



IN THE SUPREME COURT OF THE STATE OF DELAWARE

GYÖRGY B. BESSENYEI,	)	
and ROBERT S. GOGGIN, III,	)	
	)	
Plaintiffs Below,	)	
Appellants,	)	
	)	
v.	)	No. 648, 2012
	)	
VERMILLION, INC., BRUCE A.	)	
HUEBNER, WILLIAM C. WALLEN,	)	Court Below: Court of
PH.D., JAMES S. BURNS, PETER S.	)	Chancery of the State of
RODDY, CARL SEVERINGHAUS,	)	Delaware, Hon. Vice
JOHN F. HAMILTON and	)	Chancellor John W. Noble,
GAIL S. PAGE,	)	C.A. No. 7572-VCN
	)	
Defendants Below,	)	
Appellees.	)	

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This appeal challenges a discretionary order dismissing this action under Court of Chancery Rule 41(b) and the court's inherent authority to police the integrity of the judicial process. The dismissal was the result of Plaintiffs' repeated false statements to the court below. At the very inception of the case, Plaintiffs filed a complaint including a notarized verification they knew to be false, and which at the time, they stated in writing that they knew to be "a problem." Knowing the need for notarized complaints and verifications, Plaintiffs provided false ones. And then they hid it. Learning the truth required multiple depositions, court involvement, and resources spent addressing issues and questions Plaintiffs could have avoided with candor and sunlight. The trial court - which had to order the discovery and who noted Plaintiffs' "cavalier" approach to the litigation process - ultimately could countenance no more. To protect the integrity of the courts, the system, and the rules, the trial court dismissed the action. This appeal asks whether the trial court abused the wide discretion it is afforded to address repeated rules violations and the integrity of the judicial process. The answer is that the court below did not abuse its discretion.

Plaintiffs, two stockholders of Vermillion, Inc. ("Vermillion" or the "Company"), filed their initial Verified Complaint below on May 25, 2012 seeking declaratory and injunctive relief to invalidate a bylaw amendment. The challenged amendment eliminated the board seat formerly held by the Company's CEO, Gail Page, following her resignation from the board. The Vermillion board, which has more

directors than there are Company officers, had previously reduced its size from eight directors to seven in January 2012 after Plaintiff György Bessenyei ("Bessenyei") published an article criticizing the board as too large. The bylaw amendment at issue then decreased the size of the board from seven directors to six, and reduced the number of board seats up for election at the Company's 2012 annual meeting from two to one. Prior to that second board reduction, Plaintiffs had expressed an intent to run a proxy contest for the open director seats at the 2012 annual meeting, although that contest was not yet formally underway.

After Plaintiffs filed their initial complaint along with a request for expedited treatment and a motion for preliminary injunction, the parties agreed to an expedited schedule for discovery and trial. The scheduling order provided for the delay of the annual meeting until after the bylaw amendment's validity was decided. Thus, by falsifying the necessary verification, Plaintiffs were able to quickly file their complaint and obtain expedited treatment. The urgently-filed lawsuit further resulted in the postponement, ultimately a lengthy one, of Vermillion's annual shareholder meeting.

At Bessenyei's July 12, 2012 deposition, Defendants first became aware of possible misconduct on the part of Plaintiffs in their preparation and use of three notarized verifications in the litigation. At deposition, Bessenyei first testified that he had not been in the United States for several months prior to when the verifications were given. Confronted with the verifications, Bessenyei changed his testimony and stated that he might have been in

Pennsylvania to sign the verifications, but he could not recall. As the facts were later developed only after discovery and motion practice, it turned out that Bessenyei did not subscribe the verifications personally before the notary in Philadelphia.

Instead, on three separate occasions, Plaintiff Robert Goggin ("Goggin"), a Pennsylvania attorney, caused his legal assistant in his Philadelphia law office to notarize verifications purportedly signed by Bessenyei even though she did not personally witness his signature, a violation of Pennsylvania law. Each verification bore a false jurat that it was personally "SWORN TO and subscribed before" the notary in Pennsylvania. Plaintiffs' Delaware counsel thereafter caused the verifications to be filed in the Court of Chancery on two occasions, including to initiate the case and seek expedited treatment. On a third occasion, Plaintiffs' counsel sent a defective verification to answer interrogatories under oath.

After Bessenyei's deposition, Defendants requested additional limited discovery concerning Plaintiffs' execution and use of the verifications. Plaintiffs refused.

Defendants then filed a motion to compel with the court below. Plaintiffs opposed the motion, cavalierly calling it a "diversion," and failing to explain to the Court of Chancery that the verifications were falsely sworn in violation of Rule 3. To the contrary, Plaintiffs took the position that the verifications were somehow proper. On July 19, 2012, over Plaintiffs' objections, the court below compelled Plaintiffs to produce documents concerning the creation and use of the verifications. The court also ordered a

deposition of the notary and a second deposition of Goggin.

Only through discovery and motion practice, then, did Defendants unearth the fact that the verifications were falsely sworn. Plaintiffs had several opportunities to be candid with the Court of Chancery as to what happened, but failed in their duty to do so.

Based on the resulting record, Defendants moved to dismiss pursuant to Court of Chancery Rule 41(b) for Plaintiffs' misconduct in failing to follow the rules of the court and for failure to be candid with Defendants and the Court of Chancery during discovery and motion practice. The court ordered that the trial be postponed pending resolution of Defendants' motion to dismiss. After briefing and argument on the motion, the court issued an opinion and order dated November 16, 2012. Bessenyei v. Vermillion, Inc., C.A. No.7572-VCN (Del. Ch. Nov. 16, 2012)("Mem. Op.", attached as Exhibit A to Plaintiffs' Opening Brief "Op. Br."). The court below, citing reckless violations of Pennsylvania law and ethical requirements by Plaintiffs, and finding violations of the Court of Chancery Rules that undercut the integrity of the judicial process, dismissed the action. Plaintiffs now appeal from the Court of Chancery's discretionary November 16 ruling.

