COURT OF CHANCERY
OF THE
STATE OF DELAWARE

TIMOTHY J. FOX, JR.
MAGISTRATE IN CHANCERY

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September 14, 2026

<u>Via File & ServeXpress</u>

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Re: *Melissa Brandao v. HerdDogg, Inc.*,
C.A. No. 2026-0824-TJF

Dear Counsel & Parties:

This letter decision resolves the petitioner's motion for disqualification of respondent's counsel and related relief. Petitioner has moved to disqualify co-counsel to the respondent while the respondent's motion to dismiss is fully briefed, and requested the Court decide the motion for disqualification before ruling on the motion to dismiss. Petitioner is a non-client of respondent's co-counsel and alleges violations of Delaware Lawyer's Rules of Professional Conduct Rule 1.7(a), and Rule 3.7 require disqualification, or in the alternative, seeks co-counsel disclose and explain perceived incongruities in respondent's financing history, and provide an accounting. I find that the petitioner does not meet the high bar for a non-client to obtain disqualification of opposing counsel, as any rule violation, if one were to exist, does not prejudice the petitioner's rights, and no clear and convincing evidence of a rule violation can be presented.

Case law cautions that technical violations of the rules should not be permitted to allow a party to seek relief as a litigation tactic, a caution which I follow here. I interpret elements of petitioner's request as tracking what would be required of counsel to an entity seeking relief under the U.S. Bankruptcy Code, but such restrictions are not required here. The petitioner through this motion attempts to achieve part of what is sought in the petition, removal of respondent's chosen counsel, as a prelude to displacing current management with a receiver. That desire conflates applicable standards with petitioner's objective to have someone else make decisions for the respondent. For the reasons set forth below, I find the petitioner's motion for disqualification and other relief should be denied. As this is not a final disposition of the case, any exceptions or appeal of this report are stayed consistent with Court of Chancery Rule 144.

I. BACKGROUND

This motion is one of several pending items submitted for consideration in this case commenced on June 23, 2026 by the filing of a Verified Petition for Appointment of Receiver Pursuant to 8 Del. C. 291 (the "Petition").[1] Melissa

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[1] Docket ("Dkt.") 1.

Brandao ("Petitioner"), seeks a receiver asserting that HerdDogg, Inc. ("Respondent") is insolvent, and that the insolvency plus factors require an independent fiduciary to investigate numerous issues and act in creditors and stockholders best interests.[2] Petitioner is the Founder and a former officer and director of the Respondent, who departed from Respondent's management in 2022.[3] Petitioner is also a stockholder of Respondent.[4]

Respondent is a Delaware corporation, that operates in the agricultural technology sector.[5] No other individual or entity is a named respondent or defendant in the Petition.[6] I held a hearing on July 20, 2026 to consider Petitioner's motion to expedite and motion for a temporary restraining order.[7] I denied those requests as stated on the record.[8] Respondent has moved to dismiss the Petition (the "Motion to Dismiss"), and that Motion to Dismiss is fully briefed.[9]

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[2] *Id.* ¶¶ 24 & 36–38.

[3] Dkt. 1 ¶¶ 1 & 14 ("Following Petitioner's departure from the Company's management, the Controlling Shareholders assumed operational control. From and after 2022, the Controlling Shareholders have managed the Company . . . .").

[4] *Id.* ¶ 1.

[5] *Id.* ¶ 2.

[6] Dkt. 1.

[7] Dkts. 44 & 55.

[8] *See* July 20, 2026 Hearing Tr. 50:14 – 70:13.

[9] Dkts. 45, 88, & 121.

In connection with the Petition, the Petitioner on August 5, 2026 filed her Motion for Disqualification of Respondent's Counsel and for Relief.[10] The Motion for Disqualification is likewise fully briefed.[11] As of September 11, 2026, the Respondent's motion for sanctions against the Petitioner is also fully briefed.[12] Petitioner has requested the Court adjudicate the Motion for Disqualification before hearing argument on the Motion to Dismiss.[13] This letter decision does just that, so as to avoid further dispute over whether Respondent may be represented by its chosen counsel. I take the Motion for Disqualification under advisement on the papers.

A. Facts Relevant to the Motion for Disqualification

On July 14, 2026, I entered an order granting Andrew P. Shelby, of Michael Best & Friedrich LLP ("Michael Best"), admission *pro hac vice* to represent Respondent.[14] Petitioner initially filed a letter to the Court on July 28, 2026 asserting

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[10] Dkt. 80 ("Motion for Disqualification").

