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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEF and GHI, Non-Parties Below Appellants, STATE OF DELAWARE, ex. rel. THE HONORABLE KAREN WELDIN STEWART, CIR-ML, Insurance Commissioner of the State of Delaware, Petitioner Below- Appellee, and XYZ, Respondent Below- Appellee.	)	No. 545, 2013 Court Below—Court of Chancery of the State of Delaware, C.A. No. 8601-VCL

APPELLEE'S ANSWERING BRIEF

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I. STATEMENT OF THE NATURE OF PROCEEDINGS

On or about May 30, 2013, the Court of Chancery ("the Trial Court") granted a Petition for the Entry of a Confidential Seizure and Injunction Order with regard to XYZ (the "Seizure Order") (A51- 61). The Petition was filed by the Honorable Karen Weldin Stewart, CIR-ML, Insurance Commissioner of the State of Delaware (the "Commissioner") pursuant to 18 *Del. C.* §§5905, 5906 and 5943 and was prompted by the Delaware Department of Insurance's ("the DOI") receipt of a fraudulent bank confirmation and prior concern over the financial condition of XYZ. (B1-143). Based on pervasive fraudulent conduct of DEF discovered post-seizure, and further examination of the finances of XYZ, on July 26, 2013 the Commissioner filed a Petition for Liquidation of XYZ. (B144 - 525).

On November 6, 2013, after the filing of the instant appeal, the Commissioner filed a Petition for Rehabilitation and Injunction Order By Consent (*See* Docket, A41), and on November 7, 2013, the Trial Court entered a Rehabilitation and Injunction Order ("Rehabilitation Order") (B576-89) which, *inter alia*, appointed the Commissioner as the Receiver of XYZ ("the Receiver") and authorized her to continue to prosecute actions already commenced by or for XYZ in the courts of this State.

This appeal concerns the Trial Court's rulings on three motions in September and October of 2013. On September 10, 2013, the Trial Court entered

an Order Amending Seizure and Injunction Order and to Show Cause (the "Amended Seizure Order"). On September 25, 2013, the Trial Court entered an Order Imposing Sanctions and Directing Discovery ("the Sanctions Order"). On October 7, 2013, the Trial Court entered an Order denying Appellants' Motion to Modify or for Relief from the Trial Court's Order Imposing Sanctions. ("Rehearing Denial").

This is the Receiver's Answering Brief.

II. SUMMARY OF ARGUMENT

1. Appellants' first argument is DENIED. There was no procedural due process violation based upon the Trial Court's entry of the Amended Seizure Order where the non-party Appellants received notice of the motion to amend the seizure order, filed multiple pleadings and opposition papers, and were represented by three attorneys at the hearing scheduled within two weeks of the entry of the Amended Seizure Order. Additionally, the appeal of Amended Seizure Order should be dismissed for mootness.

2. Appellants' second argument is DENIED. There was no procedural due process violation based upon the Trial Court's entry of the Sanctions Order where Appellants had notice of the hearing, were represented by three attorneys at the hearing, raised the arguments decided by the Trial Court, and made the conscious decision not to attend the hearing and present evidence. Additionally, the appeal of the Sanctions Order should be dismissed for mootness.

3. Appellants' third argument is DENIED. The Trial Court did not abuse its discretion when it denied DEF's motion to amend the Sanctions Order without prejudice based on the conclusory nature of Appellants' assertions, unsupported by any details. Additionally, the appeal of the Rehearing Denial should be dismissed for mootness.

[redacted]

III. STATEMENT OF FACTS

A. DEF's Fraudulent Activity Causes the DOI to Seize XYZ

This action arises from the unravelling of DEF's efforts to mislead the DOI and XYZ's auditors about the true financial condition of XYZ and his year-long obstinate resistance to the DOI's proper and well-founded attempts to regulate XYZ -- a Delaware-domiciled risk retention group.

The beginning of the end for DEF occurred in the early spring of 2013 when DEF submitted a fraudulent bank confirmation to the DOI in response to a routine regulatory inquiry. More specifically, the DOI had requested that DEF provide a bank confirmation for Bank 4 identified in XYZ's third quarterly statement that XYZ had filed with the DOI as a matter of course. The financial statement identified Bank 4 as holding $5,100,000 on deposit in unencumbered cash. In response, DEF prepared and provided a signed confirmation form to the DOI to submit to Susquehanna Bank, which was the bank identified on the confirmation, at the post office box identified on the confirmation. (B10-14). The DOI received the return confirmation purportedly from Susquehanna Bank by fax. The DOI had questions regarding the confirmation and tried, without success, to contact the purported sender and bank representative, Nicole Bliss, at the telephone number for her identified on the fax transmittal. (B15-16).