SUMMARY OF THE ARGUMENT

1. Denied. Plaintiffs improperly argue for the first time on appeal that the court below erred by not considering the motion to dismiss under different standards that have sometimes been applied where there was an alleged "fraud on the court." But Plaintiffs expressly stated to the court below that the dismissal standard set forth by the Court of Chancery in Parfi Holdings AB v. Mirror Image Internet, Inc., 954 A.2d 911 (Del. Ch. 2008), appeal dismissed, 966 A.2d 348 (Del. 2009) governs Defendants' motion to dismiss. Indeed, at oral argument on the motion to dismiss, Plaintiffs' counsel stipulated that "both sides agree that the standard here is the Parfi standard." Transcript of August 22, 2012 Argument on Defendants' Motion to Dismiss ("Aug. 22 Tr.") at 30, attached as Exhibit B to Plaintiffs' Opening Brief). Plaintiffs never advanced any theory below that a different legal standard should apply. Nor did they even cite below the cases now cited in their Opening Brief. Supreme Court Rule 8 precludes Plaintiffs from presenting a different standard on appeal that they did not raise below. And, Plaintiffs waived any claim to a different standard. Moreover, if this Court somehow reaches the issue, the court below ruled correctly that the Parfi standard of Rule 41(b) governs and permits dismissal where a party violates the rules of the Court of Chancery and/or acts recklessly to impugn the integrity of the judicial process. In circumstances where, as here, rules are directly violated and the court process is denigrated by misconduct including a lack of candor, it was proper for the court below to dismiss without independently analyzing each and

every one of the factors Plaintiffs now advance for the first time, or decide whether there was a "fraud on the court."

2. Denied. The Court of Chancery properly exercised its discretion in ruling that Plaintiffs' litigation misconduct supports dismissal of this action under the Parfi standard. The court below properly exercised its discretion in dismissing under both: (1) Rule 41(b) and (2) the court's inherent authority to police the litigation process. Plaintiffs do not dispute the key facts underlying the Court of Chancery's ruling: that Plaintiffs violated Pennsylvania's notary laws on multiple occasions and failed in their obligations to comply with the Court of Chancery Rules. In addition, Plaintiffs misrepresented facts at deposition, and were less than candid with the Court of Chancery throughout the motion to dismiss proceedings. The court below found this conduct to be, at a minimum, reckless. Under any standard, dismissal was appropriate. The court below was and is in the best position to evaluate such litigation misconduct, and is accordingly given broad discretion to do so.

3. Denied. The court below expressly considered and discussed at length different sanctions that it could impose to address Plaintiffs' preparation and submission to the court of falsely notarized verifications. The sanctions considered and discussed by the court below included the possibility of dismissing one or the other plaintiff, as well as the separate (additional) sanction of fee shifting. Mem. Op. at 20-23. The Court of Chancery properly exercised its discretion in finding that Plaintiffs' misconduct warranted dismissal.

STATEMENT OF FACTS AND PROCEEDINGS

Plaintiffs' Opening Brief purports to state "facts" by telling only part of the factual story. And, it entirely ignores the lack of candor Plaintiffs showed all along the way to the ruling on the motion to dismiss. The court below knew that full record, experienced it live, and responded accordingly. This Court, by contrast, has only the cold record, but it is important that this record be a full one.

Defendants initially became aware of Plaintiffs' possible misconduct at the deposition of Plaintiff Bessenyei on July 12, 2012. Bessenyei provided false and evasive testimony concerning his execution of two verifications in this litigation: 1) one dated June 1, 2012 and filed in support of Plaintiffs' Amended Verified Complaint pursuant to Court of Chancery Rule 3(aa) (the "June 1 Verification," A-044), and 2) another dated June 26, 2012 for Plaintiffs' Responses to Defendants' First Set of Interrogatories (the "June 26 Verification," B34). A third verification, dated May 25, 2012 that Plaintiffs filed with their initial complaint pursuant to Rule 3(aa) (the "May 25 Verification," A-043), suffered from the same defect as the other two - it falsely stated on its face that it was "SWORN TO and subscribed before" Jennifer L. Bennett ("Ms. Bennett"), a Philadelphia notary public who is employed as a legal assistant in Goggin's law office.

A. Bessenyei's Deposition Testimony

Bessenyei offered inconsistent and misleading testimony at his deposition on the very verifications at issue. He repeatedly claimed to have no recollection of the events relating to his execution of the

June 1 and June 26 Verifications, even though the former was dated within the two months preceding his deposition, and the latter was dated approximately two weeks before his deposition.

Defendants initially questioned Bessenyei, a Hungarian national residing in Switzerland, regarding his recent travel to the United States. Mem. Op. at 10. In response, Bessenyei testified that the last time he was in the United States had been March or April, 2012. A-086 at 174:20-175:4. He testified specifically that he was not in the United States in June 2012. Id. Defendants' counsel then marked Bessenyei's June 1 Verification which stated on its face that it was "SWORN TO and subscribed before" the notary, Ms. Bennett, in Philadelphia, Pennsylvania on June 1, 2012. Id. at 175:11-176:7. Although Bessenyei testified that he remembered signing the affidavit on or about June 1, 2012, he asserted that he was "not sure" whether or not he was present before Ms. Bennett on June 1, 2012. Id. When questioned further, Bessenyei testified that although he remembered signing the verification, he did not remember the circumstances. Id. But then, when he was asked where he was when he signed the document, he stated, "I believe in Philadelphia, but I am not sure." Id.

Regarding Ms. Bennett, who he purportedly appeared before in executing each of the May 25, June 1 and June 26 Verifications, Bessenyei testified that he had "a vague idea meeting her," but he could neither recall when he had met her nor what she looked like. B35.1 at 177:16-18. Ms. Bennett would later testify that she had never met Bessenyei until July 13, 2012 - the day after his deposition. (A-094, "Q: When was the first time you met [Bessenyei]?

A: July 13 Q: July 13, 2012? A: Yes.")

Finally, when he was shown the June 26 Verification, Bessenyei testified that he "only vaguely recall[ed] signing it," notwithstanding the fact that it was dated only approximately two weeks before his deposition. B36 at 183:4-184:13. When asked if he was in Philadelphia when he signed the June 26 Verification, Bessenyei claimed to not be able to recall. Id. When asked if he was even anywhere in the United States when the June 26 Verification was purportedly signed two weeks before, Bessenyei responded that he was "not sure." Id.

B. The Motion to Compel Additional Discovery

The day following Bessenyei's deposition, Friday, July 13, Defendants wrote to Plaintiffs' counsel and, citing the contradictions and questionable veracity of Bessenyei's testimony, proposed that the parties stipulate to permit narrow discovery into what had happened. B37-38. Plaintiffs' counsel responded in an email the evening of Friday, July 13 and stated that Bessenyei was not, in fact, in the United States on the dates he purportedly executed the verifications. B39. Instead, Plaintiffs' counsel stated that Bessenyei "appeared electronically before the notary . . . to confirm his signature and identity." Id. Plaintiffs' counsel refused to provide any discovery concerning the verifications and did not provide any further explanation of the facts. Id.