[11] Dkts. 82, 134, & 138. Dkt. 82 does not have pagination, so I cite to the pages reflected in the browser or PDF viewer for the document. Dkt. 138 is likewise unpaginated and cited in the same manner.

[12] Dkts. 113, 136, & 155.

[13] Dkts. 122 & 123.

[14] Dkt. 15 (granting order); *see also* Dkt. 14 (moving for admission, and including Mr. Shelby's certification to be bound by the Delaware Lawyers' Rules of Professional Conduct).

that Respondent's Counsel, Michael Best, had a "serious conflict of interest" as a result of Michael Best overseeing and administering a secured note financing and receiving a financial instrument in the Respondent.[15] On July 29, 2026, I entered a Minute Order confirming receipt of the letter and its exhibits, and notifying the Petitioner that if relief was being sought, it must be done so by motion, with an opportunity for other parties to respond.[16] The Motion for Disqualification followed, and attached 21 lettered exhibits, along with a declaration from Petitioner in support of the Motion.[17] After a stipulation and proposed order for briefing were filed, the Court granted that order on August 13, 2026.[18] The Respondent filed its Answering Brief on September 1, 2026.[19] Petitioner filed her reply on September 6, 2026.[20]

Despite the numerous exhibits put forward by the Petitioner, what is an established fact amongst the parties remains elusive for this contested motion. As will be discussed more fully in the analysis below, I set forth the following operative facts based on the absence of objection from the Respondent in its brief to the assertions made by Petitioner in her opening brief on the Motion for

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[15] Dkt. 50.

[16] Dkt. 54.

[17] *See* Dkts. 56–83.

[18] Dkts. 86 & 87.

[19] Dkt. 134.

[20] Dkt. 138.

Disqualification. I do not treat as established facts any conclusory allegations from the Motion for Disqualification that are not otherwise supported by documentary evidence, or agreed by the Respondent.

Michael Best and its predecessors have represented Respondent from March of 2023 through the present.[21] Included in that representation were capital raise activities and defense against litigation initiated by Petitioner in Federal District Court in Colorado (the "Colorado Litigation").[22] Michael Best received a Simple Agreement for Future Equity (a "SAFE") from the Respondent, in an approximate amount of $80,000.00.[23] Both in the Colorado Litigation and this case, Michael Best has moved for sanctions against the Petitioner.[24] Michael Best has also represented the Respondent in other adversarial matters to Petitioner, including books-and-records requests.[25]

Petitioner is not a current or former client of Michael Best.[26] Michael Best has represented other individuals with an interest in the Respondent, including Lou

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[21] Dkt. 82 at p. 3–4. *See also* Dkt. 83 ¶¶ 3–6 (citing Dkts. 58, 59, & 62).

[22] Dkt. 82 at p. 3–8 & p. 10. When relevant, I cite to items in the Colorado Litigation as: "Colorado Litigation Case No. 25-cv-02254-GPG-NRN Dkt. __.".

[23] Dkt. 82 at p. 14.

[24] Dkts. 82 at p. 16; 113.

[25] Dkt. 134 at p. 2.

[26] *See* Dkts. 82 at p. 24–25; 134 at p. 2.

Faust, Andrew Uden, Shane Schulz, Rob Schultz, Edward Hamburg, Jason Wrone, Jon Moyes, Jeffery Mitchel, Scott Shambo, and Beth Hammar.[27] Rob Schultz and Edward Hamburg had affiliates, Sheldon Group, LLC, and Serra Capital Ag Tech Fund, L.P., respectively, participate in secured note financing for the Respondent, which was subject of a UCC Financing Statement filed with the Nebraska Secretary of State on December 16, 2025.[28] "Serra Capital Ag Tech Fund, LP," was named as the secured party, and Rob Schultz was the name of contact, with a "@serraventures.com" email address.[29] No allegation or information is provided by the Petitioner that Michael Best represented both the Respondent and any combination of Mr. Schultz, Mr. Hamburg, and their affiliates on the secured note transaction.[30]

The Petitioner contends Michael Best's representation of the Respondent has in some way contributed to declining financing value for the Respondent, while simultaneously asking that Michael Best provide additional disclosures about those

[27] Colorado Litigation Case No. 25-cv-02254-GPG-NRN Dkt. 72 at p. 16–17 (setting forth Michael Best's signature block for Defendants in the Colorado Litigation).

