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Case Number 144,2011

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LINDA MERRITT (a/k/a LYN MERRITT, et al.)		
Defendants -below,		
Appellants,	)	
v.	)	**No. 144-2011**
	)	
R&R CAPITAL, LLC, a New York limited liability company, and FTP CAPITAL, LLC, a New York limited liability company,	)	**On Appeal from The Court of Chancery**
	)	
Plaintiffs-Below-Appellees,	)	
and	)	
BUCK & DOE RUN VALLEY FARMS, LLC, a Delaware limited liability company, et als.	)	
	)	
Nominal Defendants-Below Appellees.	)	

REPLY BRIEF OF APPELLANTS LINDA MERRITT, MER-LYN FARMS, LLC AND MERRITT LITIGATION SUPPORT, INC.

Filing Date: July 9, 2012

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I. THE CHANCERY COURTS DENIAL OF ADVANCEMENT OF LEGAL FEES TO MERRITT FROM THE INCEPTION OF THIS CASE IS CONTRARY TO THE ENTITY OPERATING AGREEMENTS.

R&R contends that Merritt was not entitled to immediate advancement of legal fees because i) "the trial court" recognized that any contractual advancement claim was contingent upon a party's status as manager of the LLC's, so it would be imprudent to authorize advancement to anyone -- either Merritt or R&R both of whom claimed to be the valid manager -- before determining their status vis a vis the LLC's", R&R Op. at 29; ii)"had the trial court ultimately concluded that Merritt was entitled to advancement, she could have been compensated for the loss of that contractual right," Id. at 30[1], and iii) "Merritt suffered no prejudice if this court confirms summary judgment in the DE removal action," Id. at 31. R&R's arguments are contrary to the operating arguments and are untenable under Delaware law. R&R's argument that it removed Merritt by letter and appointed itself manager, thus creating a dispute as to who rightfully should manage the Entities, did not preclude advancement to Merritt. Section

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[1] R&R's statement that Merritt would have been compensated if the court found in her favor is a non starter. First, section 9.1 of the operating agreement requires advancement as legal expenses are incurred, not after a finding in her favor. Moreover, Merritt was financially devastated in attempting to defend litigating R&R's vexatious litigation. R&R's statement that the Entity assets would have to be sold to fund Merritt's advancement is incorrect. At the time R&R obtained the status quo order, the Entities had over $1.6 million in cash in the bank. R&R op. at 9. R&R's claim that it needed the status quo order to protect the funds from Merritt was designed to thwart Merritt from obtaining counsel.

9.1 of the operating agreement applies "whether or not the indemnified party continues to be a member or an officer at the time any such indemnification is paid as incurred." Thus the trial courts "wait and see" decision towards advancement under Delaware Law was error.[2]

Delaware common law authorizes advancement pursuant to indemnification provisions agreed to by the contracting parties. *Morgan v. Grace*, 2003 WL 22461916, at *2 and n. 13 (Del. Ch. Oct. 29, 2003). Furthermore, Delaware law rejects R&R's argument that partners or officers may be denied advancement of legal expenses where they "would not be entitled to be indemnified if the conduct alleged _ _ were eventually proven to be true." That argument is deemed "fallacious" because it "blurs the distinct purpose of advancement provisions." *Id.* at *2 8. Advancement of legal fees is regularly allowed and is not dependent on the ultimate success or failure of the underlying claim against the party seeking advancement. *Id.* And in *Homestore v. Tafeen*, 888 A.2d 204 (Del. 2005), this Court directed that an entity advance legal fees to enable a former employee to continue his defense of federal criminal charges and related civil litigation, reasoning that a stay delaying advance payment of legal fees "would be inimical to the public policy of this state of affording advancement" and would create "a harm that could never be undone_ _." *Id.* at 213 & n. 14. Chancellor Chandler own words that

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[2] *See Ridder v. City Fed Fin. Corp.*, 47 F.3d 85, 89-88 (3d Cir. 1995) "[U]nder Delaware Law, Appellants right to receive the costs of defense in advance does not depend upon the merits of the claims asserted against them").

this is "probably one of the most complex and convoluted morasses of litigation I have ever been engaged in, in over 25 years," A. 1850., confirms that denial of legal fees with the courts "wait and see" attitude caused irreparable harm to Merritt.[3] The trial court's denial of advancement must be reversed as well as all subsequent orders.