Defendants promptly moved for discovery regarding Plaintiffs' verifications. Plaintiffs opposed the motion, arguing that the issue was not serious and attacking Defendants' motives for having even

raised any issue about the verifications. Plaintiffs claimed the issue of whether the verifications were properly notarized amounted to “little more than a diversion.” B46.

At a July 19, 2012 hearing on the discovery motion, and contrary to the Plaintiffs’ repeated references to the matter as a “technical” issue or “diversion,” the court below stated that Defendants’ allegations of misconduct by Plaintiffs “are serious” and “go[] to the core of the integrity of the judicial process.” B54. Like many courts, the Delaware Court of Chancery requires notarized pleadings. Ct. Ch. R. 3(aa). An action cannot be filed unless properly verified with a notarized verification, or the statutorily permitted equivalent thereof. This is not a technicality in the sense that filing a brief with margins smaller than one inch is a technicality. This is a gateway requirement. If a litigant or lawyer does not take the oath seriously, the system cannot function. The whole system is built on respect for the oath.

The court ruled that depositions of Ms. Bennett and Goggin should go forward, and directed Plaintiffs to produce documents. B54-55 at 11-14. Plaintiffs had an opportunity in their opposition to Defendants’ motion for discovery, and at the hearing on that motion, to explain to the Court the true facts surrounding Bessenyei’s verifications. Plaintiffs disclosed no such additional information. In fact, the court below admonished the Plaintiffs for their “cavalier” response to this “serious” issue. B54-B55 at 7-8.

C. Facts Learned During the Court-Ordered Discovery

1. Bessenyei’s May 25 Verification

During the additional court-ordered discovery, Defendants learned

that Plaintiff Goggin caused his legal assistant, Ms. Bennett, to notarize Bessenyei's verifications. The morning of May 25, the day the original complaint, motion for expedited proceedings and preliminary injunction motion were filed, Plaintiffs' counsel emailed draft verifications for the complaint to Goggin and Bessenyei at 10:11 a.m. with instructions to "fill in the state and country information, sign them and have them notarized and then email me a signed copy." A-038. In response emails to Plaintiffs' counsel and Goggin, Bessenyei stated that there was a "[n]otorization (sic) problem." Id. At 10:38 a.m., Bessenyei wrote to Plaintiffs' counsel, copying Goggin: "problem likely solved, working on it." Id. Plaintiffs' counsel responded immediately, "Great - thanks." Id.

The documents do not say explicitly what the "notarization problem" was, but it is clear from the documents that Plaintiffs were having problems getting the notarized verification they needed from Bessenyei so that they could file the complaint. Plaintiffs' counsel did not take steps to inquire into what the notarization problem was or determine how it was being addressed. Mem. Op. at 16-17.

Approximately a half hour later, at 11:09 a.m., Bessenyei wrote to his counsel, copying Goggin, "[n]otorization problem solved, you get it in an hour or so." A-038. Bessenyei then sent Goggin via email at 12:01 p.m. a document named "verification letter signed.pdf", which was a signed but un-notarized copy of Bessenyei's initial complaint verification. A-039. The version of the May 25 Verification Plaintiffs filed with their complaint, however, was notarized by Ms. Bennett and contained her notary seal beneath the

jurat "SWORN TO and subscribed before me this 25 day of May, 2012." A-043. But notwithstanding the jurat, there is no dispute that the May 25 Verification was not actually sworn to or subscribed before the notary.

2. Bessenyei's June 1 Verification

One week after filing the May 25 Verification with its false jurat, Plaintiffs filed an amended verified complaint. Plaintiffs' counsel transmitted amended complaint verification forms to Bessenyei and Goggin by email on May 31 at 1:32 p.m. A-046. At 2:26 that afternoon, Bessenyei, who was physically outside the United States at the time, sent Goggin an email with the subject line "Notarization" and a PDF attachment with the document name "verification letter signed amended.pdf". A-048. The attachment to the email was a signed but un-notarized copy of the June 1 Verification. A-049. Thus, not only was this verification again not "SWORN TO and subscribed before" Ms. Bennett, but she did not even notarize the verification on the same day that Bessenyei purportedly signed it, despite attesting it was verified "this day." Rather, at the direction of her employer (Goggin), Ms. Bennett notarized it the following day, June 1. A-098 at 32:10-12.

Plaintiffs' counsel filed Bessenyei's falsely notarized June 1 Verification with the Register in Chancery on June 4, 2012. A-044.

3. Bessenyei's June 26 Verification

As with his testimony about the June 1 Verification, Bessenyei asserted repeatedly at his deposition that he did not recall the circumstances surrounding his execution of the June 26 verification. Although he had purportedly signed the June 26 Verification only

approximately two weeks prior to his July 12 deposition, Bessenyei testified as follows:

Q. Do you recall signing this affidavit?

A. Vaguely.

Q. If the date on this affidavit is correct, this was approximately two weeks ago; is that correct, Mr. Bessenyei?

A. Yes, June 26 is two weeks from today, I guess.

Q. And you only vaguely recall signing it?

A. Yes.

Q. Do you recall reviewing the plaintiffs' responses to defendants' first set of interrogatories to plaintiffs prior to signing --

A. I remember, yes, I remember reviewing it.

Q. Prior to signing this affidavit?

A. Yes.

Q. Were you in Philadelphia when you signed this affidavit?

A. I don't recall if I was on June 26 in Philadelphia.

Q. Were you in the United States on June 26, 2012?

A. Might have been. Possibly yes, but I am not sure on the exact dates when I was in the United States.

. . .

Q. Okay. Let's forget the certain date. Let's just say two weeks ago. Do you recall if you were in the United States?

A. Two weeks ago. I am not sure.

B36 at 183:4-184:13.

Documents produced by Plaintiffs pursuant to the court's ruling on Defendants' motion for additional discovery show that the notarized date on the June 26 Verification, like the June 1 Verification, was not correct. Bessenyei emailed a verification page with a signature

to Goggin five days earlier on June 21 at 5:40 p.m. A-077-A-078. The subject line of the email was "Notarization" and the message read "Pls, thanks!" Id. That document was subsequently sent to Defendants' counsel by Plaintiffs' counsel with Ms. Bennett's notarization dated June 26, the date that Goggin's assistant Ms. Bennett finally signed and affixed her seal to the document. A-101 at 45:9-15. The documents Plaintiffs produced also show that during the period two weeks prior to his deposition, when Bessenyei claimed not to recall if he was in Philadelphia or even in the United States, Bessenyei was actually on an 8-day trip to Hungary. B30-31. Bessenyei departed on June 24 (two days before his verification was supposedly signed and notarized) and returned on July 2 - the week immediately before his deposition. Id.

