff had initiated the settlement discussions, which had been going on, for the specific mediator. And essentially, the SLC picked up where the plaintiff

left off and held discussions with that same mediator and reached a result.

So things were going down the track -- I don't know if I can say an open dialogue, but words they always profess to us, "We want an open dialogue with the plaintiffs." Unless they don't.

So those are their three examples, none of which are discussed at all in their papers, because they're all inapt. And I'm not saying, therefore, there's some hard-and-fast Delaware rule on our side. But similarly, there's no hard-and-fast rule on their side to say, oh, after a year, of course I get another three months to explore the possibility of settlement, in a situation where we may still seek to voluntarily dismiss the case. That's -- that's very unusual.

And there is no question, this -- I think if there's anything undisputed about Delaware law is when the SLC completes its investigation, it has a determination to make. It can make that determination a variety of ways, how it wants to deal with the litigation. And whatever that is, the SLC has to turn over the basic fruits of its investigation to the plaintiff. That's just -- that's a given.

So when we ask for documents, we said the same standard categories of documents that were turned over in *Sandys v. Pincus*. There's no question they have to turn over their report and the interview memos and documents that they gave to the committee and documents they gave to witnesses. I don't think there's any serious dispute about that. That's what the Chancellor required to be turned over in *Sandys v. Pincus*, and that wasn't breaking new ground.

So if the question is how to best use this time, after the SLC has actually completed its fact investigation, it seems like the next logical step is they've assembled all these documents. They know what these documents are -- you know, what's been given to the committee and what's been given to witnesses, the memos from the 39 or 40 interviews. Why can't we look at them in the interim? And if they don't want to listen to us, they don't have to listen to us, but we can at least provide some input to them.

So that's -- so that's the unusual aspect number two, or three. I mean, and the last one is there's no stated reason. They say, oh, well, here are the bios of these directors. Abbreviated bios, but yeah, they have -- you know, you don't get to be

an SLC member for no reason. They have distinguished resumes, I would agree. And they've exercised their business judgment, and that's all we're told.

But if there's anything in Delaware law bedrock since 1981, *Zapata* -- or '82 -- is that business judgment doesn't apply. Delaware, doctrinally, does not trust SLC members just to say, oh, you made a determination? That's fine. They will bear the burden of proof, whether they're proposing a settlement or a dismissal, that they -- that they acted reasonably and in good faith. And actually, there has to be no fact issue. It has to be on a summary judgment type record, that they've been reasonable and in good faith and diligent in what they've done. That's prong one.

Then it goes over to the Court for the Court to exercise its own independent business judgment to say whether this makes sense. Because there's something inherently suspicious. Again, SLC members don't accidentally become SLC members. Two of these people are new directors. They're selected for this purpose. And the person doing the selecting, or two of the prominent people with prominent roles in the selection, are inevitably the two defendants in

this case.

So just to invoke the bios and the fact that they met and exercised business judgment, we're not even going to tell you the reasons, that's odd. In this context, that's odd. So we have a process that's been going on for over a year to set up a mediation in a way that no one has ever tried to set up a mediation before, that we know of, in this way; to publicly, you know, reserve judgment on whether or not the case will even go forward; to seek -- to refuse to turn over information that will inevitably be produced, for no stated reason.

And there's nothing -- there's nothing cut and dry that we don't get information. There's a -- in *London v. Tyrrell*, by Chancellor Chandler ten years ago, the condition of the SLC getting a stay in that case was we'll turn over the documents to the plaintiff that have been requested. Certain -- plaintiffs are entitled to the electronic documents they requested while the stay takes place.

There is no hard-and-fast rule that the plaintiff gets shunted aside for any -- whatever length of time the SLC chooses, for reasons that are unclear, in a way that seems to just violate common

sense about how a negotiation should work. Hasn't been asked for before. They're asking for that here. We don't think that's proper.

THE COURT: Thank you, Mr. Friedlander.

MR. FRIEDLANDER: Thank you, Your Honor.

THE COURT: That was helpful.

Mr. Shannon.

MR. SHANNON: I certainly will answer any questions, but I will again try and be very brief.

I think what's clear is at no time did we suggest that a final determination had been made, because none has been made.

I do want to briefly respond to the --

THE COURT: I have to make one at some point, though; correct?