When the DOI ultimately spoke to Ms. Bliss, she denied any knowledge of the confirmation and the DOI ultimately learned from Susquehanna Bank that the post-office box and email address on the confirmation provided by DEF and the phone number on the fax cover page purportedly from Susquehanna Bank did not belong to, and were not used by, Susquehanna Bank. (B16-18). Susquehanna Bank also disclosed that contrary to the representation in the financial statement of XYZ that the $5,100,000 in the Bank 4 account was available cash and not encumbered, in fact, the money in the account was fully encumbered and unavailable, as it represented the proceeds of a loan to a DEF-affiliated entity that XYZ had pledged 100% as security for the loan. (B21-22).

This fraud, coupled with the DOI's pre-existing concerns about XYZ's lack of financial strength and apparent violations of various Delaware insurance statutes -- concerns that the DOI had attempted to examine but that DEF had up to that point aggressively attempted to block -- prompted the DOI to file the Petition for a Confidential Seizure and Injunction Order pursuant to 18 Del. C. §5943. (B27-30).

B. Further Investigation Shows Additional Fraudulent Activity by DEF and Leads to the Filing of the Petition for Liquidation

After entry of the Seizure Order,[1] the DOI conducted a targeted examination of the financial condition of XYZ and an investigation into the conduct of DEF and

[1] After the Seizure Order was entered, the Commissioner sought and obtained an Order of the Circuit Court of Baltimore County, Maryland, entering, enrolling and

others in the operation of XYZ. This investigation revealed more frauds by DEF, some of which, similar to the Susquehanna Bank fraud, used phony financial confirmations that were sent to and from email addresses that were controlled by DEF for the purpose of aiding him in providing false and misleading financial information to auditors. (B184-190). Based on the pervasive fraudulent conduct of DEF and further examination of XYZ's financial condition, on July 26, 2013, the Commissioner filed a Petition for Liquidation of XYZ ("Liquidation Petition"). (B144 - 525). On August 21, 2013, XYZ filed an Answer to the Liquidation Petition and an Opposition Statement in which XYZ contested the allegations that XYZ was insolvent and the relief requested in the petition. XYZ's pleadings did not contest the allegations of DEF's frauds. (B535 [10:12-16]).

C. DEF's Violations of the Seizure Order Give Rise to the Motion to Amend Seizure Order and Rule to Show Cause

Paragraph 9 of the Seizure Order provides:

> All persons or entities having notice of these proceedings or of this Seizure and Injunction Order, are hereby prohibited from interfering with the Commissioner and her authorized agents either in their possession and control of the Assets or in the discharge of their duties hereunder. (A58).

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enforcing the Seizure Order because, based upon the prior dealings with DEF, the Commissioner and Department believed that unless the Seizure Order was domesticated in Maryland and served with the assistance of the Baltimore County sheriff, DEF would not voluntarily relinquish control of XYZ nor would he permit the DOI to enter the premises of XYZ or to otherwise execute the directives contained in the Seizure Order. (B153-54).

At the request of XYZ's board of directors, DEF resigned as President and CEO of XYZ and his seat on XYZ's board on August 5, 2013. (A568, ¶6). Nonetheless, DEF continued to interfere with XYZ's operations. DEF accessed XYZ's information technology system, and admitted that he continued to monitor and read XYZ's email traffic. (A273-74; 865 [117:10-118:5]). DEF also sent emails denigrating management to XYZ's employees and to brokers working with XYZ. (A274-275; 868 [119:14-120:42]). In addition, given DEF's past misuse of emails, it was suspected that DEF utilized an employee's email account or otherwise caused it to appear that the employee's email account at XYZ was the source of an email to the insurer rating service, A.M. Best, that leaked the confidential seizure of XYZ by the DOI. (A275-276; 808-11 [59:18-72:14]; 828 [79:13-17]).

In light of these actions, and in an effort to more specifically define the application to DEF of the injunctions imposed by the Seizure Order, including paragraphs 7 and 9 of the Seizure Order, XYZ filed its Expedited Motion to Amend Confidential Seizure and Injunction Order (A271). The Trial Court granted the Motion to Amend the Seizure Order and issued a Rule to Show Cause to DEF to show why his accessing XYZ's information and technology system was not a contempt of paragraphs 7 and 9 of the existing Seizure Order. (Amended Seizure Order, Ex. A to Appellants' Br.).

D. DEF Commits Further Actions that Violate the Seizure Order and Amended Seizure Order and Give Rise to Another Motion

Immediately after the Amended Seizure Order was issued, DEF, either directly or through others, recorded meetings at XYZ. (A310-11). This led to the filing by XYZ of an Expedited Motion for Sanctions. (A309). During the pendency of the motion, and prior to the hearing, further actions of DEF came to light. DEF caused the telephone services of XYZ to be cancelled (A589-90) and sought to convert deferred compensation accounts of XYZ employees into cash, as an offset of monies allegedly due from XYZ to GHI. (A587-89; 779-782 [30:20-33:8]).