4. Goggin's and Bennett's Deposition Testimony

Goggin testified at his July 25 deposition that the idea to have his legal assistant notarize the May 25 Verification came from Bessenyei. Goggin stated that Bessenyei called him the morning of May 25, and said "is it possible for you guys to notarize this" verification. A-106 at 14:5-17. "[A]t the time he was down in the islands and didn't know where he could get anything notarized." Id. Goggin then approached Bennett about notarizing the document, even though Bessenyei was not present before her. A-096 at 22:6-7 (Q: Who asked you to notarize this document[, the May 25 Verification]? A: Mr. Goggin). Bennett confirmed that she would do so.¹

¹ Ms. Bennett claimed that before agreeing, she quickly "researched" the question using Google. A-096 at 22:8-21. But neither Ms. Bennett nor the Plaintiffs have provided the sources upon which she supposedly

D. Briefing on the Motion to Dismiss

After discovering the correct facts that Plaintiffs refused to disclose to the Court in briefing on the discovery motion or at the hearing on the request for discovery, Defendants promptly moved to dismiss the case under Rule 41(b) and Parfi for violation of the Court of Chancery rules and for litigation misconduct that threatened the integrity of the judicial system. In response, Plaintiffs primarily argued that Pennsylvania's notary law was "ambiguous" as to the necessity of personal appearance before the notary. Plaintiffs did not argue that any legal standard besides Rule 41(b) and Parfi should apply, nor did they cite any authorities for a different standard.

In reply, Defendants cited numerous Pennsylvania authorities finding the practice of notarizing a document without the affiant's physical presence to be illegal, including cases holding that the

relied. Mem. Op. at 12. At her deposition, Ms. Bennett failed to recall whether her Google search was even targeted at Pennsylvania notary law or what website she found on Google. A-096 at 23:2-12. When asked whether she searched specifically for whether it was proper under Pennsylvania law to notarize the documents without Bessenyei's presence, Ms. Bennett stated that she could not remember. Id.

Ms. Bennett testified that she notarized Bessenyei's May 25 Verification because she thought that a "credible witness" exception permitted the notarization. A-094 at 14:10-16:11. In fact, under Pennsylvania's notary public law, having a "credible witness" does not excuse the signatory from having to appear personally. Mem. Op. at 12. To the contrary, Pennsylvania law requires that a notary shall "have satisfactory evidence that the person appearing before the notary is the person described in and who is executing the instrument." 57 Pa Cons. Stat. § 158.1(a). The statute goes on to say that "satisfactory evidence" may consist of a government issued identification card "or the oath or affirmation of a credible witness who is personally known to the notary and who personally knows the individual." Id. In other words, where a person does not have an identification card (e.g., an elderly person who no longer has a driver's license), a credible witness can aver that the person is who they say they are. That in no way excuses the signatory from appearing personally. Mem. Op. at 13.

failure “to sign the affidavit before the notary” to be a “defect that cannot be characterized as merely ‘technical’” and finding dismissal an appropriate remedy. B115-116 (citing Bolus v. Saunders, 833 A.2d 266, 270 (Pa. Commw. Ct. 2003)).

E. The Hearing on the Motion to Dismiss

At argument on the motion to dismiss, the court below specifically asked Plaintiffs’ counsel whether he was aware of a “notarization problem.” Plaintiffs’ counsel initially represented to the court that he was not aware of a “notarization problem.” Aug. 22 Tr. at 16 (“THE COURT: Were you aware that there was a notarization problem? MR. NEIDERMAN: I was not, no.”). After Defendants’ counsel brought Plaintiffs’ counsel’s “notarization problem” response email (discussed above) to the court’s attention, Plaintiffs’ counsel then stated: “It’s correct I did receive an e-mail referring to a notarization problem. I don’t know what that notarization problem was. I did not have any discussion with anybody about it at the time.” Id. at 38. Plaintiffs’ counsel admitted that he did not inquire into the “notarization problem.” Id. at 38-39. Plaintiffs’ counsel also indicated that he did not even know whether anyone else at his firm was aware of the problem. Id. at 16. Thereafter, the court below asked Plaintiffs’ counsel about alternate remedies. Id. at 27-29. In responding, Plaintiffs’ counsel stated that “both sides agree that the standard here is the Parfi standard.” Id. at 30.

F. The Court of Chancery’s November 16 Ruling

On November 16, 2012, the Court of Chancery issued its Order and 23-page Memorandum Opinion dismissing this case based on Plaintiffs’ misconduct. After noting that “[t]he parties agree that the Parfi

standard governs the application of Rule 41(b)," Mem. Op. at 4, the court found that Plaintiffs' conduct violated Pennsylvania law and the court's rules, and that Plaintiffs misled the Court and Defendants in a way that dismissing just one of the Plaintiffs would not adequately address. In addition, the Court made findings indicating that Plaintiffs' conduct was at least reckless, if not knowing:

- "The steps that Bennett took to determine whether she could perform the notarizations without Bessenyei's presence were not reasonable." Id. at 11.
- "Goggin had knowledge of her conduct and subsequently ratified her conduct by seeking to benefit from the improperly notarized documents in this litigation. . . . [A]n attorney who directs or encourages an employee-notary to notarize documents not signed in the notary's presence commits serious misconduct." Id. at 14-15.
- "The problems with Bessenyei's notarizations occurred on three separate occasions. The Court (and opposing counsel) were misled." Id. at 20.
- "[T]he requirement that the person whose signature is to be notarized personally appeared before the notary is both clear and readily accessible to anyone who undertakes any sort of effort to find out." Id. at 20.
- "The documents report that Bessenyei signed before the notary. Bennett and Goggin knew that not to be true, but Goggin did nothing to preserve the integrity of the [judicial] process[.]" Id. at 21.

