IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GEORGE LITTERST,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 7700-ML
	)	
ZENPH SOUND INNOVATIONS, INC., a Delaware Corporation,	)	
	)	
Defendant.	)	

MASTER'S REPORT
(Motion for Contempt, Sanctions, and Attorneys' Fees)

Date Submitted: August 6, 2013
Draft Report: September 30, 2013
Final Report: October 17, 2013

Michael F. Bonkowski, Esquire of Cole, Schotz, Meisel, Forman & Leonard, P.A., Wilmington, Delaware; OF COUNSEL: John D. Lanza, Esquire and Courtney Worcester, Esquire of Foley Lardner, LLP, Boston, Massachusetts; Attorneys for Plaintiff.

M. Duncan Grant, Esquire and James H. S. Levine, Esquire of Pepper Hamilton, LLP, Wilmington, Delaware; Attorneys for Defendant.

LEGROW, Master

The plaintiff, a stockholder of the defendant corporation, filed a motion for contempt, sanctions, and attorneys' fees after the defendant failed to comply with this Court's order requiring the corporation to allow the plaintiff to inspect books and records under 8 *Del. C.* § 220. The defendant corporation, who did not appear in this action until the contempt motion was filed, argues that it should not be held in contempt because all of its assets, including its books and records, were sold in an asset sale, and it no longer has possession, custody, or control of the books and records the plaintiff seeks to inspect. Because the corporation has waived any argument that the plaintiff lacks standing to inspect the books and records, and because the corporation has not established that it is impossible to comply with the inspection order, I recommend that the Court hold the defendant in contempt and order that, unless the corporation provides the books and records for inspection within thirty days, the corporation and its officers and directors will be precluded from bringing any motion challenging the sufficiency of the pleadings in a direct or derivative action the stockholder initiates against the corporation or its management.

BACKGROUND

The plaintiff, George Litterst, is a stockholder of Zenph Sound Innovations, Inc. ("Zenph"), a self-described "small, innovative startup" in the field of "high-tech music innovation."[1] Zenph is a Delaware corporation that was founded in 2002. In 2009, it received a $1,500,000 revolving line of credit (the "Line of Credit") from Square 1 Bank

[1] Def.'s Answering Br. in Opp'n to Pl.'s Mot. for Contempt, Sanctions and Att'ys' Fees (hereinafter "Opp'n Br.") at 4.

("Square 1"), which was governed by a Loan and Security Agreement dated December 30, 2009. The Line of Credit was secured by certain Zenph collateral (the "Collateral"). The security interest was described as a "valid, first priority security interest" in existing and later-acquired collateral.[2] The Collateral included all of Zenph's books and records.[3]

Zenph began floundering in 2011, and by March 2012 Square 1 was concerned about Zenph's ability to satisfy its obligations, including payments owed under the Line of Credit. When Zenph was unable to regain financial stability, Square 1 notified Zenph on May 25, 2012 that it had defaulted on the Line of Credit and, if Zenph was unable to repay the debt in full, Square 1 would foreclose on the Collateral.[4] Zenph's CEO, Kirk Owen, sent a notice to Zenph's stockholders on June 4, 2012, alerting them of the default and advising that Mr. Owen expected Zenph to be "wound down at some point following the auction" of Zenph's assets.[5] Mr. Owen's June 4 e-mail further indicated that, in light of the expected value of the assets at auction and the amounts Zenph owed to Square 1 and other secured creditors, it was unlikely that Zenph's stockholders would receive anything of value when Zenph's assets were auctioned.[6]

Shortly thereafter, on June 12, 2012, Mr. Litterst delivered to Zenph a books and records demand (the "Demand"), through which Mr. Litterst sought to inspect several categories of documents relating to Zenph's finances, its corporate governance, its

[2] Opp'n Br. Ex. A, at § 4.1.
[3] *Id.* Ex. A, at Ex. B.
[4] *Id.* Ex. C.
[5] *Id.* Ex. D.
[6] *Id.*

business operations, the Line of Credit, and the foreclosure and sale of Zenph's assets.[7] When Mr. Litterst did not receive any response to the Demand, he forwarded a copy of it to an attorney who represented Zenph, Justyn Kasierski, Esquire.[8] Mr. Kasierski responded the same day, June 27, 2012, stating that Mr. Owen was out of the office that week, but that Mr. Kasierski would "try to reach [Mr. Owen] and find out the timing for getting [Mr. Litterst] access to the requested materials." In the meantime, Mr. Kasierski stated that he would work with Mr. Litterst's counsel on a confidentiality agreement to govern the inspection.[9]