E. The Trial Court Holds a Hearing Which DEF Fails to Attend

1. The Trial Court Schedules an Evidentiary Hearing

On September 13, 2013, the Trial Court issued an Order setting a response date for DEF to respond to the Expedited Motion for Sanctions and Order to Show Cause, and scheduled a hearing, specifically stating that evidence would be taken at the hearing: "An in-court hearing shall take place on September 24, 2013 from 9:15 a.m. until 11:15 am, during which the parties may present evidence and argument." (A326) (emphasis added).

2. DEF Raises Corporate Separateness in His Papers

DEF's Response to the Order to Show Cause included an affidavit from DEF in which DEF did not deny accessing XYZ's information and technology

systems, but argued instead that the servers housing XYZ's information and technology systems were owned by GHI. (A343-344, 512 at ¶ 4). DEF's affidavit asserted, *inter alia*, that GHI "[is] not regulated by the Insurance Commissioner of the State of Delaware." (A511 at ¶ 3).

Significantly, DEF's Response to the Order to Show Cause specifically raised the issue of corporate separateness by asserting that GHI was one of 17 separate companies operating out of the same address as XYZ and whose records were contained in the same servers as XYZ's records. (A335). DEF's Response also alleged that the DOI was obstructing DEF's ability to operate the 17 other entities. (A336). In the Request for Relief, DEF specifically requested a ruling from the Trial Court that he "is and shall be permitted to access the computer servers owned by [GHI] so that he can conduct the business of [GHI] and other non-[XYZ] companies in the ordinary course." (A348-349).

3. DEF and GHI's Attorneys Raise Corporate Separateness, but Present No Evidence of It

Although DEF raised the issue of the "17 other entities" in his Response to the Order to Show Cause as a defense to the relief sought by XYZ (A335-36), he chose not to attend the hearing to present this defense. DEF's counsel only cross-examined witnesses and presented argument at the hearing. DEF's counsel presented no witnesses of its own at the hearing. (A913-14 [164:22-165:2]).

When the Trial Court asked DEF's counsel why DEF "decide[d] not to come to testify and rebut some of these issues that have been raised", DEF's counsel responded:

> Well, Your Honor, a couple reasons. One, we did submit his affidavit, which we think squarely addressed and rebutted all the accusations against him. More importantly, Your Honor, it's not his burden. It's the movant's burden to come forward with evidence that shows that they are entitled to the sanction that they seek. (A752-53 [3:21 - 4:10]).

DEF's decision not to attend the hearing was not altogether surprising, and may have been strategic. Neither XYZ nor DEF has submitted any denial of the detailed and verified evidence of pervasive fraudulent conduct that are part of the record. No matter, it is clear that the decision to not proffer testimony or evidence was deliberate. Due process requires no more.

However, at the hearing, DEF's counsel consistently discussed and relied upon the alleged corporate separateness of XYZ from GHI, as well as from the other entities owned by DEF. When asked by the Trial Court to "Tell me about these 17 companies. What do you know about them?", DEF's counsel gave a lengthy response, beginning with "Thank you, You Honor. That's something I was itching -- have been itching to tell you." (A753 [4:11-15]). DEF's attorney later stated to the Trial Court that "we think the structure of the companies is important and provides context for those motions." (A776 [27:12-14]). When the Trial Court expressed to counsel for DEF and GHI that "your response has hinged on the

separateness of [GHI]", counsel agreed. (A777-778 [28:23 - 29:4]) ("Ah. That's part of it, Your Honor...").

F. DEF Declines the Trial Court's Invitation to File a Proper Motion to Amend

On September 25, 2013, the Trial Court issued a written Order Imposing Sanctions to memorialize the oral Order that it issued from the bench at the end of the hearing held on that day. Among other things, the written Order stated that "[p]ending further order of this Court, [DEF] shall not, directly or indirectly, exercise any control over [GHI]." (Ex. "B" to Appellants' Br.).

Twelve days later, on October 7, 2013, DEF and GHI filed an Expedited Motion to Modify or Alternatively for Relief from Order Imposing Sanctions (A929) in which they argued that the above-quoted provision of the order "has severe and unintended consequences." (A930). The motion was not verified and no affidavit was included with the motion to support the conclusory statements contained in the motion. Instead, the only "evidence" submitted with the motion was the withdrawal by XYZ's in-house attorneys from two cases in which they represented GHI. DEF and GHI also alleged that checks to GHI were not being deposited, but instead forwarded to DEF. (A933).