Based on its authority pursuant to Court of Chancery Rule 41(b) and its inherent power to redress litigation misconduct in its docket, the court ruled that dismissal was the only appropriate remedy.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY APPLIED THE LEGAL STANDARDS (RULE 41(B) AND PARFI) THAT BOTH PARTIES AGREED GOVERNED THE MOTION TO DISMISS

A. Question Presented

Did the Court of Chancery act properly in using the Parfi standard of applying Rule 41(b) to the motion to dismiss where both sides agreed it was the proper standard and Plaintiffs below never argued for nor cited any cases to assert a different legal standard?

B. Scope of Review

This Court precludes a party from challenging a judgment on a theory which was not advanced in the court below. Danby v. Osteopathic Hospital Ass'n of Del., 104 A.2d 903 (Del. 1954); see also Sup. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review"). The Court will not consider such a theory absent a showing of manifest injustice. Sullivan v. State, 636 A.2d 931, 937 (Del. 1994).

In addition, this Court reviews a trial court's decision to dismiss a case for failure to follow the court's rules based on whether the action taken was within the realm of sound judicial discretion. Gebhart v. Ernest DiSabatino & Sons, Inc., 264 A.2d 157, 159 (Del. 1970). The authority of a trial court to dismiss an action "for failure . . . to comply with its Rules or orders, is clear." Id. "It is an inherent power of the [t]rial [c]ourt arising from the control necessarily vested in the Court to manage its own affairs and to achieve the orderly and expeditious disposition of its business." Id.

C. Merits of Argument

1. Plaintiffs Did Not Fairly Present the Fraud on the Court Legal Standards Below

Plaintiffs unequivocally stipulated below that the dismissal standard set forth in Parfi Holdings AB v. Mirror Image Internet, Inc., 954 A.2d 911 (Del. Ch. 2008), appeal dismissed, 966 A.2d 348 (2009) for failure to follow the court's rules governs Defendants' motion to dismiss. During the August 22, 2012 argument on Defendants' motion to dismiss, Plaintiffs' counsel averred: "Your Honor: I think both sides agree that the standard here is the Parfi standard." Aug. 22 Tr. at 30.

Now, however, for the first time on appeal, Plaintiffs point to two cases, (1) Paron Capital Mgmt., LLC v. McConnon, 2012 Del. Ch. LEXIS 13 (Del. Ch. Jan. 24, 2012) (Exhibit A) and (2) Postorivo v. AG Paintball Holdings, Inc., 2008 Del. Ch. LEXIS 120 (Del. Ch. Aug. 20, 2008) (Exhibit B) as setting forth specific factors they say the Court of Chancery must consider in deciding the motion to dismiss. But neither case was cited below. Nor did Plaintiffs argue for application of specific factors or a different legal standard; to the contrary, Plaintiffs expressly agreed that the Parfi standard was correct. Under Supreme Court Rule 8, Plaintiffs did not present the issue of applying a different legal standard to the court below and are prohibited from raising it for the first time on appeal. Squire v. Bd. of Educ. of Red Clay Consol. Sch. Dist., 2006 WL 3190337 (Del. Nov. 6, 2006) (TABLE) (Exhibit C). At a minimum, Plaintiffs waived any argument for application of a different legal standard.

2. The Interests of Justice Do Not Support Consideration of Plaintiffs' New Argument For Application of Different Legal Standards

Certainly, there is no manifest injustice or plain error present where the Court of Chancery is told the parties agree on the proper legal standard and then applies that standard. Thus, the "interest of justice" exception to Rule 8 does not apply here. Danby v. Osteopathic Hospital Ass'n of Del., 104 A.2d 903 (Del. 1954).

The only exception to this prohibition of raising issues for the first time on appeal is that Rule 8 will allow parties to present new issues on appeal where the interests of justice so require. Squire, 2006 WL 3190337. The exception is "very narrow" and "extremely limited." Russell v. State, 5 A.3d 622, 627 (Del. 2010). It requires that the Court find there was "plain error" before it will excuse an appellant's failure to raise an issue at the trial level. Smith v. Delaware State Univ., 47 A.3d 472, 479 (Del. 2012). For plain error to exist, the error complained of "must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." Id. at 479 (quoting Turner v. State, 5 A.3d 612, 615 (Del. 2010); Beebe Med. Ctr., Inc. v. Bailey, 913 A.2d 543, 555 (Del. 2006)).

There is no such "plain error" or manifest injustice in the instant case. The question of applying a different legal standard was never raised below. Plaintiffs waived any argument for a different legal standard. It is not prejudicial at all to any rights of Plaintiffs for the court below to have applied the legal standard that Plaintiffs agreed should be applied.

3. The Court Below Did Not Err In Applying Rule 41(b) and Parfi to Circumstances Involving Direct Rule Violations and Repeated Misconduct Undermining the Integrity of the Judicial Process

The cases cited for the first time in Plaintiffs' Opening Brief involve factors or standards a court may consider for motions to dismiss for "fraud on the court." Paron, 2012 Del. Ch. LEXIS 13, at **23-28; Postorivo, 2008 Del. Ch. LEXIS 120, at *43. But in this case, by contrast, the issue presented was whether dismissal was warranted due to Plaintiffs' direct violation of the Court of Chancery Rules and by litigation misconduct that tarnished the integrity of the judicial process. The issue of a formula-based "fraud on the court," and the legal standards that are applied in such cases, were thus not the basis of the motion to dismiss made to the court below.

Even if this Court were to consider whether the court below applied the correct legal standards to the motion to dismiss which it should not- the court below was correct to apply the Parfi standard to Rule 41(b) in granting the motion to dismiss. The Court of Chancery in Parfi recognized that a party's litigation misconduct may implicate the authority of the court to dismiss a case on two separate bases: (1) Court of Chancery Rule 41(b), which provides in relevant part that, "For failure of the [P]laintiff to . . . comply with these Rules or any order of the court, a [D]efendant may move for dismissal of an action or of any claim against the [D]efendant;" and (2) the court's "inherent authority to police the litigation process, to ensure that acts that undermine the integrity of that process are sanctioned." Parfi, 954 A.2d at 932 (citing Gebhart, 264 A.2d at 159).

In fact, the “inherent power” of the court to “manage its own affairs” is actually recognized by Court of Chancery Rule 41(b). Cf. Gebhart, 264 A.2d at 159 (the inherent control vested in the court to manage its affairs “has been recognized by Superior Court Civil Rule 41(b)”). To this end, Rule 41(b) exists with, rather than supplants, the court’s inherent power to manage its cases. Chambers v. NASCO, Inc., 501 U.S. 32, 46, 47 (1991) (recognizing courts’ inherent authority to manage their own proceedings, which power may be exercised either with or independently of rule-based sanctions).