[28] *See* Dkts. 64 & 65.

[29] Dkt. 65.

[30] *See* Dkt. 82 at p. 6–8 (lacking any discussion of what attorney represented Messrs. Schultz and Hamburg, or their affiliates).

financing transactions, as an alternative form of relief.[31] Petitioner likewise posits that Michael Best's opposition to her ability to pursue a statutory demand for books and records under 8 *Del. C.* § 220, is some sort of discovery misconduct, specifically discussing Michael Best and the Respondent refusing to provide further information, including after Petitioner commenced the Colorado Litigation and this case, but does not discuss any formal Section 220 litigation to enforce her rights.[32] The Petitioner also seeks the Court to construe advocacy for the Respondent as a source of misconduct or as examples of Michael Best and its attorneys as being somehow responsible for the Respondent's actions in opposing Petitioner's requests to her prejudice.[33] Petitioner also points to alleged records discrepancies as a basis for requiring alternative relief if Michael Best is not disqualified, requesting the Court order disclosures from the firm instead.[34]

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[31] Dkt. 82 at p. 10.

[32] *See* Dkt. 82 at p. 11–12.

[33] Dkt. 82 at p. 12–13 ("Mr. Shelby litigated that dismissal himself; he is not a stranger to this record, but the lawyer who knows it best. Presenting a sanction for noncompliance to this Court as a merits adjudication is not the kind of error available to someone unfamiliar with what actually happened."); *see also* Dkt. 82 at p. 22–23 ("the fairness and completeness of Respondent's litigation position on the central insolvency question in this case cannot be disentangled from counsel's own financial interest in the answer to that question. Michael Best's own conduct confirms the stakes: when this exact conflict was raised with the Court, Michael Best's response was not disclosure, but a same-day threat of sanctions, ...").

[34] Dkts. 82 at p. 23-24; 83 ¶¶ 9–10.

Petitioner does not establish what the governing law is for Michael Best's representation of Respondent.[35] Petitioner alleges rule violations of the Delaware Lawyer's Rules of Professional Conduct (the "DLRPC") Rule 1.7(a) and 3.7.[36] Petitioner also cites the Michael Best SAFE as problematic under ABA Committee on Ethics and Professional Responsibility Formal Opinion 00-418 (2000), Acquiring an Ownership Interest in a Client ("ABA Opinion 00-418"), but does not directly assert a violation of DLRPC 1.8 in the motion, although the reply did include discussion of Rule 1.8.[37]

B. Petitioner's Additional Discovery Activity and Related Motions

In addition to the Motion for Disqualification, the Petitioner has engaged in five instances of third party discovery seeking subpoenas from the Register in Chancery, including a companion motion for shortened notice and expedited discovery.[38] I addressed the insufficient timing of the motion for shortened notice

[35] *See* Dkt. 82 at p. 1–2 & 17 (suggesting the Delaware Lawyer's Rules of Professional Conduct apply).

[36] Dkt. 82 at p. 18.

[37] Dkt. 82 at p. 18–19 (citing ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 00-418 (2000) (Acquiring an Ownership Interest in a Client)); *see also* Dkt. 138 at p. 9. The Respondent asserts that no violation of Rule 1.8(a) or Rule 1.5 have occurred. Dkt. 134 at p. 9.

[38] Dkts. 16, 20, 22, 24, 115, 118, 151. The motion for shortened notice and expedited discovery was served in connection with the hearing on the motion to expedite and for temporary restraining order held on July 20, 2026. *See* Dkts. 16–19.

and expedited discovery on the record during the July 20, 2026 hearing, as the motion was filed on July 15, 2026, sought Court action before July 20, 2026, and afforded the recipients of the subpoenas less than two business days to respond.[39] Recently Petitioner filed two motions to compel compliance with her subpoenas with respect to two third parties.[40] In reliance on information obtained through the third-party discovery, Petitioner sought to stay this case pending a criminal investigation.[41]

The Petitioner has at times sought to expedite matters in this case and at other times has sought indefinite delay.[42] In parallel to this case, Petitioner has sought relief in the Colorado Litigation as to: (1) relief from judgment pursuant to Federal Rule of Civil Procedure 60(b);[43] (2) lodging objection to Magistrate Neureiter's report and recommendation to grant of fees to counsel for defendants other than the

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[39] July 20, 2026 Hearing Tr. At 6:24 – 8:18.