MR. SHANNON: Absolutely. And at that point --

THE COURT: So the special litigation committee has made a determination that whether this mediation can be successful or not, it will at the least be a useful information-gathering exercise for you on its way to a final determination?

MR. SHANNON: Well, it certainly will be that. And the hope, and based on the work they'd done -- and this is what's in the motion -- is based on that, they believed this would be a proper course to take.

THE COURT: No, no. I get it.

MR. SHANNON: And I do want to point out the suggestion that this is unprecedented. In fact, Your Honor, if you look at the *Zynga* case or the *Sandys* case, what happened in that case is the SLC did take over settlement negotiations that had been ongoing, and plaintiff had been involved in those, but plaintiff got no information from the SLC. And what was important, and what was key, is during that negotiation, the SLC refused to say what it would do if, in fact, the settlement didn't come out. Because the SLC had not yet made -- like here -- a final determination.

So this is not unprecedented. This is almost exactly what happened in the *Sandys* case. So unless -- unless --

THE COURT: I don't have any further questions, Mr. Shannon. Thank you.

MR. SHANNON: Thank you.

THE COURT: Ms. Norman, anything you want to add on behalf of your client?

MS. NORMAN: No, Your Honor. Thank you very much for asking.

THE COURT: All right. Thank you.

I should say, I didn't mean to be flip about the motion to strike. I tend to, if I've got an issue that I know I have to deal with, and I get briefing that starts out in a way that indicates to me that what's coming is important but not pertinent, I tend to set it aside. And that's what I did here. So I don't mean to be flip about it, but I've already denied the motion to strike.

Let me turn to the motion to allow the stay to continue. Basically, what's being sought at this point is a nine-week stay in light of an investigation that's been going on for more than a year. I don't think that the time that is being sought is unreasonable, nor can I say that the special litigation committee is proceeding in a way -- although I credit Mr. Friedlander's argument that it poses some interesting problems from a leverage position, or at least it appears to -- that is so unreasonable that it makes the stay untenable.

I'm going to go ahead and grant the stay. The question is whether the conditions that Mr. Friedlander's client would like to be imposed should be imposed. I'm not sure that I have any basis to order the special litigation committee to do what Mr. Friedlander proposes, and so I am going to deny the request to add those conditions to the stay. I'm granting the motion for a stay without conditions.

I will say this, Mr. Shannon: Eventually, your client's going to have to justify what it ultimately does. To the extent that it is considering wrongdoing and things that are going to be recovered for wrongdoing, it's got a partner sitting right across the aisle. To the extent it doesn't view the plaintiff as a partner or treat the plaintiff as a partner, there will inevitably be further litigation.

While I'm not imposing any conditions, I think it would be wise for the special litigation committee to think carefully about how it can accommodate and realize value from the efforts of the plaintiffs as they have proceeded in this matter, and attempt to limit the post-determination litigation and the issues that are going to inevitably be presented.

So I am granting the special

litigation committee's motion without conditions, but I've had my say. For whatever it's worth, I've said it.

Was that comprehensible, Mr. Shannon?

MR. SHANNON: That was. Thank you, Your Honor. And I understand your position.

THE COURT: Thank you.

Mr. Friedlander, was that comprehensible?

MR. FRIEDLANDER: Yes, Your Honor.

THE COURT: All right. Thank you for the argument. It's always a pleasure to hear argument at this level. It's very learned, and the history and knowledge of Delaware law represented by the two parties arguing here is very impressive. I appreciate your coming all the way down and being attentive, and I hope the drive was not too onerous and you have a pleasant trip back.

Thank you very much.

MR. SHANNON: Thank you, Your Honor.

MR. FRIEDLANDER: Thank you, Your Honor.

THE COURT: To the extent, Ms. Norman, I didn't say, it was a pleasure to see you and your

crew as well. I wasn't trying to send a signal of any kind. It's always a pleasure to have you down here.

MS. NORMAN: Thank you.

THE COURT: And I enjoyed seeing everyone here.

MS. NORMAN: I appreciate it.

(Court adjourned at 11:32 a.m.)

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CERTIFICATE

I, JULIANNE LaBADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify the foregoing pages numbered 3 through 30, contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing 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 this 11th day of June, 2019.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public