Unfortunately, Mr. Owen's actions in this case bear out the ancient adage that promises, like pie crusts, are made to be broken. Notwithstanding Mr. Kasierski's representations, neither Mr. Litterst nor his counsel received any further communications regarding the timing for an inspection. As a result, Mr. Litterst's counsel sent a follow-up e-mail on July 9, 2013, asking for a prompt response to Mr. Litterst's demand.[10] Neither Mr. Owen nor Zenph's counsel responded to this inquiry.[11] Mr. Litterst then filed this action on July 16, 2013.

In the meantime, however, the auction of Zenph's assets proceeded. The asset sale closed on July 13, 2012.[12] Square 1 ultimately sold the bulk of Zenph's assets to a newly established Delaware corporation, Online Music Network, Inc. ("OMNI"), for

[7] Verified Compl. under 8 *Del. C.* § 220 (hereinafter "Compl.") Ex. A.
[8] Compl. Ex. B.
[9] *Id.* Ex. C.
[10] *Id.* Ex. D.
[11] *Id.* ¶¶ 13-14.
[12] Opp'n Br. Ex. E (aff. of Kirk Owen) ¶ 6.

$500,000.[13] With the exception of certain pianos and cash on hand, OMNI purchased all of the Collateral, including Zenph's books and records. OMNI now operates out of Zenph's old offices, and Mr. Owen is employed as CEO of OMNI.[14]

Although Zenph now contends that the sale of its assets, including its books and records, three days before Mr. Litterst filed this action excuses – and in fact precludes – Zenph from complying with the default judgment entered in this action, Zenph did not take that position in the weeks or months following the asset sale. To the contrary, one day after Mr. Litterst filed his complaint in this case, and four days after the asset sale, Mr. Owen represented to Mr. Litterst that Zenph would allow him to inspect the documents listed in the Demand, provided Mr. Litterst signed a confidentiality agreement.[15] At the time he made this representation, Mr. Owen was aware that Square 1 had completed the sale of "most of Zenph's assets."[16]

On July 23, 2012, Mr. Litterst's counsel communicated a number of concerns regarding the proposed nondisclosure agreement.[17] Neither Mr. Owen nor Zenph's counsel responded to this communication. Nevertheless, on August 2, 2012, Mr. Owen again represented that Mr. Litterst would be permitted to inspect the books and records if

[13] *Id.*; Opp'n Br. Ex. F.
[14] Pl.'s Mot. for Contempt, Sanctions and Att'ys Fees (hereinafter "Mot. for Contempt") Ex. 5; Opp'n Br. at 17-18.
[15] Pl.'s Mot. for Default Judgment (hereinafter Mot. for Default") Ex. A.
[16] *Id.*
[17] *Id.* Ex. B.

he signed the confidentiality agreement.[18] When he was unable to make any progress in negotiating an inspection with Zenph, Mr. Litterst filed a motion for default judgment on the basis that Zenph had failed to appear and respond to the complaint.

In its opposition to the motion for contempt, Zenph contends that it did not appear in this Court or otherwise respond to the complaint because it lacked the funds to retain counsel and was "attempting to cope with the reality of its financial ruin."[19] Perhaps for that reason, Zenph also did not appear at the hearing on Mr. Litterst's motion for default judgment, and I ultimately entered a default judgment against Zenph. That order was approved and adopted as a final order of this Court on November 9, 2012 (the "Final Order"). The Final Order required Zenph to permit Mr. Litterst to inspect the books and records listed in the Demand and ordered Zenph to reimburse Mr. Litterst for the attorneys' fees and costs he incurred in connection with the Demand.

Shortly after the default judgment hearing, and after the sale of Zenph's assets by Square 1 failed to yield sufficient funds even to pay Zenph's existing secured debts, the Zenph board passed a resolution to dissolve. That resolution was approved by the written consent of Zenph's stockholders,[20] and Zenph filed a certificate of dissolution with the

[18] Mot. for Contempt Ex. 7. There is some dispute in the record as to what "hat" Mr. Owen was wearing at the time he made this representation – his Zenph CEO "hat" or his OMNI CEO "hat." The e-mail at issue suggests that Mr. Owen was acting on behalf of OMNI, because earlier in the communication he references OMNI's decision not to sell certain Zenph assets it had purchased from Square 1. The question of which "hat" Mr. Owen was wearing is not material to my decision, and therefore I need not make this factual determination.
[19] Opp'n Br. at 9.
[20] *Id.* Ex. H.