[40] Dkts. 140–45 (seeking compliance with a Subpoena issued before the hearing on the Motion to Expedite); Dkts. 146–48 (seeking compliance with a subpoena issued to Cooley LLP as former counsel to the Respondent).

[41] *See* Dkts. 126–33. I denied that Motion to Stay on September 1, 2026 for the reasons appended to that order. Dkt. 135.

[42] *Compare* Dkts. 1 Motion to Expedite & 8 Motion for Temporary Restraining Order (seeking an expedited schedule and injunctive relief on an emergent basis), *with* Dkts. 122 & 126 (requesting the deferral of certain items pending resolution of the Motion for Disqualification and a recently filed criminal report).

[43] Colorado Litigation Case No. 25-cv-02254-GPG-NRN Dkt. 65 (seeking the court to vacate its order of dismissal, Colorado Litigation Case No. 25-cv-02254-GPG-NRN Dkt. 49).

Respondent;[44] and (3) seeking a stay of rulings on items in the Colorado Litigation pending resolution of a criminal investigation.[45]

II. ANALYSIS

A. Standard of Review

"[A] non-client litigant has standing to enforce Rule 1.7(a) when he or she can demonstrate that the opposing counsel's conflict somehow prejudiced his or her rights. The non-client litigant does not have standing to merely enforce a technical violation of the Rules."[46] "Recognizing the potential abuses of the Rules in litigation, . . . the burden of proof must be on the non-client litigant to prove by clear and convincing evidence (1) the existence of a conflict and (2) to demonstrate how the conflict will prejudice the fairness of the proceedings."[47] "The Court first must determine if a conflict of interest exists under the [DLRPC]. If a conflict is identified, the Court then must determine whether continued representation by the

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[44] Colorado Litigation Case No. 25-cv-02254-GPG-NRN Dkt. 64.

[45] Colorado Litigation Case No. 25-cv-02254-GPG-NRN Dkt. 75 (requesting a stay on any ruling on Dkts. 65 & 64 of the Colorado Litigation until the conclusion of a law enforcement investigation in Ashland, Oregon).

[46] *Appeal of Infotechnology, Inc.*, 582 A.2d 215, 221 (Del. 1990).

[47] *Id.* (citing R. Bd. Prof. R. Del. Supr. 15(c)).

conflicted attorney would so undermine the integrity of the proceedings that the attorney must be disqualified."[48]

Petitioner's Motion for Disqualification fails to satisfy the requirements for a non-client to seek disqualification of opposing counsel. Petitioner has not proven by clear and convincing evidence the existence of a conflict and that the asserted conflicts will prejudice the fairness of this proceeding. Any conflict, if one exists, is at most a technical violation of the rules, and given case law detailing a trial court's lack of jurisdiction to enforce the DLRPC,[49] I proceed with caution to decide only those issues presented by the Petitioner.[50]

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[48] *Hendry v. Hendry*, 2005 WL 3359078, at *2 (Del. Ch. Dec. 1, 2005).

[49] While the Petitioner does not specify the governing law for Michael Best's representation, because of Mr. Shelby's admission *pro hac vice* and his certification to be bound by the DLRPC, I analyze Petitioner's Motion for Disqualification with reference to the DLRPC, which the Motion for Disqualification also used. *See* Dkts. 14 & 15.

[50] *See Crumplar v. Superior Court ex rel. New Castle County*, 56 A.3d 1000, 1009 (Del. 2012) ("[T]rial judges have no independent jurisdiction to enforce the Rules of Professional Conduct."); *Dollar Tree, Inc. v. Dollar Express LLC*, 2017 WL 5624298, at *7 (Del. Ch. Nov. 21, 2017) ("[I]t would be inadvisable for the Court to opine on the issue since, under prevailing Supreme Court authority, a trial court does not have the independent authority to enforce disciplinary rules governing attorney conduct when the challenged conduct does not prejudice the fairness of the proceedings.").

B. Petitioner's Asserted Rule Violations Are Not Established

Petitioner argues that Michael Best has violated DLRPC 1.7 and 3.7, but has not presented sufficient evidence, and therefore not clear and convincing evidence, of a violation of either rule. I address each in turn.

DLRPC 1.7 governs conflict of interest as to current clients.[51] It states in relevant part:

> a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . .
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.[52]

DLRPC 1.7(b) is permissive for a concurrent conflict where the lawyer reasonably believes competent and diligent representation can be provided to each affected client, the representation is not prohibited by law, the lawyer is not representing a client against another client for a claim asserted in the same litigation or proceeding, and each affected client gives informed consent confirmed in writing.[53]

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[51] Del. Lawyers' R. Pro'l Conduct 1.7.