Although the Trial Court denied this Motion, it did so without prejudice and invited DEF and GHI to re-file the motion if they could support the facts and requested relief by proper evidence:

[redacted]

> The motion is denied without prejudice. Having reviewed it, the Court regards the motion as another unfortunate example of the improvident filings from [DEF] that have burdened this case to date. Citing two examples of motions to withdraw by counsel, [DEF] makes the broad claim that [XYZ] employees cannot protect [GHI's] interests. There are no specifics to back this up. There are no details about the status of the underlying actions, whether the withdrawals actually threaten harm to [GHI], or whether successor counsel can be retained. There are likewise no specifics about the "substantial, unintended collateral damage that the injunction provision is causing." There is no indication that, as to matters such as the withdrawals or the depositing of [GHI] checks, [DEF] has made any effort to contact [XYZ] and solve the problem before attempting to create an issue for the Court to resolve. It is also troubling that there continues to be no acceptance of any responsibility by [DEF] for the situation he has created. The main reason why the Court's questions could not be answered on September 24 was because [DEF] chose not to show up for a hearing about whether he was in contempt of an order from this court. Having chosen to send his lawyers and not appear personally, [DEF] cannot complain about their inability to answer questions.
>
> [DEF] may renew his motion, but only if he (i) grounds it on specifics [sic] facts and (ii) demonstrates that he has met and conferred with [XYZ] before seeking relief. (Ex. "C" to Appellants Br.).

Rather than avail themselves of the willingness of the Trial Court to re-visit and re-consider the scope of the Sanctions Order, DEF and GHI instead, three days later, appealed the Sanctions Order to this Court and now argue that they have been denied the very process that the Trial Court offered them.

On November 7, 2013, after the filing of the instant appeal, the Trial Court entered the Rehabilitation Order which, *inter alia*, appointed the Commissioner as the Receiver of XYZ and authorized her to continue to prosecute actions already commenced by or for XYZ in the courts of this State. (B579-80).

[redacted]

IV. ARGUMENT

A. THERE WAS NO PROCEDURAL DUE PROCESS VIOLATION WHERE APPELLANTS RECEIVED NOTICE OF THE MOTION TO AMEND, FILED OPPOSITION PAPERS, AND WERE REPRESENTED BY COUNSEL AT A HEARING SHORTLY FOLLOWING THE ORDER

Question Presented

Whether procedural due process was violated where non-parties received notice of the motion to amend, filed pleadings and oppositions, and actively participated in the proceedings related to the entry of an amended seizure order, and participated in a post-order hearing? (No.)

Scope and Standard of Review

This Court's standard of review of issues of constitutional law is *de novo*. *Cooke v. State,* 977 A.2d 803 (Del. 2009).[2]

Merits of Argument

1. DEF and GHI Were Accorded Due Process

Appellants incorrectly contend that they were denied due process with respect to the Trial Court having entered an Amended Seizure Order without a reasonable opportunity to be heard. Appellants do not appeal the entire Amended Seizure Order, rather they appeal paragraph 2 of the order which enjoins DEF from:

> discussing, disclosing, or communicating with or to Respondent's [XYZ's] employees or any persons or entities that [DEF] knows have business relationships with Respondent regarding (i) any matter or fact relating to the Seizure Order or other matters contained in filings under this docket or (ii) any matter relating to Respondent's business. Those entities having business relationships with Respondent shall include but are not limited to insurance brokers and agents that have placed their clients in Respondent's insurance policies, rating agencies, existing or prospective reinsurance counterparties and Respondent's policy holders. (Appellants' Br. at p. 21) (quoting Amended Seizure Order, at ¶ 2).

Contrary to Appellants' arguments, there has been no deprivation of due process because appellants were provided a reasonable opportunity to be heard.

Courts in Delaware follow the test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) to evaluate what process is "due." This test requires a court to balance three factors:[3] (1) the private interest that will be affected by the official action; (2) the risk that there will be an erroneous deprivation of the interest through the procedures used and the probable value of additional or substitute procedural safeguards; and (3) the government interest involved, including the added fiscal and administrative burdens that additional or substitute procedures would require. *See, e.g., Waters v. Division of Family Services,* 903 A.2d 720, 725 (Del. 2006) (citing cases); *Franco v. State*, 918 A.2d 1158, 1162 n. 12 (Del. 2007) (citing *Mathews*, 424 U.S. at 334–35).

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[2] The Appellee adopts Appellants' case law references for purposes of simplifying the argument.

[3] These factors are commonly referred to as *Eldridge* factors.