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[3] R&R argues that the standard of review is abuse of discretion by focusing its argument on the status quo order. This is incorrect; the standard is de novo because the heart of the issue is whether Merritt was entitled to advancement under the plain language of the operating agreement.

II. THE CHANCERY COURT'S DENIAL OF ADVANCEMENT AND INDEMNIFICATION VIOLATED THE DOCTRINE OF RES JUDICATA.

R&R contends that res judicata does not apply to the Delaware removal action because i) The parties against which any advancement claim would be made were not parties to the New York proceedings, ii) the New York Court's January 4, 2008 order related to indemnification (not advancement), and iii) The New York court order was entered prior to Merritt's removal as manager, which materially changed Merritt's rights under the contracts. R&R's arguments are baseless. First, Merritt and R&R are the parties that agreed to the operating agreements the LLC's themselves are not a party to the agreements.[4] Second: The New York court relied on Section 9.1 in its entirety when it granted Merritt her right to indemnification which section includes advancement. The Court stated: "Section 9.1 of the ML agreement defines an indemnification party as any member of officers of the company."[5] A. 1720.

Finally, the litigation did not end with R&R's self serving removal letter. As found by the trial court, "in August 2008, however, when the notice was given Merritt was not immediately

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[4] *R&R Capital v. Buck and Doe Run Valley Farms*, LLC 2008 WL 3846318 (Del. Ch. 2008)("Limited Liability Companies are creatures of contract, 'designed to afford the maximum ordering and flexibility to the parties involved"). Merritt's right to advancement and indemnification is part of her contract agreed to by R&R.

[5] R&R asserts that the NY First Dept Appellate division found that the Delaware Court retained jurisdiction over Merritt's claims of indemnification rights. What R&R fails to mention is that R&R specifically argued in New York that all of Merritt's res judicata arguments must be presented to the Delaware Court.

removed as manager but rather remained in office pending a finding of 'cause' by this court." R&R Capital v. Merritt, WL 2937101 (Del. Ch.2009) Clearly, the New York courts order granting advancement and indemnification in the first removal action should have been honored in the second removal action.[6] See R&R op at 4.

[6] *Maldonado v, Flynn*, 417 A.2d 378 (Del.Ch.1980) ("Res judicata extends to all issues which were known at the second action at the time of the first action then the claims are barred").

III. THE GRANT OF SUMMARY JUDGMENT AGAINST MERRITT WAS IN ERROR.

R&R's repeated accusations of fraud against Merritt backfire for two reasons. First, R&R fails to disclose in its brief that Ira Russack, the (100%) owner and Manager of R&R, pled guilty to tax fraud several years before meeting Merritt but concealed his conviction from Merritt from the inception of their business relationship. A. 234-235 R&R therefore had no right to remove Merritt as managing member on grounds of fraud when it was guilty of fraud itself[7].

Second, as Merritt argued in her opposition to summary judgment, the parties never intended that fraud committed outside the operation of the Entities could be cause for removal, especially given that Russack committed the crime of fraud outside the Entities. A. 226-229. The only conceivable interpretation that the parties gave to the operating agreements was that fraud *relating to* the Entities constituted the only ground for removal.

It is inconceivable that in 2003-04 when the operating agreements were executed after Russack was convicted of fraud that he believed that any fraud outside of the Entities would constitute cause for removal. R&R's argument that: " ... the only reasonable interpretation is that any fraud by the manager (i.e.: Merritt) can serve as grounds for removal for "cause", R&R op. at 21, is directly

[7] It also bears mention that Russack declined to be subject to a full back ground check in order for Pandora Farms LLC (one of the jointly owned Entities) to be licensed to race their thoroughbred horses. Each track requires the individual members/partners of an entity that owns thoroughbred horses to be licensed. Russack was denied a license by the New York racing association. A. 233. Merritt has never been denied an owners license.

contrary to its own conduct and pleadings and must be rejected. The absurdity of this argument is undeniable; in one breath, R&R claimed Merritt should be removed and forfeit her member interest because of her alleged misrepresentation on the thoroughbred yearling, and in the next breath, R&R asserts that de facto control of the entities should be given to Russack, who defrauded the federal government.