[52] *Id.*

[53] *Id.*

Petitioner is not a client of Michael Best.[54] Petitioner's argument that Michael Best has a conflict under DLRPC 1.7 is premised on the "significant risk" of a material limitation to the representation of Respondent, largely attributable to the Michael Best SAFE.[55] DLRPC 1.7's ninth comment informs the scope of "third persons" and generally limits the applicability to former clients under Rule 1.9 or the lawyer's responsibilities to persons "arising from a lawyer's service as a trustee, executor or corporate director."[56] DLRPC 1.7's tenth comment, likewise informs the scope of "Personal Interest Conflicts" which cross references DLRPC 1.8 involving business transactions with clients, but also covers a lawyer's discussions of employment with an opponent or counsel to an opponent.[57]

Petitioner as a non-client must establish by clear and convincing evidence that she is a third person owed responsibilities by Michael Best that materially limit the firm's representation of Respondent, or that Michael Best has a personal interest that materially limits its representation of Respondent, that is not addressed by DLRPC 1.7(b)'s permissive representation. She cannot do either. Petitioner is a litigation adversary and had exited her role with the Respondent prior to any predecessor of

[54] Dkts. 82 at p. 24–25; 134 at p. 2.

[55] *See* Dkt. 82 at p. 22 (citing DLRPC 1.7(a)(2)).

[56] Del. Lawyers' R. Pro'l Conduct 1.7 cmt. 9.

[57] *Id.* cmt. 10.

Michael Best being engaged.[58] Petitioner was never represented by Michael Best personally, nor were any of her actions while an officer or director of Respondent part of Michael Best and its predecessors representation, such that any confidences, or other responsibilities would restrict Michael Best's representation of Respondent.[59] No assertion is made that Michael Best or its attorneys has served as a fiduciary in any capacity that would affect Petitioner's rights.

Petitioner's argument for disqualification relating to Michael Best's personal interest through the Michael Best SAFE fares no better. While this case arises from Petitioner's request for a receiver, and therefore the insolvency of Respondent will be a critical fact, Michael Best's financial incentive in no way conflicts with the Respondent's position that it is solvent, and should not have its affairs managed by a receiver instead of its ordinary corporate governance. Petitioner cites to ABA Opinion 00-418, but its analysis straightforwardly acknowledges how generally "the lawyer's legal services in assisting management usually will be consistent with the lawyer's stock ownership."[60] Nothing about opposing the receivership sought by the Petitioner implicates a situation where Michael Best is at risk of impairing its

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[58] *See* Dkts. 1 ¶ 14 & 82 at p. 3–4.

[59] *See id.*

[60] ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 00-418 at p. 9 (2000) (Acquiring an Ownership Interest in a Client).

loyalty to the Respondent, or creating circumstances where its advice would not be objective.[61]

Petitioner presents no evidence that Michael Best has violated DLRPC 1.8(a),[62] and as the Respondent is not seeking to discharge Michael Best, it does not appear that any rule violation would exist beyond a mere technical one. Michael Best asserts that no such violation has occurred.[63]

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[61] *See id.* at p. 10.

[62] In her Reply, Dkt. 138, Petitioner for the first time makes a direct assertion of a violation of DLRPC 1.8. Dkt. 138 at p. 9. Generally, a failure to assert an argument in the opening brief waives that claim, and using that tactic has been referred to as "sandbagging." *See e.g.*, *Murphy v. State,* 632 A.2d 1150, 1152 (Del.1993) ("The failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim on appeal."); *Zutrau v. Jansing*, 2013 WL 1092817, at *6 (Del. Ch. Mar. 18, 2013) (indicating that a failure to raise legal issue in an opening brief generally constitutes waiver of ability to raise that issue for that matter) (quoting *Thor Merritt Square, LLC v. Bayview Malls LLC*, 2010 WL 972776, at *5 (Del. Ch. Mar. 5, 2010); *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *4 (Del. Ch. Oct. 19, 2006) (holding that the movant "is obliged in its motion and opening brief to set forth all of the grounds, authorities and arguments supporting its motion" and "should not hold matters in reserve for reply briefs."); *see also In re Asbestos Litig.*, 2014 WL 7150472 at *1 (Del. Super. Ct. Dec. 14, 2014) (engaging in "sandbagging" litigation practice is at the moving parties' peril); *State v. Jackson*, 2014 WL 4407844, at *10 (Del. Super. Ct. Sept. 3, 2014) ("The Supreme Court disdains sandbagging in reply briefs[.]"); *Solway v. Kent Diagnostic Radiology Assoc.*, *P.A.,* 2014 WL 948318, at *2 (Del. Super. Ct. Feb. 26, 2014) (dismissing later-raised discovery violation allegations that were not in movant's opening papers); *Paikin v. Vigilant Ins. Co.*, 2013 WL 5488454, at *3 n.12 (Del. Super. Ct. Oct. 1, 2013) ("Plaintiffs' additional argument ... was raised for the first time in their reply brief and the Court finds it to be waived, it not having been raised in their initial motion."); *Mateson Chem. Corp. v. Barton*, 2008 WL 142510, at *1 n.5 (Del. Super. Ct. Jan. 15, 2008) (refusing to address arguments Defendants raised for the first time in their reply pleading).