This test is based, at its heart, on the notion that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Izquierdo v. Sills*, 2004 WL 2290811, at * 8 (Del. Ch. June 29, 2004) (internal quotations omitted) (citing *Mathews*, 424 U.S. at 333).

The amount of process required to safeguard an individual's due process rights varies greatly depending on the facts and issues involved in each case:

> In some cases due process does not require an evidentiary hearing. And even when required, a hearing need not be tantamount to a trial. At other times, however, in addition to notice and the opportunity to be heard, due process also may require further procedural safeguards such as the opportunity to confront and cross-examine adverse witnesses, oral argument, presentation of evidence, and the right to retain an attorney.

W.L. Gore & Associates, Inc. v. Wu, 2006 WL 905346, at *4 (Del. Ch. March 30, 2006) (footnotes and citations omitted). In the case at hand, balancing the *Eldridge* factors shows that DEF and GHI received due process.

Appellants' sole argument with regard to the first *Eldridge* factor, their interest, is the broad conclusory statement that the amendment to the Seizure Order preventing DEF from communicating to those with a business relationship with XYZ regarding matters relating to the Seizure Order or the business of XYZ "had the effect of shuttering several of DEF and GHI's businesses: XYZ has business/contractual relationships with several of DEF's and GHI's various other

business entities." (Appellants' Br. at p. 23). This allegation is devoid of further explanation or citation to the record.

The absence of citation is not surprising, as Appellants' Brief on appeal is the first time that DEF or GHI have argued that the proposed relief or granted relief would have such effect. As Appellants have provided no support or citation for the claimed interest, it should be given little, if any, weight in the determination.

The second *Eldridge* factor focuses on the risk of harm of the procedure used and the value of additional safeguards and alternative procedures. The third *Eldridge* factor focuses on the government's interest and also includes a weighing of the added burdens caused by the additional safeguard or alternative procedures.

Because, as discussed below, the actual procedure the Trial Court followed is the very procedure Appellants suggest as an alternative, the Receiver's response is the same to the Appellants' arguments on the second *Eldridge* factor (second risk of the actual procedure and value of alternative procedures) and to the "weighing of burdens" portion of the third *Eldridge* factor.[4]

At its core, Appellants' primary argument is that the Trial Court's procedure

[4] Appellants' argument on the third *Eldridge* factor ignores the interest of the State, and instead reargues the value of additional procedural safeguards. (Appellants' Br. at pp. 24-25). As discussed more fully in Section IV(B)(2)(c), below, Appellants have acknowledged the DOI has a "significant interest" in the seizure of XYZ. (Appellants' Br. at p. 32). *See also Remco Ins. Co. v. State Ins. Dept.*, 519 A.2d 633, 635 (Del. 1986) (DOI "has broad regulatory authority to protect policyholders and others who may be harmed by business practices of insurers").

was deficient--that the Trial Court should have held a hearing on the Motion to Amend shortly afterward. As Appellants put it:

> Unfortunately, because the Amended Seizure Order was so quickly granted, there were no procedural "safety valves" built into the order to protect DEF's due process right. For example, the Amended Seizure Order could have resembled a Temporary Restraining Order—with a procedural safeguard of having a 10-day expiration date (*see* Chancery Rule 65(b)); or, similar to cases where no notice is provided prior to the granting of an order, there could have been a requirement for a "hearing at the earliest possible time." Neither of these procedural checks occurred. In fact, DEF and GHI, in order to preserve their arguments, filed a response to the Motion to Amend on September 19, 2013. XYZ wrote in a reply the following day that the Amended Seizure Order was "decided on September 10, 2013 and does not contain any provision permitting [DEF] or [GHI] to reopen the matter and argue the merits of the Amended [Seizure] Order" (A585).

(Appellants Br. at p. 25).

What Appellants suggest is exactly the procedure the Trial Court followed. The hearing held on September 24, 2013 was in part on the Motion to Amend the Seizure Order. The transcript of the September 24, 2013 hearing is titled: "***Oral Argument on Respondent [XYZ's] Expedited Motion To Amend Confidential Seizure And Injunction Order*** and to Show Cause, Respondent [XYZ's] Expedited Motion for Sanctions, and Rulings of the Court." (A750) (emphasis added). Counsel for XYZ presented testimony and documents in support of the Motion to Amend the Seizure Order. *See, e.g.*, (A273-74; 865 [117:10-118:5]) (accessing XYZ emails and IT system); (A274-275; 868 [119:14-120:42]) (emails

denigrating management to employees and brokers); (A275-276; 808-11 [59:18-72:14]; 828 [79:13-17]) (sending confidential court filing regarding XYZ's seizure to A.M. Best).