Delaware Secretary of State on October 23, 2012.[21] Zenph's stockholders were advised of the dissolution on December 6, 2012.

After the Final Order was entered, Mr. Litterst served copies of the order on Zenph's registered agent and sent courtesy copies to Mr. Owen, Zenph's other directors, and Mr. Kasierski. When Zenph still did not respond to the Demand or the Final Order, Mr. Litterst noticed depositions for Zenph, Mr. Owen, and Zenph's directors. One day before the first such deposition, an attorney purporting to represent Zenph contacted Mr. Litterst's counsel, indicated that he would now be representing Zenph, and asked Mr. Litterst's counsel to postpone the depositions while Delaware counsel was retained to represent Zenph.[22] Shortly thereafter, Zenph's current Delaware counsel entered the fray. For the next month, it appeared to Mr. Litterst as though Zenph would comply with the Final Order. The parties, through counsel, negotiated a confidentiality agreement and discussed the search for documents.

Zenph's tune changed, however, when its Delaware counsel became aware, apparently for the first time, that the Collateral sold to OMNI included Zenph's books and records. At that time, and for the first time, Zenph took the position that it could not comply with the Final Order because it no longer had possession, custody, or control of its books and records. Zenph's counsel did provide copies of responsive books and

[21] *Id.* Ex. I.
[22] Mot. for Contempt ¶¶ 23-24.

records that resided in the personal files and on the private e-mail accounts of Mr. Owen and Zenph's other directors, consisting of approximately 650 pages of documents.[23]

Although he has received some books and records from the personal files of Zenph's CEO and directors, Mr. Litterst filed this motion for contempt, sanctions and attorneys' fees because Zenph has not complied with the Final Order. Zenph opposes the Motion for Contempt, primarily on the basis that it is impossible for Zenph to comply with the Final Order because it no longer has possession, custody, or control of the books and records, and because it cannot satisfy the monetary judgment outside the statutory scheme required by 8 *Del. C.* § 281.

ANALYSIS

Under Court of Chancery Rule 70(b), this Court may find a party in contempt when it fails to obey a Court order of which it had knowledge. This Court has broad discretion to remedy violations of its orders, but the decision to impose sanctions for failure to abide by a court order must be just and reasonable.[24] A party moving for a finding of contempt bears the burden of establishing by clear and convincing evidence that a court order was violated.[25] If the movant makes that showing, the burden then shifts to the contemnor to show why it was impossible to comply with the order or why

[23] Opp'n Br. at 3.
[24] *Gallager v. Long*, 940 A.2d 945 (Del. 2007) (TABLE), 2007 WL 3262150, at *2 (Del. Nov. 6, 2007); *Jagodzinski v. Silicon Valley Innovation Co.*, 2012 WL 593613, at *2 (Del. Ch. Feb. 14, 2012); *TR Investors, LLC v. Genger*, 2009 WL 4696062, at *15 (Dec. 9, 2009).
[25] *Genger*, 2009 WL 4696062, at *15; *State ex rel. Oberly v. Atlas Sanitation Co. Inc.*, 1988 WL 88494, at *2 (Del. Ch. Aug. 17, 1988).

he otherwise should not be held in contempt.[26] The moving party is not required to show that the violation was willful or intentional, but the intentional or willful nature of a contemnor's acts may be considered in determining the appropriate sanction.[27]

There is no dispute that Zenph has not complied with the Final Order, and therefore Mr. Litterst has established by clear and convincing evidence that Zenph is in violation of the order. The burden then falls to Zenph to show that it is impossible to comply with the Final Order. As explained below, although Zenph has established that it is legally prohibited from paying the attorneys' fees awarded in the Final Order, Zenph has not met its burden with respect to the portion of the Final Order that requires it to provide books and records for inspection.

A. Zenph is in contempt for failing to produce books and records for inspection

There are two aspects to Zenph's argument that it should not be held in contempt for failing to comply with the inspection portion of the Final Order. First, Zenph essentially contends that Mr. Litterst lacks standing to inspect the books and records because he did not file his complaint in this action until after Zenph's books and records were sold to OMNI. Second, Zenph asserts that it is unable to comply with the Final Order because Zenph no longer has possession, custody, or control over the books and records. Each of these arguments fail, but for different reasons.