R&R's fallback position of its any fraud argument for cause for removal is the trial court's finding that Merritt's fraudulent conduct had a material adverse effect on "Plaintiffs - other Members" which constituted cause for removal. See R&R op. at 22. This finding was erroneous for two reasons.

First, sections 4.4 and 4.5 of the operating agreements, read together, precluded Merritt's removal for conduct that did not relate to the Entities. The second sentence of section 4.4 restricts Merritt's liability to other members to acts of "bad faith, gross negligence, willful misconduct or fraud" in the performance of her duties as Managing Member. Similarly, section 4.5 restricts Merritt's removal to "removal for cause," i.e., removal for "(a) engag[ing] in fraud or embezzlement, (b) commit[ing] an act of dishonesty, gross negligence, willful misconduct or malfeasance that has a material adverse effect on the Company or other member, (c) convic[tion] for any felony." Section 4.5's language is virtually identical to the pertinent language in section 4.4 – which limits Merritt's liability to acts performed in the course of her duties as Managing Member. The only logical reading of section 4.5 is to limit "removal for cause" to acts that occur in the course of Merritt's performance of duties as

Managing Member. The pinhooking transaction that R&R used to secure Merritt's removal fell outside of Merritt's duties as Managing Member and therefore could not serve as grounds for her removal. Having entered into an agreement to limit grounds for removal to certain specific acts, R&R is bound by the plain language of these provisions. *Cf. Fisk Ventures, LLC v. Segal*, 2008 WL 1961156, *11 (Del.Ch.2008) (parties may choose to expand, restrict or eliminate duties of LLC members through plain language of operating agreement).

Second, the trial court never held an evidentiary hearing to determine whether the rescission had a material adverse effect on R&R. The federal court granted Merritt's counterclaim in the amount of $28,432.76 for expenses incurred by Merritt in connection to the pinhooking horses. The federal court offset that amount from the $150,000.00 purchase price for the Lipstick horse. After the courts offset, Merritt owed $121,567.24 to R&R. (B. 1198.) The only way to determine whether this sum had a "material adverse" effect on R&R was through an evidentiary hearing, especially since R&R is a multimillion dollar operation.

IV. R&R'S CLAIM OF CAUSE FOR REMOVAL OF MERRITT AS MANAGING MEMBER BASED UPON THE PINHOOKING TRANSACTION IS BARRED UNDER THE DOCTRINE OF RES JUDICATA.

R&R's representations that it never alleged the Pinhooking dispute as a cause for removal in the New York Action is false. Not only did R&R assert the pinhooking transaction as cause for removal in New York, but it now attempts to twist out of that fact by asserting that its 2005 removal letter controlled that action and misrepresenting its pleadings in support of removal. Under the transactional approach to res judicata articulated in *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185 (De. 2009), R&R was barred from seeking Merritt’s removal on the basis of the pinhooking issue raised previously in New York.

By focusing on the 2005 letter and ignoring its own pleadings, R&R creates the misleading impression that it did not request Merritt's removal in the New York pleadings, and that its second removal action in Delaware arose solely after the 2005 notice. The truth is much different: R&R requested Merritt's removal from the beginning of the New York 2005 litigation. R&R's initial complaint included "the pinhooking horses" and their inferior quality" as part of its fraud allegation against Merritt. A. 53. Along with the initial complaint, R&R filed a motion for preliminary injunction which included an affidavit from Harvey Russack, the brother of R&R's owner, which stated that he executed his affidavit for the purpose of "removing [Merritt] as managing member of all [of the entities]A. 276. The affidavit includes the pinhooking transaction as a basis for removing Merritt. On February 1, 2006, R&R filed a verified amended

complaint adding Count vii, "repeats and realleges" the allegations within paragraphs 1-188 of the amended complaint including allegations of fraud in connection with the pinhooking transactions contained in A. 13. at ¶¶ 59-60, A. 90-91. at ¶¶ 99-102, A.101. at ¶¶ 147-150.[8]

Furthermore on October 6, 2006, the New York Court specifically denied R&R's request to remove Merritt as managing member by stating on the record that R&R's "motion [to remove] is denied in all respects," A. 1412. Counsel for Merritt inquired: "The issue of removal is off the table?" The court replied: "It's off the table." A. 1413. This constituted a denial of removal on all grounds which included the pinhooking transaction and barred R&R from seeking Merritt's removal in any other courts based on those claims. Approximately nine (9) days after the New York court denied removal, R&R filed in the Federal Pinhooking action its opposition to Merritt's motion to dismiss, asserting that the fraud part of its Pinhooking claim remained in New York: "While the Pinhooking horses are mentioned in the New York case, the only issue there is related to whether Merritt engaged in fraud in the transaction transferring horses to R&R capital." R&R Capital contends in New York that it was offered the "opportunity" to purchase the Pinhooking horses as in inducement to relinquish its half ownership in over all horse business at a lower price (emphasis is added) A. 725.