Further, Appellants' counsel, on several occasions during the hearing, acknowledged that the purpose of the hearing was to address ***both*** motions, the Motion to Amend Seizure Order and the Motion for Sanctions: (A752 [3:5-8]) ("we stand here prepared to respond substantively to the motions"); (A776 [27:10-12]) ("We are here. We were prepared to come here today to address the two motions that are before the Court."); and (A777 [28:8-22]) ("...we didn't think we were going to have time in two hours on these two motions to present a fulsome presentation on that....but we're here on these two motions.")

Appellants do not argue that a hearing provided two weeks after the entry of the Amended Seizure Order was inadequate. Indeed, they themselves acknowledge that a later hearing would comply with due process.[5] (Appellants Br. at p. 25). Similarly, they do not argue that they were in some way prevented from cross-examining the witnesses or challenging the evidence which was presented on September 24, 2013 in support of the Motion to Amend. Nor do they contend that

[5] In this Appellants are correct. As this Court has held, "mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of the liability is adequate." *Slawik v. State*, 480 A.2d 636, 646 (Del. 1984).

they were prevented from calling witnesses or presenting evidence themselves.

Instead, they ignore the September 24, 2013 hearing altogether; arguing, by implication, that there was no hearing on the Motion to Amend. As discussed above, this claim is belied by the record, and indeed by Appellants' counsel's own arguments at that very hearing.

DEF and GHI (i) received adequate notice of the amendment to the Seizure Order; (ii) had the opportunity to be heard at a meaningful time and in a meaningful manner; (iii) had the opportunity to present witnesses on their behalf; and (iv) were afforded the opportunity to cross-examine the witnesses called by XYZ. The procedure fully complied with due process. *See Xcomp, Inc. v. Ropp*, 2002 WL 1753168 *4 (Del. Ch. July 19, 2002).

The Trial Court's entry of the September 10, 2013 Order Amending Seizure and Injunction Order should be affirmed.

2. The Appeal of the Amended Seizure Order is Moot

On November 7, 2013, after this appeal was filed, the Trial Court entered a Rehabilitation and Injunction Order for XYZ. (B 576). Pursuant to 18 *Del. C.* § 5943(b), entry of the Rehabilitation Order acts to vacate the Seizure Order, and by extension, the modification of the Seizure Order. Thus, the appeal of the Amended Seizure Order is moot. *See Smullen v. State,* 2013 WL 842516 * 1 (Del. March 5, 2013) ("under the mootness doctrine, although there may have been a justiciable

controversy at the time the litigation commenced, the action will be dismissed if that controversy ceases to exist"). Under Supreme Court Rule 29(b), the power to dismiss an appeal for mootness is always available to the Court. *Stotland v. GAF Corp.*, 469 A.2d 421, 423 (Del. 1983). Thus, this Court should dismiss the appeal of the Amended Seizure Order as moot.

[redacted]

B. THERE WAS NO PROCEDURAL DUE PROCESS VIOLATION WHERE APPELLANTS HAD NOTICE OF THE HEARING, WERE REPRESENTED BY THREE ATTORNEYS AT THE HEARING, RAISED THE ARGUMENTS DECIDED BY THE COURT AND MADE THE CONSCIOUS DECISION NOT TO ATTEND AND PRESENT EVIDENCE

Question Presented

Whether procedural due process was violated where non-parties actively participated at the hearing through their three attorneys and raised the arguments decided by the Trial Court while the principal non-party opted not to attend the hearing and offer evidence? (No.)

Scope and Standard of Review

This Court reviews mixed questions of fact and law *de novo* as to legal conclusions and for clear error as to factual determinations. *Hunter v. State,* 783 A.2d 559 (Del. 2010); *Miller v. State*, 4 A.3d 371 (Del. 2010).

Merits of Argument

Appellants generally assert that the Trial Court's consideration of corporate separateness was *sua sponte*. Appellants Br. at pp. 3, 27-28. Appellants argue that they were not on notice that the issue of other corporations owned by DEF would be relevant, and thus did not come prepared to discuss such issues. *Id.* at p. 30.

1. No Due Process Analysis is Necessary Because the Issue of Corporate Separateness Was Raised by DEF and GHI

An examination of the record shows that the issues relating to the companies

owned by DEF (including GHI) were interjected into the motions by DEF, himself, and not raised by the Trial Court *sua sponte*.

The Expedited Motion to Amend the Seizure Order asserted DEF's improper use and monitoring of XYZ's information technology systems. (A274, ¶6). DEF's Response to the Order to Show Cause did not deny accessing XYZ's information and technology systems, but instead argued that the servers housing XYZ's information and technology systems were owned by GHI. (A343-344, 512 at ¶ 4). DEF's affidavit specifically asserts that GHI "[is] not regulated by the Insurance Commissioner of the State of Delaware." (A511 at ¶ 3).