The few Delaware Supreme Court cases applying Rule 41(b) do not require any specific factor-by-factor determination of a “fraud on the court” where orders or rules are violated. For example, in Gebhart, this Court affirmed dismissal under Superior Court Rule 41(b) based on failure to prosecute, including repeated failures to comply with court orders. There, the plaintiffs failed to comply with several pre-trial orders regarding discovery. Gebhart, 264 A.2d at 158. The defendant filed a motion to dismiss “for failure of plaintiffs’ attorney’s [sic] to comply with various pre-trial orders and Rules of Court.” Id. The court reserved decision and entered another pre-trial order; when plaintiffs again failed to comply, the defendant renewed and the trial court granted his motion. Id. at 159. On appeal, the Supreme Court simply found that the lower court’s dismissal “was within the permissible range” of its discretion. Id. The court also noted that “[f]aults of omission or commission by the plaintiffs’ attorneys must be imputed to the plaintiffs.” Id. at 160.

Similarly, in Rowdy v. Rowdy, 2008 WL 2520788 (Del. June 23,

2008) (Table) (Exhibit D), this Court affirmed the dismissal under Family Court Rule 41(b) based on a mother's failure to comply with a court order. In Rowdy, the Family Court sent a letter to the parties informing them that failure to participate in a scheduled teleconference "may result in the case being dismissed or a default judgment being entered." Rowdy, 2008 WL 2520788, at *1. The mother did not attend and her case was dismissed. Id. On appeal, she offered several explanations for her absence but did not dispute that she failed to comply with the court's directive. Id. The Supreme Court affirmed, stating: "Mother does not dispute that she failed to comply with the Family Court's order. Nor has she succeeded in demonstrating that the Family Court abused its discretion when it dismissed her petition." Id.

The two Court of Chancery cases Plaintiffs cite for a different legal standard - which lower court decisions obviously do not bind this Court or undermine Gebhart or Rowdy - are both inapposite. The first case, Paron, 2012 Del. Ch. LEXIS 13, involved a post-trial motion to dismiss for "fraud on the court" filed by a pro se defendant. Id. at *1. Under the facts of that case, the court ruled that the Plaintiffs' conduct did not amount to fraud that unfairly prevented the defendant from presenting his defense. Id. Although the precise nature of the pro se defendant's fraud arguments is not clear from the opinion, they appear to have involved evidentiary issues that the Court had largely ruled on at trial, rather than direct violations of the court rules or anything similar to the circumstances presented by this case. Id. at **23-25.

Paron certainly does not stand for the proposition that all motions to dismiss for litigation misconduct must involve formula-based findings of fraud on the court; indeed, Paron did not address all factors Plaintiffs now assert must be considered. Id. Nor does the plain language of Court of Chancery Rule 41(b) require a court to find every factor supporting fraud before dismissing an action for failure to comply with the court's rules.

Plaintiffs' reliance on a second case, Postorivo, is similarly misplaced. Postorivo involved a claim against a party of repeated perjury, which claim is naturally one more appropriately addressed through various mechanisms at trial. Although Postorivo sets forth a factor-by-factor analysis the court may engage in to determine if a "fraud on the court" claim is sufficient to warrant dismissal, Postorivo does not stand for the proposition that such a formulaic analysis is required for all cases, even those involving direct violations of orders or rules or litigation misconduct that undermines the integrity of the judicial process. To the contrary, Postorivo stated that "as part of its inherent power to manage the cases before it," a court "has 'considerable latitude in dealing with serious abuses of the judicial process,' and has the discretion in the face of abuse or fraud to impose a sanction of dismissal." Postorivo, 2008 Del. Ch. LEXIS 120, at *73. The court noted, in other words, that its decision was an act of discretion. That the Postorivo court chose not to exercise that discretion based on the case before it says nothing about whether the court below abused its discretion in deciding to dismiss based on Plaintiffs' repeated false statements.

II. THE COURT OF CHANCERY PROPERLY EXERCISED ITS DISCRETION IN DISMISSING THIS ACTION

A. Question Presented

Did the Court of Chancery abuse its broad discretion by finding that Plaintiffs' violation of the rules and litigation misconduct impugning the integrity of the judicial process should be sanctioned with dismissal?

B. Scope of Review

This Court reviews a trial court's decision to dismiss a case for failure to follow the court's rules or for litigation misconduct based on whether the action taken was within the realm of sound judicial discretion. Gebhart, 264 A.2d at 159. The authority of a trial court to dismiss an action "for failure . . . to comply with its Rules or orders, is clear." Id. "It is an inherent power of the [t]rial [c]ourt arising from the control necessarily vested in the Court to manage its own affairs and to achieve the orderly and expeditious disposition of its business." Id.

C. Merits of Argument

1. Rule 41(b) and Parfi

As discussed supra at 21-22, under Parfi, the court below has substantial latitude to dismiss actions for litigation misconduct under either Rule 41(b) or the Court's inherent powers. Rule 41(b) unequivocally states: "For failure of the plaintiff to . . . comply with these Rules or any order of the court, a defendant may move for dismissal of an action or of any claim against the defendant."

As found in Parfi, dismissal is also proper when "the tradition of civility and candor that has characterized litigation in this court" is threatened because "the integrity of the litigation process

is fundamentally undermined if parties are not candid with the court.” Id. at 933. Moreover, the Court of Chancery may dismiss an action “[w]hen a party knowingly misleads a court of equity in order to secure an unfair tactical advantage.” Mem. Op. at 4 citing Parfi, 954 A.2d at 915.

2. The Court Did Not Abuse Its Discretion In Dismissing The Action Under Rule 41(b) and Parfi

a. The Court’s Findings About Plaintiffs’ Misconduct Support Dismissal

Plaintiffs do not challenge the principal findings of the Court of Chancery underlying the dismissal ruling, namely, that they repeatedly violated the rules and that they engaged in litigation misconduct, including a lack of candor, that undermined the integrity of the judicial process.