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[8] Paragraphs 147 and 151 sought damages in excess of $600,000 in connection to the purchase of the 3 Pinhooking Horses.

Thus, R&R's representation to this Court that it did not request Merritt's removal in New York based on the Pinhooking action is untrue.

On December 10, 2007, after R&R's presentation of its case in chief the New York court granted Merritt's request for directed verdict. Thus, even if The New York court had not taken removal out of play in October 2006, the court certainly eliminated it at the end of R&R's case-in-chief.

R&R contends that Merritt is barred from raising the affirmative defense of Res judicata as to her removal because: i) "The NY first Dept has repeatedly ruled that the Delaware proceedings to not overlap with the 2055 New York proceedings," and ii) the Trial court independently concluded that Justice Ramos had not decided R&R's removal claim based on Pinhooking fraud and noted that the judge in the Pennsylvania Pinhooking action "failed to find that Justice Ramos specifically ruled on the Pinhooking transaction" *Id.* at 27.

Both arguments fail based on i) R&R's own arguments before the NY First Dept during its appeal of the New York courts injunction and ii) Merritt as a matter of right can appeal to this Court all rulings rendered by the Trial court. R&R specifically argued before the New York appeals court in its appeal of Justice Ramos' injunction that it would be improper for the New York court to make a res judicata finding and that Merritt was required under New York law to present her res judicata claims to the Delaware and Pennsylvania courts. R&R stated: "New York Law is clear that under the present circumstances Merritt's proper remedy was to make her collateral estoppel and or res

judicata arguments to the Delaware and Pennsylvania courts (citation omitted). A. 1724. Thus, whether or not the claims asserted by R&R in Delaware and Pennsylvania had already been decided was a matter for the Delaware and Pennsylvania courts not the court below." Id. The First Dept reversed the trial court based on R&R's arguments. R&R is judicially estopped from now claiming that Merritt is barred from raising her res judicata arguments having convinced the New York court that under the law her res judicata claims had to be presented to Delaware and Pennsylvania Courts. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory).

In *LaPoint*, this Court endorsed the transactional approach to res judicata, which bars claims that were known to the moving party at the time of the first suit but not pursued or abandoned. Determining whether two claims arise from the same transaction requires pragmatic consideration, with the fact finder "giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Id.* at 193. Two claims "derive[d] from a common nucleus of operative fact[s]" arise from the same transaction. *Id.* To assert res judicata as a bar to plaintiff's claim, in addition to showing that the same transaction formed a basis for both the present and former suits, the defendant must show that the plaintiff "neglected or failed to assert claims

which in fairness should have been asserted in the first action." *Id.* at 194.

The case at bar is a text book application of the transaction approach to res judicata. All of R&R's claims were dismissed in their entirety by the New York court, which barred R&R from asserting the pinhooking transaction as cause for removal in the Delaware court. R&R even asserted the pinhooking transaction as a basis for relief in New York but failed to litigate that issue in New York. Assuming arguendo that the New York court never decided the Pinhooking transaction as a cause for removal, R&R is still barred under Res judicata because by its own admission it was aware of its Pinhooking allegations [which was 2004 conduct] at the time it filed and litigated the New York action and was not precluded from asserting that claim in that action.

For these reasons all of the trial courts order of removal should be vacated.