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[26] *Id*.

[27] *Mother African Union First Colored Methodist Protestant Church v. The Conference of African Union First Colored Methodist Protestant Church*, 1998 WL 892642, at *6 (Dec. 11, 1998).

Zenph first argues that it should not be held in contempt because "[i]t did not own, and did not have possession, custody, or control of, the books and records requested by [Mr. Litterst] *at the time [Mr. Litterst] commenced this action*.[28] This argument flows from the basic, undisputed proposition that a stockholder only may inspect documents that are in the possession, custody, or control of the corporation. Although Zenph is correct that an inspection under Section 220 generally is limited to documents within the subject corporation's possession, custody, or control,[29] Zenph's contention that the determinative factor is the date on which Mr. Litterst commenced this action reveals that Zenph essentially is advancing a standing defense, which it waived by failing to respond to the complaint or the motion for a default judgment.

Neither this Court nor the Delaware Supreme Court has directly addressed whether a stockholder has standing to bring an action to inspect books and records if, between the time the inspection demand was made and the complaint was filed, a transaction occurs that deprives the corporation of possession, custody, and control of the documents at issue. In both *Cutlip v. CBA International, Inc. I*[30] and *Deephaven Risk Arb Trading Ltd. v. UnitedGlobalCom, Inc.*,[31] this Court held that a merger after the commencement of a Section 220 action does not deprive the stockholder of standing, but

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[28] Opp'n Br. at 13 (emphasis added).

[29] *See Deephaven Risk Arb Trading Ltd., v. UnitedGlobalCom, Inc.*, 2005 WL 1713067, at * 11 (Del. Ch. July 13, 2005) ("Section 220 contemplates production by a subject corporation of documents within its 'possession, custody or control' in generally the same sense that language is used in Rule 34 of the Federal Rules of Civil Procedure and Court of Chancery Rule 34. In the Rule 34 context, 'control has been defined to include the legal right to obtain the documents requested upon demand.' Thus, the key inquiry is whether the company has the power, unaided by the court, to force production of the documents.") (internal citations omitted).

[30] 1995 WL 694422, at *2 (Del. Ch. Oct. 27, 1995).

[31] 2005 WL 1713067, at *7.

neither Court had occasion to address the question Zenph suggests is implicated here: whether a stockholder – who makes an inspection demand but does not file suit until after the corporation loses possession, custody, and control – loses standing to later file the action.

I need not, however, resolve that issue of first impression here, because Zenph waived its ability to assert this standing defense by failing to respond to Mr. Litterst's complaint and by allowing a default judgment to be entered.[32] Had Zenph responded to the complaint and participated in these proceedings in a timely manner, it could have attempted to defeat Mr. Litterst's inspection claim by raising any number of defenses, including this standing defense.[33] Having chosen not to do so, Zenph cannot now raise that argument. "Reasonably prudent persons are expected to take part in court proceedings in which they are parties, and to respond appropriately within the time period required by law."[34] The failure to do so carries consequences. Zenph has not moved to vacate the Final Order, and therefore cannot raise the pleadings-based defenses that could have been raised before the Final Order was entered. It is not an excuse that Zenph failed

[32] *See Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods., N.V.*, 2002 WL 31439767, at *7 (Del. Ch. Oct. 23, 2002).

[33] During the hearing on this motion, Zenph asserted that it wasn't really asserting a "defense" to a Section 220 action, but rather just pointing out the reality that Zenph did not have any documents. *Litterst v. Zenph Sound Innovations, Inc.*, C.A. No. 7700-ML (Aug. 6, 2013) (TRANSCRIPT) (hereinafter "Transc.") at 42. Both the *Deephaven* and *Cutlip* decisions, however, indicate the opposite is true, as both of those decisions identify this possession, custody, and control argument at a standing defense. *See Deephaven Risk Arb. Trading Ltd.*, 2005 WL 1713067, at *7; *Cutlip*, 1995 WL 694422, at *2.

[34] *Stonington Partners, Inc.*, 2002 WL 31439767, at *5.

to give this case priority because it believed that it should focus its time and resources on the foreclosure of the assets.[35]

The related aspect to this argument, however, and the one Zenph has not waived, is its contention that, regardless of whether Mr. Litterst had standing to initiate his lawsuit, it is impossible for Zenph to comply with the Final Order because the books and records at issue are now in the legal control of a separate entity. Whether this argument would prevail if the facts bore it out is a question I need not reach, because Zenph's representations and actions after the sale of assets to OMNI demonstrate that it continues to have custody or control over the books and records.