First, having forced Defendants to pursue motion practice and discovery over Plaintiffs’ vigorous objections, Plaintiffs no longer challenge the finding that it was a violation of Pennsylvania notarial law when on three occasions Ms. Bennett notarized Bessenyei’s verifications without him personally appearing before her to sign them. This finding was undoubtedly correct: the court below cited and discussed several Pennsylvania authorities that emphasize the importance Pennsylvania (like Delaware) places on the signing of documents in a notary’s physical presence, including Commonwealth Bureau of Comm’ns v. Downing, 357 A.2d 703, 703 (Pa. Commw. Ct. 1976) wherein the court found that “while it is all too common a practice for notaries public to affix their seals to documents not signed in their presence, such a practice . . . is clearly unlawful, and should not be condoned, for the evils of such an unlawful practice are

readily apparent[.]” Mem. Op. at 7. The Court of Chancery also cited Bolus v. Saunders, 833 A.2d 266, 270 (Pa. Commw. Ct. 2003) (internal quotations omitted) for its ruling that a failure to sign an affidavit before a notary is not a defect that is “merely ‘technical’” and the dismissal of an improperly-notarized complaint is an appropriate remedy. Mem. Op. at 7.

Second, Plaintiffs do not challenge the finding that they violated the rules of the Court of Chancery by using the three verifications that were not properly notarized and that bore the plainly false jurat that they were “SWORN TO and subscribed before” the notary. And, Plaintiffs concede the obvious truth that “Plaintiffs are ultimately responsible for ensuring that they have complied with all applicable [court] rules” Op. Br. at 20-21.

Plaintiffs persist, however, in attempting to characterize their rule violations as merely technical, claiming again in their brief (without any authority) that the verifications were “technically defective.” Op. Br. at 7. This contrasts with the Bolus court’s view of the seriousness of such violations under Pennsylvania law, as well as the court below’s ruling that the failure “to comply with [the notarized verification] requirement is not some mere technicality; it undercuts the integrity of the judicial process.” Mem. Op. at 20.

Plaintiffs also do not challenge the Court of Chancery’s conclusions respecting Plaintiff Goggin’s ethical responsibilities as a Pennsylvania lawyer, and his ethical misconduct of having knowledge of his employee, Ms. Bennett’s, unlawful actions in notarizing the verifications and “subsequently ratif[ying] her conduct by seeking to

benefit from the improperly notarized documents in this litigation.” Mem. Op. at 14. Plaintiffs do not address the court’s conclusion that, “[a]fter each time that Goggin asked Bennett to notarize a verification without Bessenyei’s presence, Goggin took the document and transmitted it to Delaware counsel” (id.) – except to claim that the Court of Chancery “provided no factual basis” for the conclusion that Goggin “should have known the notarizations were defective.” Op. Br. at 28 n.10. But Plaintiffs have no answer to the Court of Chancery’s discussion of the Pennsylvania Rules of Professional Conduct which “bind Goggin as a Pennsylvania attorney,” and the apparent discipline Goggin may be subject to for causing his legal assistant to improperly notarize the verifications and subsequently transmitting them to Delaware counsel to be used in a Delaware court. Mem. Op. at 15-16.

As to Bessenyei’s conduct, Plaintiffs say that the court below found “little to no culpability on the part of Mr. Bessenyei.” Op. Br. at 28. This misstates the Court of Chancery’s ruling. The court found Bessenyei to be culpable in that he had an obligation to comply with the rules of the Court. Mem. Op. at 20. The Court also found that everyone involved in the false notarizations had acted recklessly: “[T]he requirement that the person whose signature is to be notarized personally appeared before the notary is both clear and readily accessible to anyone who undertakes any sort of effort to find out.” Mem. Op. at 20. And, as noted above, Bessenyei’s failure to comply with the verification requirement was “not some mere technicality; it undercuts the integrity of the judicial process.”

Mem. Op. at 20. Additionally, the court ruled that because of all of the Plaintiffs' misconduct, "The Court (and opposing counsel) were misled." Id.

On these facts, the court below acted well within its discretion to order dismissal under Rule 41(b) and Parfi.

b. Plaintiffs' Unfair Tactical Advantage

Plaintiffs attempt to distinguish Parfi - and excuse themselves - by arguing that even though the Court of Chancery ruled that "Plaintiffs achieved short-term tactical benefits by avoiding compliance with the notary laws," (Mem. Op. at 22) there really were no such benefits because there was no "exigent reason why the Complaint had to have been filed on the day it was." Op. Br. at 29. But Plaintiffs' brief fails to mention that their complaint was filed together with motions for expedited proceedings and a preliminary injunction, and that Plaintiffs were attempting to obtain a ruling on the disputed bylaw amendment before Vermillion's impending annual meeting. By filing their papers quickly, Plaintiffs were able to obtain expedited treatment rather than proceed in the ordinary course.²

c. Plaintiffs Never Requested An Evidentiary Hearing

Plaintiffs make the ipse dixit assertion that because the court below ruled on the motion to dismiss without an evidentiary hearing, "[t]o the extent there are any disputes of material fact, the Court

² To this end, in a motion for expedited proceedings, Plaintiffs represented that, "Because Vermillion's next annual meeting is expected to be held sometime during the next several weeks, expedited proceedings are needed to avoid [irreparable] harm." B12. Likewise, in their preliminary injunction motion, Plaintiffs argued, "Without a preliminary injunction, Plaintiffs thus face imminent irreparable harm, especially in light of the fact that the next annual meeting will likely be held sometime during the next several weeks." B27.

must resolve them in favor of the Plaintiffs." Op. Br. at 27, n.9. Yet, both parties presented extensive evidence on the motion to dismiss which the court below clearly considered in its ruling. Plaintiffs' counsel also had the opportunity to cross examine witnesses, including his own clients, to elicit favorable facts if there were any. They failed to do so, and, as noted above, Plaintiffs do not even dispute the principal findings underlying the ruling.

Moreover, in stating that the court below resolved Defendants' motion without an evidentiary hearing, Plaintiffs fail to mention that they never applied for one. Thus, at a July 27, 2012 scheduling conference, the court observed, "I'm assuming that [these proceedings are] going to be on undisputed facts. And if it turns out I'm wrong on that and we actually need an evidentiary hearing, that will obviously have an impact on how much time we set aside and when we can schedule it." B60-B61. When Plaintiffs filed their opposition, they did not request such a hearing. B62-104. Instead, their position was: "To the extent there are determinations of credibility to be made . . . Plaintiffs are providing and respectfully request that the Court consider the videotaped deposition testimony[.]" B69 at n.2. So, to the extent the court below made findings based on the videotapes, papers and evidence as to Plaintiffs' reckless, illegal conduct, the court was only doing what Plaintiffs asked it to do.