V. THE CHANCERY COURT'S CONTEMPT ORDER AND SANCTIONS ARE CLEARLY ERRONEOUS.

A motion for contempt is taken "very seriously" and is governed by specific rules to guard against frivolous allegations of contempt. *Magness v. Krewson*, 2004 WL 877348, * 6 (Del.Ch.2004). The trial court ignored these rules in order to hold Merritt in contempt. The receiver's motion for contempt purported to rely upon Del.Ch.Rule 70(b) but did not attach an affidavit delineating the alleged "facts constituting the disobedience" as required by the rule. *In re Tyson Foods Inc.*, 919 A.2d 563, 599 (Del.Ch.2007). The trial court compounded this fatal flaw by failing to hold a hearing and receive sworn testimony from live witnesses. *Dickerson v. Castle*, 1991 WL 208467 (Del.Ch.1991). A finding of contempt that is unsupported by sworn testimony or at least an affidavit cannot meet the threshold standard of "clear and convincing evidence." *Dickerson*.

R&R asks this Court to ignore those standards and rules of contempt:

> [N]evertheless, the contempt motion was based upon (i) documentary evidence, (ii) oral and written representations by the court appointed Receiver (which were subject to Rule 11), iii) oral and written representations by Merritt which were subject to rule. Moreover Merritt directly answered the trial court's question during the contempt hearing. As such, any suggestion that the trial court lacked an adequate record is baseless. R&R op. at 38 n. 125.

These words demonstrate the lack of proof of contempt against Merritt due to the complete absence of sworn testimony.

Nor was there any justification for the court's orders for Merritt to withdraw her claims in the New York Court that sought to establish any entitlement to any assets of the receivership entities,

including but not limited to any interest in the Buck and Doe Farms, and to cause Mer-Lyn Farms, LLC to withdraw its mechanics liens in the Chester County Pennsylvania court. There was no prior order by the trial court requiring Merritt to withdraw her claims in the New York action as to her rights to the Farm. Nor was there any prior order prohibiting Mer-Lyn from enforcing its contractual rights against real property located in a sister state.[9] Absent prior orders, there was nothing for Merritt to violate and nothing for which to hold her in contempt. Moreover, Merritt/Mer-Lyn's right to use the Farm was litigated in the New York action three years before this case was filed and six years before contempt proceedings. A. 85. The New York court dismissed R&R's claims in February 2007, 18 months before this action was filed. (B. 1406-1471.) Furthermore, there are written contracts that empower Mer-Lyn to manage and occupy the Farm. The first was executed on December 11, 2011, A. 30-31. and the second is built into Section 4.1 (P) of the Buck and Doe Run Valley operating agreement. (B. 162-195.) Mer-Lyn's right to occupy the Farm is built directly into the Hannum leases which was approved by the members and Buck & Doe. A.2375-2392. Hannum Leases at ¶(d). Mer-Lyn is not a party to the receivership nor was it named in any of the orders allegedly violated by Merritt. To hold Merritt in contempt of orders as to her claims in New York, and to impose sanctions against Mer-Lyn,

[9] At argument on the contempt motion, the Receiver conceded he had not even reviewed Mer-Lyn's claims. A. 1811-1813.

a non-party not named in the contempt motion was clearly an abuse of discretion.

Even if this Court were to find ambiguities in the Chancery Court's orders, this inures in Merritt's favor, for "any ambiguities and omissions in orders redound to the benefit of the persons charged with contempt." *Ford v. Kammerer*, 450 F.2d 279, 280 (3d Cir. 1980).

The sanctions against Merritt were also clear error. A sanction for contempt is limited to compensatory damages incurred by the offended party. It is the general principal that "the relief granted in civil contempt proceedings is compensatory... [and] must not exceed the actual damages caused the offended party by a violation of the court's order." *Quinter v. Volkswagen of America*, 696 F.2d 969, 975 (3d.Cir.1982).

Without conducting an evidentiary hearing on the appropriate sanction, the trial court imposed draconian sanctions by forcing Merritt to forfeit her 50% member interest in the entities, canceling any distribution to Merritt and her wholly owned entities, Mer-Lyn Farms, LLC and Merritt Litigation Support, Inc. forced Merritt to withdraw claims in the New York action and her appeal of the Receiver's ejectment action in Pennsylvania and ordered her to cause Mer-Lyn to withdraw its mechanics liens in its Pennsylvania action against the entities properties. A. 969-971. Subsequently, the Receiver submitted an order transferring the remaining Entity assets to R&R which included a 55 year long farm lease valued at over $4.3 million dollars along with other entity assets totaling several hundred thousand dollars. A. 2393-2394. Contrary to R&R's false