[63] Dkt. 134 at p. 9.

Turning to DLRPC 3.7, Petitioner has likewise failed to present evidence of a violation. Then Vice-Chancellor Zurn analyzed DLRPC 3.7 just last year in *Re Hillblom v. Wilmington Trust Company*, 339 A.3d 753 (Del. Ch. 2025) and cited to its fourth comment, which explains how prejudice to the opposing party, "depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses."[64]

First, there is nothing at this stage of the case that requires any Michael Best attorney to be a likely witness, let alone a necessary witness.[65] Second, even if a Michael Best attorney must testify at some point in the future, Petitioner has made no showing of how she is prejudiced, the Motion for Disqualification itself contemplates seeking disclosure from the firm as an alternative to disqualification.[66] Third, even if a Michael Best attorney will later be a witness, I do not expect any testimony adduced to be anything other than truthful, preventing any prejudice to

[64] *Re Hillblom v. Wilm. Trust Co.*, 339 A.3d 753, 756 (quoting Del. Lawyers' R. Pro'l Conduct 3.7 cmt. 4 (internal quotations omitted)).

[65] A fully briefed Motion to Dismiss is pending and Respondent will necessarily have authorized representatives that can testify about relevant issues of fact in this case.

[66] *See* Dkt 82 at p. 1 & 28–29; *see also* Dkt. 138 at p. 12–14.

the administration of justice.[67] Finally, on the record for this Motion, "[e]nforcement of the ethical rules of conduct is solely within the purview of the Supreme Court."[68]

C. Petitioner's Conduct Here and in the Colorado Litigation Raises a Specter of Tactical Abuse

Petitioner commenced this case seeking expedited relief.[69] Petitioner has undertaken multiple instances of third-party discovery, using this proceeding to issue subpoenas.[70] Many of the issues present in Petitioner's filings are unrelated to the insolvency of the Respondent at the time of the Petition, and instead reflect issues originally brought in the Colorado Litigation, with perhaps some relevance to the "insolvency plus" standard.[71]

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[67] *See Re Hillblom*, 339 A.3d at 756–57.

[68] *Id.* at 756 (quoting *In re Straight Path Commc'ns Inc. S'holder Litig.*, 2021 WL 2913069, at *4 (Del. Ch. July 12, 2021).

[69] Dkt. 1 ("Motion to Expedite").

[70] Dkts. 16, 20, 22, 24, 115, 118, 151.

[71] *Compare* Dkts. 1, 24, 140, & Dkt. 146 (discussing the patent disputes, seeking discovery from an alleged competitor and recipient of corporate opportunities, and the alleged fabrication of a release of Petitioner's rights) *with In re Geneius Biotechnology, Inc.*, 2017 WL 6209593 at *5 (Del. Ch. Dec. 8, 2017) ("Petitioner also must demonstrate the necessity of a neutral third party 'to protect the insolvent corporation's creditors or shareholders by showing 'some benefit that such an appointment would produce or some harm it could avoid,' and 'the potential benefits must outweigh any potential harm that appointment of a receiver could cause.'") (quoting *Badii ex rel. Badii v. Metro. Hospice, Inc.*, 2012 WL 764961, at *7 (Del. Ch. Mar. 12, 2012) & *Pope Invs. LLC v. Benda Pharm., Inc.*, 2010 WL 5233015, at *13 (Del. Ch. Dec. 15, 2010) (footnotes omitted)). Those issues are generally specific to the Petitioner, or in the case of the usurpation of corporate opportunities something the Petition seeks to leave to a receiver's investigation.