Although Zenph now contends that the sale of the assets to OMNI deprived it of possession, custody, and control of the books and records at issue and rendered it unable to comply with the inspecton portion of the Final Order, on multiple occasions after the sale of assets Zenph and its agents represented that the books and records would be produced. Those representations exhibit Zenph's custody or control of the documents. Mr. Owen, Zenph's CEO, represented on two occasions after the asset sale that the books and records would be produced if Mr. Litterst signed a confidentiality agreement.[36] Zenph's counsel made similar representations, at least by implication, when it negotiated the terms of a confidentiality agreement with Mr. Litterst and discussed with his counsel

[35] *See id.* at *6.
[36] Mot. for Default Ex. A, Ex. B.

how the search for books and records was proceeding and the anticipated timing for inspection.[37]

Zenph argues that it should not be held to those representations because "[a] non-lawyer CEO cannot be expected to fully appreciate the requirements and nuances of Section 220," Mr. Kasierski is a North Carolina attorney who is "not a litigator," and Delaware counsel was not aware of the "'document ownership' issue" until a month after counsel was retained, and advised Mr. Litterst's counsel of the issue promptly after learning of it.[38] Although I have no doubt that Delaware counsel was not aware of the issue when they negotiated the confidentiality agreement and that Zenph's Delaware counsel promptly advised Mr. Litterst's counsel of the issue, the fact remains that representations were made demonstrating that Zenph has proceeded since July 2012 as though it had possession, custody, or control of the documents. Delaware counsel was not aware of the issue because Zenph's representatives treated the documents as though they were in Zenph's possession, custody, or control. The fact that Delaware counsel seized on a technicality regarding the legal ownership of the books and records cannot alter the manner in which those documents were treated by Zenph.

Zenph's focus on whether its initial counsel was a "litigator" is puzzling, and its contention that Mr. Owen cannot be charged with understanding the law is simultaneously absurd and concerning. The type of law that Zenph's counsel practiced does not excuse him from being informed before rendering legal advice. More

[37] Mot. for Contempt ¶¶ 26-27.
[38] Opp'n Br. at 22.

importantly, Delaware law is premised on corporate directors and officers understanding the law, and, if necessary, those fiduciaries are charged with retaining knowledgeable counsel to assist in explaining the law.[39] This argument also misses the point, which is not whether Mr. Owen or Zenph's counsel correctly understood the law when Mr. Owen made those representations, but whether Mr. Owen was able, at the time he made those representations, to marshal the books and records for inspection.

Zenph's concessions during the hearing on this Motion to Compel are telling on this point. During argument, counsel acknowledged that, if Mr. Litterst had filed his complaint in this action even one day before the asset sale to OMNI, Zenph would not be arguing that compliance with the Final Order was impossible, and would have produced the books and records for inspection.[40] Zenph argued that

> If [Mr. Litterst] had filed the complaint before the foreclosure, then Zenph could go to Square 1 Bank or OMNI and say 'Look, I'm under statutory obligation' and/or 'court order,' depending where we are in the process. 'These were my documents at the time, and you've got to give me copies so I can turn them over.' But we're in a different situation where they have no ownership interest at the time of the complaint. They, Zenph, has no ownership interest at the time the complaint is filed.[41]

Having already held that Zenph waived its standing argument by failing to respond to the complaint or oppose the motion for default judgment, this argument only serves to underscore why Zenph cannot prevail on its "impossibility" argument. Zenph is under court order to permit the inspection, and its counsel conceded that it therefore can go to OMNI and require OMNI to "turn over" the books and records. Zenph's argument in this

[39] *See Stonington Partners, Inc.*, 2002 WL 31439767, at *6.
[40] Transc. at 39, 41-42.
[41] Transc. at 41:18-42:3.

regard reveals that its true focus is on disputing the validity of the Final Order, rather than on establishing the impossibility of complying with that order.