In DEF's Response to the Order to Show Cause, he asserted: (1) that GHI was one of 17 separate companies whose records were located on servers which also contained XYZ's records; (2) that GHI owned the servers; and (3) that GHI and other companies operated out of the same address as XYZ (A335).

DEF's discussion of the 17 other entities was not merely perfunctory. In DEF's Response, he argued that the DOI was obstructing DEF's ability to operate the 17 other entities. (A336). In fact, in DEF's Response to Expedited Motion to Amend Seizure Order & Order to Show Cause, DEF specifically requested a ruling from the Trial Court that he "is and shall be permitted to access the computer servers owned by [GHI] so that he can conduct the business of [GHI] and other non-[XYZ] companies in the ordinary course." (A348-349).

At the hearing, DEF's counsel did not express surprise or concern that the issue of the 17 other companies was to be addressed. In response to the Trial Court's question "Tell me about these 17 companies. What do you know about them?" DEF's counsel began his presentation with "Thank you, You Honor. That's something I was itching -- have been itching to tell you." (A753 [4:11-15]). Indeed, later in the hearing, DEF's counsel acknowledged that "we think the structure of the companies is important and provides context for those motions." (A776 [27:12-14]).

The Trial Court expressed its concern that DEF was attempting to use the alleged corporate separateness of GHI as a means to interfere with the DOI's regulatory efforts toward XYZ. The Trial Court also noted that DEF, the only person able to present evidence of actual separateness, had failed to appear at the hearing. DEF's attorneys did not state that the issue of corporate separateness was not implicated by the motions. Instead, they stated that DEF declined to come because "we didn't think we were going to ***have time in two hours*** on these two motions to present a fulsome presentation on that." (A775-77 [26:9-28:22]) (emphasis added).[6]

[6] Further, this issue had previously been raised in a motion to intervene by another company owned by DEF. The attorney for that company, Mr. Brown, who also argued for DEF and GHI on the Motion for Sanctions, argued that the seizure was affecting other companies, and the Trial Court made clear that DEF could not use

Similarly, when the Trial Court expressed to counsel for DEF and GHI that "your response has hinged on the separateness of [GHI]", counsel did not disagree with the Trial Court's statement of their position, but rather stated: "Ah. That's part of it, Your Honor..." (A777-778 [28:23 - 29:4]).

The record is clear that DEF and GHI, themselves, raised the issue of corporate separateness, and that it was DEF and GHI's position that the structure of the other companies "was important and provides context for [the] motions." (A776 [27:12-14]). Any claim for a lack of due process because the Trial Court brought up the issue *sua sponte* fails as a factual matter.

2. Regardless, There Was No Violation of Due Process

a. The Failure of DEF to Attend Waives DEF's Due Process Claim

The Trial Court's show cause order provided for a hearing at which "the parties may present evidence and argument." (A326). DEF cannot convert his own refusal to appear and present evidence into a lack of due process. *See In Re Buckson*, 610 A.2d 203, 219-20 (Del. Jud. 1992) (holding conscious refusal to attend hearing constituted a waiver of right to be heard).

b. The Evidence of Interrelatedness

The Trial Court did not act to pierce the corporate veil, but instead, given the

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his ownership of other companies to do what he could not do with regard to XYZ. (B572-73 [47:1 - 48:7]).

uncontradicted testimony of the interrelatedness of XYZ and GHI, and the fact that credible evidence was presented that DEF was using his control over GHI to interfere with XYZ, enjoined DEF from so acting.

Prior to the Spring of 2012, GHI performed the daily operations of XYZ, including providing all employees, and paying for utilities and other services. (A760-61 [11:1-12:22]). After the Spring of 2012, those operational functions, including employees, were transferred to XYZ, and the services previously provided were now being provided by employees of XYZ. (A761-63 [12:23-14:10]). XYZ was now paying bills including utilities, even where such bills were still nominally addressed to GHI. (A800 [51:10-22]; 807 [58:7-9]).

The prior interrelatedness of the companies, and the fact that many accounts still remained in the name of GHI, were used as a pretext by DEF to interfere with the operations of XYZ by utilizing his control over GHI, cancelling utilities (A800-802 [51:23-52:9]; 805-807 [56:3-58:9]), and cashing out XYZ employee deferred compensation accounts (A587-89; 779-782 [30:20-33:8]).