Now when faced with the prospect of another dismissal, Petitioner has implemented a strategy of further delay, seeking indefinite stays both in this case and the Colorado Litigation.[72] Petitioner's conduct seeks to deprive the Respondent of the opportunity to have its position adjudicated promptly, which was a key problem in the Colorado Litigation.[73] While Petitioner is self-represented here, and will receive the benefit of review of certain items, like the Petition, with "forgiving eyes,"[74] the parallels to how the Colorado Litigation was conducted are difficult to escape, and the outcome there cannot be placed solely at the feet of Petitioner's counsel in that action.[75] The Petitioner has sought to deprive the Respondent of its chosen counsel, while simultaneously pursuing additional discovery, and seeking to prevent merits adjudications on items in the Colorado Litigation that could affect

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[72] Colorado Litigation Case No. 25-cv-02254-GPG-NRN Dkt. 75; Dkt. 126.

[73] Colorado Litigation Case No. 25-cv-02254-GPG-NRN Dkt. 49 at p. 3–4.

[74] *Richardson v. New Residential Mortg. Loan Tr. 2019RPL3*, 2025 WL 2491199, at *9 (Del. Ch. Aug. 29, 2025) (citing *Hall v. Coupe*, 2016 WL 3094406, at *3 (Del. Ch. May 25, 2016)).

[75] *See Link v. Wabash R. Co.*, 370 U.S. 626, 633–34 (1962) (rejecting petitioner's contention that dismissal of a claim because of counsel's unexcused conduct imposes an unjust penalty on the client, stating that "[p]etitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent."); *see also Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 769 (Del. 2013) (We have consistently held that 'our system necessarily imposes upon [parties] the consequences of their chosen attorneys' choice of conduct. . . .' Because 'each party must be deemed bound by the acts of his lawyer-agent,' Levey's first claim cannot excuse his delay and necessarily fails.") (quoting *Vance v. Irwin*, 619 A.2d 1163, 1165–66 (Del.1993)).

arguments for both parties here on the Motion to Dismiss.[76] "[D]isqualifying [counsel] would prejudice [respondent] by denying [its] choice of counsel and delaying the adjudication of this matter."[77]

The unfairness Petitioner points to is that Respondent is represented by counsel of its choosing that has extensive knowledge of the company, and the transactions and history that the Petitioner alleges have made a receiver necessary.[78] Outside of compliance with DLRPC 4.3, to make clear to unrepresented persons that a lawyer is not disinterested, and DLRPC 3.3 Candor to the Tribunal, the lawyer need not provide a disinterested exposition of the law or be disinterested in its representation of its client.[79] Not applicable here, but suggested by Petitioner's arguments,[80] is that the Court require Michael Best satisfy the requirements for attorneys to represent a debtor under 11 U.S.C. § 101 *et seq.* which does require

[76] *See* Dkts. 81–83, 14–48; Colorado Litigation Case No. 25-cv-02254-GPG-NRN Dkt. 75 (requesting a stay on any ruling on Dkts. 65 & 64 of the Colorado Litigation until the conclusion of a law enforcement investigation in Ashland, Oregon).

[77] *Hendry v. Hendry*, 2005 WL 3359078, at *4 (Del. Ch. Dec. 1, 2005).

[78] *See* Dkt. 138 at p. 5–12.

[79] Del. Lawyers' R. Pro'l Conduct 4.3 ("In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested."); Del. Lawyers' R. Pro'l Conduct 3.3 cmt. 4 ("A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities.").

[80] *See* Dkt. 138 at p. 9–10.

disinterestedness.[81] Persuasive authority from a federal district court reviewing a bankruptcy court's disqualification of a litigant's counsel for a violation of New York's Rule 1.8, emphasizes the differences between these requirements, and counsel that has a preexisting financial interest in a client or transaction is not barred from representing that client in subsequent litigation.[82]

Petitioner's approach to litigation in this case has increased the costs of defending against the relief she seeks, driving the Respondent closer to the situation she alleges already exists, insolvency.[83] After denial of a motion to expedite and the temporary restraining order, Respondent now has to defend against disqualification of its chosen counsel. Instead of focusing on the underlying merits of whether a receiver should be appointed, the Motion for Disqualification seeks to put at issue

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[81] *See* 11 U.S.C. §§ 101(14) ("The term 'disinterested person' means a person that— (A) is not a creditor, an equity security holder, or an insider; (B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and (C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.") & 327(a) ("Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.").