Finally, the reality is that, as a corporation in dissolution, Zenph is required to prepare a plan of distribution to satisfy all outstanding claims and obligations.[42] If, as appears to be the case here, the dissolved corporation does not have sufficient assets to satisfy all the claims and obligations, the plan of distribution must "provide that such claims and obligations shall be paid or provided for according to their priority and, among claims of equal priority, ratably to the extent of assets legally available therefor."[43] Zenph's statutory obligation to prepare this plan of distribution also suggests that it must have some custody or control over the books and records, at least those books and records necessary to prepare such a plan and, if necessary, defend it.

B. Zenph has shown that it is barred from satisfying a monetary judgment against it

Although Zenph is in contempt of the inspection portion of the Final Order, Zenph has carried its burden to show that it should not be held in contempt for failing to pay the monetary judgment entered against it. As discussed above, Zenph is in dissolution, and Mr. Litterst does not dispute that Zenph does not have sufficient assets to satisfy all its obligations and the claims against it, or that Zenph is statutorily required to pay or provide for claims and obligations "according to their priority." As an unsecured obligation, the attorneys' fees awarded in the Final Order cannot be paid before Zenph's

[42] 8 *Del. C.* § 281(b).
[43] *Id*.

secured obligations are satisfied. For that reason, it would be unreasonable and unjust to hold Zenph in contempt for failing to pay the judgment.

C. Appropriate sanctions

The reality of Zenph's financial condition leaves this Court in the difficult position of devising an effective sanction. The purpose of a civil contempt order is either to coerce the contemnor into compliance with the Court's order, or to compensate the aggrieved party for the losses sustained.[44] As Zenph is essentially "judgment proof" at this point, however, entering an order imposing monetary sanctions would be meaningless and futile. Although this Court cannot tolerate willful disregard of its orders,[45] it arguably would detract from the Court's authority if it continued to enter orders that Zenph freely could ignore without repercussions. I therefore am left to employ this Court's equitable powers in a way that does not become Sisyphean in nature.[46]

Mr. Litterst demanded inspection of Zenph's books and records to, among other things, assess the conduct of Zenph's officers and directors in managing Zenph's financial condition and assets.[47] Although Mr. Litterst articulated other purposes in his demand, those purposes largely are mooted by the sale of Zenph's assets and Zenph's subsequent dissolution. Mr. Litterst still could file suit against Zenph or its officers and

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[44] *TR Investors, LLC v. Genger*, 2009 WL 4696062, at *15 (Del. Ch. Dec. 9, 2009); *Mother African Union First Colored Methodist Protestant Church v. The Conference of African Union First Colored Methodist Protestant Church*, 1998 WL 892642, at *8 (Del. Ch. Dec. 11, 1998) (citing *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 829 (1994)).
[45] *See TR Investors, LLC*, 2009 WL 4696062, at *16; *Triton Constr. Co. v. Eastern Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *7 (May 18, 2009).
[46] With all due respect to Albert Camus, I do not "imagine Sisyphus happy."
[47] Compl. Ex. A, p. 3.

directors if he believed that they had breached their fiduciary duties. Without access to the books and records, however, Mr. Litterst's complaint might face dismissal under Rule 12(b)(6) or Rule 23.1. This Court and the Delaware Supreme Court repeatedly have emphasized the importance of using Section 220 to investigate and plead potential fiduciary duty claims.[48] Having been denied that opportunity by Zenph's gamesmanship, it seems appropriate that Mr. Litterst be given an opportunity, should he so desire, to explore his claims in discovery, without first facing a pleadings-based motion to dismiss his complaint for insufficiency under Rules 12(b)(6) or 23.1.

I therefore recommend that the Court enter an order finding that Zenph is in contempt of the Final Order, and providing that, unless Zenph complies with the inspection portion of the Final Order within 30 days, Zenph and its directors and officers will be deemed to have waived any pleadings-based motion that could be raised under Rule 12(b)(6) or 23.1 in a direct or derivative action that Mr. Litterst may bring against the company or its directors or officers. This sanction is proportional to Zenph's conduct and will either coerce compliance with the Final Order or compensate Mr. Litterst for the harm associated with Zenph's contempt.

[48] *See In re China Agritech, Inc. S'holder Deriv. Litig.*, 2013 WL 2181514, at *9 n.1 (Del. Ch. May 21, 2013) (citing cases).

CONCLUSION

For the foregoing reasons, I recommend that the Court enter an order finding Zenph in contempt and awarding the sanction discussed herein. This is my final report in this matter. Exceptions may be taken in accordance with Rule 144.

Respectfully submitted,

/s/ *Abigail M. LeGrow*
Master in Chancery