3. Plaintiffs' Inequitable Conduct Forfeits Equity's Aid, Especially Where It Prejudices Defendants

Plaintiffs also argue that "considering that Plaintiffs are not seeking monetary damages, but instead are seeking to restore a Board seat, the public interest is better served by permitting the action to be heard on the merits." Op. Br. at 21. Plaintiffs provide no authority for this claim, but it does highlight that they came to the court below seeking the aid of equity. In seeking equity, Plaintiffs' conduct must also do equity or forfeit its aid. Nevins v. Bryan, 885 A.2d 233, 248 (Del. Ch. 2005), aff'd, 884 A.2d 512 (Del. 2005).

Plaintiffs also remarkably contend that "Defendants cannot possibly argue that they have been prejudiced" by Plaintiffs' litigation misconduct. Op. Br. at 33. On the contrary, Plaintiffs' misconduct first came to light fewer than three weeks before trial. Defendants were then forced to seek and obtain, at considerable time and expense, discovery into Plaintiffs' conduct after they refused to provide adequate information voluntarily. The resulting litigation delay has also substantially delayed Vermillion's 2012 annual meeting.

4. Plaintiffs' Misconduct Warranted Dismissal Under Postorivo

Finally, Plaintiffs are wrong in stating that their misconduct does not meet the six factors discussed in Postorivo. 2008 Del. Ch. LEXIS 120, at *75. As to the first Postorivo factor, "the existence of certain extraordinary circumstances," the Court of Chancery found that, "[f]ailing to comply with [the pleading verification] requirement is not some mere technicality; it undercuts the integrity of the judicial process." Mem. Op. at 20. As to second factor, "the presence of willfulness, bad faith, or fault by the offending party,"

as noted above, the court found that Defendants violated Pennsylvania notary laws, were guilty of “ethical failures” in connection with their failure to follow the court’s rules, and engaged in conduct that “misled” the court and opposing counsel. Id. at 20-23. The court below also found that the misconduct was “intentional in the sense that . . . some of the folks involved knew that the affiant was not in the physical presence when the document was signed.” Aug. 22 Tr. at 28. And, the court held that Plaintiffs’ conduct was reckless, in that even if they claimed they did not actually know what they were doing was wrong, they “should have known” it. As to the third factor, “the consideration of lesser sanctions,” as discussed in greater detail infra at 33-34, the court considered alternative sanctions including dismissal of one or the other of Plaintiffs, as well as fee shifting. Mem. Op. at 21-23. As to the fourth factor, the relationship between the misconduct and the matters in controversy, the court found that “[c]ritical documents carrying Bessenyei’s signatures were not properly notarized,” a “failure [that] was not incidental or technical.” Id. at 21. As to the fifth factor, “prejudice and the public interest,” the court found that dismissal “fully serves the purpose of protecting the integrity of the judicial process in future proceedings.” Id. at 23. And, Defendants were prejudiced in having to endure expedited proceedings and delay their annual meeting. Finally, as to the sixth factor, “the degree of the wrongdoer’s culpability,” the court below examined the conduct of each plaintiff and their counsel and found each to be at fault. Id. at 10-21.

III. THE COURT OF CHANCERY APPROPRIATELY EXERCISED ITS DISCRETION IN FINDING THAT PLAINTIFFS' MISCONDUCT WARRANTED DISMISSAL RATHER THAN A DIFFERENT SANCTION

A. Question Presented

Did the Court of Chancery properly consider other remedies in exercising its broad discretion to determine that dismissal was the appropriate sanction for Plaintiffs' litigation misconduct?

B. Scope of Review

This Court reviews a trial court's decision to dismiss a case for failure to follow the court's rules based on whether the action taken was within the realm of sound judicial discretion. Gebhart v. Ernest DiSabatino & Sons, Inc., 264 A.2d 157, 159 (Del. 1970). The authority of a trial court to dismiss an action "for failure . . . to comply with its Rules or orders, is clear." Id. "It is an inherent power of the [t]rial [c]ourt arising from the control necessarily vested in the Court to manage its own affairs and to achieve the orderly and expeditious disposition of its business. Id.

C. Merits of Argument

Plaintiffs' argument that the court below abused its discretion by failing to consider alternate remedies besides dismissing the action finds no support in the record. Plaintiffs completely ignore the instances of record where the Court of Chancery considered sanctions apart from complete dismissal of the action.³

One such sanction that was addressed both by the parties throughout the proceedings below and in the court's November 16 Opinion was that, in light of his defective verifications, Bessenyei

³ Plaintiffs cite to no Delaware authority in support of this argument. And, Plaintiffs' federal cases (Op. Br. at 31-34) are distinguishable on the nature of the underlying conduct.

alone could be dismissed as a plaintiff, leaving Goggin to litigate the case. It was Plaintiffs who first raised the notion in their August 3, 2012 opposition brief below on the motion to dismiss (B98), and Defendants addressed this proposed alternative sanction in their reply brief and at the August 22 argument, noting that it would actually reward Plaintiffs by removing a party with an obvious credibility problem from the case. And, contrary to Plaintiffs' argument, the court below's November 16 Opinion directly addressed this possible alternate sanction:

Conduct of this nature warrants dismissal. The more difficult question is: what to dismiss? The obvious dismissal would be of Bessenyei because, after all, his signatures were the ones improperly notarized. But, of those involved with the Plaintiffs and the notarizations, Bessenyei probably knew (or should have known) the least about American notary procedures. Goggin, a lawyer, directed someone in his office to go forward with the notarization process[.]

Mem. Op. at 20.

The court below went on to analyze the nature of the Plaintiffs' misconduct and ultimately determined that dismissal of both Plaintiffs was the appropriate sanction. Id. at 21.

But the court below's analysis of different sanctions did not end there. The court also considered whether fee shifting would be an appropriate (additional) remedy. Id. at 21-23. After analysis, the court found that fee-shifting was not an appropriate (additional) remedy and that dismissal of the case itself would serve "the purpose of protecting the integrity of the judicial process in future proceedings." Id.

CONCLUSION

For the reasons set forth herein and in the Court of Chancery's well-reasoned November 16, 2012 Opinion and Order, the dismissal of this action as a sanction for Plaintiffs' rules violations and litigation misconduct should be affirmed.

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Dated: March 4, 2013

CERTIFICATE OF SERVICE

I, J. Clayton Athey, hereby certify on this 4th day of March, 2013 that I caused a copy of the foregoing Appellee's Answering Brief to be filed and served electronically via LexisNexis File and Serve upon the following counsel:

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