[82] *See In re Corp. Res. Servs., Inc.*, 595 B.R. 434, 443 (S.D.N.Y. 2019) ("[W]hile counsel is barred from purchasing ownership in the subject matter of the litigation that he is conducting on behalf of a client, he is not barred from representing a client where his financial interest in the client or transaction involving the client preceded the litigation.").

[83] *See* Dkt. 134 at p. 7.

three years of financial transactions that are largely divorced from the allegations pled in the Petition.[84]

Petitioner's arguments regarding failed compliance with 8 *Del. C.* § 220 ignore that she has twice chosen to commence a plenary or other action,[85] instead of seeking the information she asserts entitlement to as a stockholder.[86] Filing of a plenary action acts as a certification a litigant has all of the information to state a claim.[87] "Delaware courts have recognized that a stockholder who files a plenary action asserting claims of mismanagement undercuts his alleged need to obtain documents under Section 220 to investigate the same alleged acts of

[84] *Compare* Dkt. 1 (setting forth the allegations for a receiver), *with* Dkts. 56–83 (annexing documents the Petitioner asserts were improperly implemented or present questions as to their propriety).

[85] *See Tang Cap. Partners, LP v. Norton*, 2012 WL 3072347, at *2 (Del. Ch. July 27, 2012) (discussing a Section 291 claim as "summary" as opposed to plenary, "[Party's] remaining claim for the appointment of a receiver, I found that the matter should be 'expedited' consistent with the summary nature of receivership actions brought under Section 291 of the DGCL. I suggested holding a hearing eight to ten weeks out, but left it to the parties to confer about scheduling.").

[86] Dkt. 82 at p. 11 (setting forth a Section 220 demand served October 31, 2024, and that during this case a second statutory demand on July 11, 2026); Dkt. 1 (filed June 23, 2026); Colorado Litigation Case No. 25-cv-02254-GPG-NRN Dkt.1 (filed July 22, 2025); *see also* Dkt. 138 at p. 15–16.

[87] *See, e.g.*, *Bizzari v. Suburban Waste Servs.*, 2016 WL 4540292, at *6 (Del. Ch. Aug. 30, 2016) ("By filing the Plenary Action, Mr. Bizzari effectively conceded that the books and records he seeks are not necessary or essential to his stated purpose of investigating mismanagement or wrongdoing with respect to the removal or asset sale issues. Mr. Bizzari and his counsel presumably concluded they possessed sufficient information under Rule 11 to file the complaint without first inspecting books and records.").

mismanagement."[88] Petitioner's requests do not fall into the line of cases where refiling after a dismissal without prejudice was permitted to collect materials to adequately plead demand futility.[89] Instead after having sought a receiver as a remedy in the Colorado Litigation, she seeks one in this case while requesting to disqualify her opponent's counsel and to delay consideration of the merits of the dismissal.[90]

III. CONCLUSION

The Motion for Disqualification should be denied, as the Petitioner cannot make the required showings by clear and convincing evidence that a conflict exists and that it will prejudice the Petitioner's rights in this litigation. Further, in view of the totality of the Petitioner's litigation conduct here and in the Colorado Litigation, the request raises substantial concerns that it is made for tactical advantage in this litigation. For the above reasons, the Motion for Disqualification should not be

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[88] *Schnatter v. Papa John's Int'l, Inc.*, 2019 WL 194634, at *11 (Del. Ch. Jan. 15, 2019), *abrogated in part on other grounds, Tiger v. Boast Apparel, Inc.*, 214 A.3d 933 (Del. 2019).

[89] *King v. VeriFone Holdings, Inc.*, 12 A.3d 1140, 1146 (Del. 2011) ("Where those derivative suits were dismissed for failure to plead demand futility adequately, both this Court and the Court of Chancery permitted the stockholder-plaintiffs to utilize the Section 220 inspection process to gather new information and replead their derivative complaints.")

[90] *Compare* Colorado Litigation Case No. 25-cv-02254-GPG-NRN Dkt.1, *with* Dkt. 1; *see also* Dkts. 56–83; 126–33.

granted. This is not a final report in this case, and exceptions are stayed under Rule 144 until a final report is entered.

Respectfully submitted,

/s/ Timothy J. Fox

Magistrate Timothy J. Fox, Jr.