representation that "Merritt's estimate of the monetary value of her sanction which summarily asserts excess of 15 million, finds no evidentiary support in the record (and should be given no weight)," R&R op. 41, the evidence supporting Merritt's position in the record is substantial. On July 24, 2007, Merritt submitted her sworn affidavit to the court in support of her opposition to summary judgment which details Merritt's capital account and loans to the entities of $6,821,000. A.672. On September 22, 2010, pursuant to the Receiver's procedure on claims against the entities, she submitted her personal claim for capital and loans to the entities and the claims of her wholly owned entities, Merlyn Farms LLC and Merritt Litigation Support Inc. Merritt's total claims were $10,100,000. A.895. Furthermore, Merritt submitted all of the required information to the alleged forensic accountant in order to perform an audit of Merritt and her wholly owned Entities claims against the LLC's. R&R further misrepresents the record by stating that Merritt's assertion is contrary to the findings of the court-appointed forensic accountant who was unable to corroborate any of Merritt's alleged contribution, R&R op. at 42 N. 138. The accountant did not complete the audit of Merritt and her companies' accounts because the court removed her as a member.[10] Once that happened the accountant and Receiver would not

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[10] At the hearing to dismiss the case Merritt's provided all of the emails and correspondence between her, the Receiver and the forensic accountant which disavows R&R's claim Merritt did not cooperate with the receiver and the accountant A. 1893-2374. Moreover any claim that Merritt did not provide documents in support for her capital, loans and wholly owned entity advances to the Entities is false based on the forensic accountants filing of the Merritt Land LLC tax return based

communicate with Merritt and disregarded any interest she had in the entities. A.895. ("I [Receiver] am no longer responding to inquiries of this kind from you, particularly now that you no longer have any interest in the entities"). At the hearing to dismiss the case, the Receiver reaffirmed his position that because Merritt was no longer a member the accounting was moot:

> MR. HEYMAN: And I would just note, Your Honor, that the -- when this -- these became one-member entities after the contempt was ordered, the accounting sort of assumed lesser importance.

A. 1795.

Clearly there is no basis in law or equity that can support the sanctions imposed accordingly the order must be reversed including the order transferring the remaining Entity assets to R&R.

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on the documents provided to him by Merritt. The returns reflect Merritt's capital account in that LLC of $581,988, and R&R's capital account at $323,056 in 2005. A.1014-1091.

VI. JUDGE CHANDLER SHOULD HAVE RECUSED HIMSELF.

The judge who entered multiple draconian orders against Merritt without evidentiary hearings joined a law firm shortly thereafter which has close, longstanding relationships with the law firm that represents R&R and the receiver in this case. The judge admitted "spen[ding] a lot of time with [the law firm]" before accepting the position, A. 1240., which would have been the same time that he was involved in the case at bar. This development smacks of impropriety and explains why the judge was so determined to rule against Merritt without a hearing.

Judges have the burden to disclose possible grounds for disqualification. *In Re Kensington Intern. Ltd.*, 368 F.3d 289, 313 (3d Cir. 2004) (*citing United States v. Bosch*, 951 F.2d 1546, 1555 n. 6 (9th Cir. 1991)). The judge herein, however, kept his budding employment relationship with Wilson Sonsini private until after repeatedly ruling against Merritt in this case. The judge's conduct places his decisions in grave doubt and mandates new proceedings before another judge whose impartiality is beyond dispute.

R&R downplays the ties between the judge, on the one hand, and R&R's law firm and the receiver, on the other, by asserting: "The cases in which Wilson, Sonsini (the firm that the judge joined) has worked with either Richards, Layton & Finger or Proctor Heyman suggest nothing more than a typical professional relationship between forwarding and local counsel in this jurisdiction." R&R op. at 44 n. 149. The number of cases in which Wilson Sonsini worked with the

receiver or his firm (3) or with R&R's law firm (5), and the close relationship in time between the judge's rulings against Merritt and his decision to leave the bench for Wilson, Sonsini, suggest otherwise. As in *Ebersole v. Evans Builders*, 15 A.3d 217 (De. 2011), the decision cited in Merritt's opening brief, the appearance of impropriety created by these unusual facts, along with the judge's *ex parte* conference with the receiver, casts the judge's decision in a highly suspicious light. The judge should have recused himself.

Respectfully Submitted:

/s/ Erik Grandell

Erik Grandell