As the Trial Court explained:

> Finally, there's sufficient evidence of a close interrelationship between [GHI] and [XYZ] that at this point I believe it's necessary to preserve the status quo to extend the seizure order and to enjoin [DEF] from taking any action to interfere with the company through [GHI].
>
> [DEF] requested basically the opposite relief; namely, that he'd be allowed full access to [GHI] and all of its assets so long as the company, [XYZ], continued to have access to its information. I'm

denying that request, and I am doing exactly the opposite. (A919 [17:2-13]).

c. The *Eldridge* Factors Show that the Hearing Accorded DEF and GHI Due Process

Even if the claim for due process is not waived by DEF's failure to attend or present evidence at the September 24, 2013 hearing, an application of the *Eldridge* factors shows that the Trial Court's procedures fully complied with due process.

With regard to the first factor, the private interest of DEF in GHI is substantially reduced in this case as the majority of GHI's business related directly to XYZ. (A756 [7:15-24]; 758-59 [9:8-10:3]).

Secondly, the procedure utilized by the Trial Court did not unfairly prejudice DEF or GHI. DEF himself interjected the matter of the other companies into the proceedings. His attorneys recognized that it was an important part of the motions being decided, and that evidence would need to be presented on the issue. Nevertheless, counsel declined to present such evidence, or even have DEF present at the hearing. Appellants' claim that inquiry into the interrelatedness of XYZ and GHI was unexpected is thus belied by the papers and Appellants' counsel's statements at the hearing.

As discussed in Section IV(C)(1), below, the Trial Court expressed its willingness to revisit the contours of the order involving GHI if GHI contended that the order caused it harm, so long as any such motion was properly supported

by evidence, and DEF made an attempt to resolve such matters with XYZ prior to bringing them to the Trial Court. DEF and GHI present no explanation why they could not follow such a procedure, and DEF and GHI's failure to take advantage of this opportunity does not equate to a lack of due process.

The final *Eldridge* factor also weighs in favor of upholding the Trial Court's decision. The State has a substantial interest in the regulation of insurance companies, and in seeing that the Seizure Order is not circumvented through the use of intermediaries. The Trial Court recognized, and DEF and GHI's counsel acknowledged, that "there is a high degree of integration, to the point of nigh complete integration between these businesses [XYZ and GHI] at the operation and functional level." (A772 [22:24 -23:21]). As the Trial Court determined:

> ...the record to date indicates -- and were I required to make an actual finding on this based on the evidence to date, I would so find -- that [GHI] and [XYZ] are so interwoven and so mutually dependent, that it is impossible for the State to perform its receivership and supervisory functions if the State is solely limited to dealing with [XYZ]. (A919 [170:19-24]).

Appellants do not dispute the finding of a substantial interest of the State, but rather make only a cursory argument that "the Trial Court placed the value of the State's police powers over the value of allowing an adequate opportunity to gather and present evidence. Undoubtedly, the State has a significant interest in being able to exercise its police powers, but it must be balanced with a right to protect property interests." (Appellants' Brief at p. 32).

As discussed above, the Trial Court did appropriately balance the property interests of DEF and GHI. The Trial Court specifically noted the importance of the property interest and balanced it against the State's interest:

> "the work of these companies is not being done" because your client set up a funky division between the regulated entity and the entity that does all the work. And the funky division may well have had legal and business justifications that he felt were sound. It may have been nice to separate the regulated entity from the MGA. It may have been optimistic. It may have been wise over the long term to try to build up this MGA as a separate business. You know, it's got, you know shades of the CV Starr/AIG structure all over it.
>
> But what we've now got is we've got a regulatory proceeding and we've got a regulatory proceeding at a stage where, at least so far, nobody is showing me real separation between these businesses....
>
> And so what your client is doing is clutching the corporate separateness of [GHI] as a basis for, put bluntly, interfering with the regulatory efforts of the State.
>
> Look, Delaware is as big as any state. I would put us No. 1 in terms of respect for corporate separateness. It's like, you know, God, apple pie, and Mom to us. But even as a Delaware judge, you are going to have a really hard sell convincing me that the intervening -- you know, essentially the entity of [GHI] is enough to allow your client to create all these problems for what, at least I have to assume so far, is a valid regulatory effort by the State. (A774-75 [25:15 - 26:21]).

3. DEF Has Waived His Argument that the Portion of the Sanction Order Providing That He Must Pay for Discovery Was Improper

In the midst of its due process argument, DEF makes a cursory, one-paragraph argument that DEF is being "penalized" and "punished" by the Trial Court's determination that DEF bears the costs of discovery (including the

[redacted]

attorneys fees of XYZ and the DOI) on the issue of corporate separateness. (Appellants' Br. at p. 31). This argument is entirely devoid of any explanation as to how the Trial Court allegedly erred, or why such an order is improper, particularly given DEF's failure to attend the hearing where he could have been questioned on such issues.

Appellants' failure to present any real argument, evidence or authority on this issue results in a waiver of this argument. As this Court has explained:

> Under Supreme Court Rule 14, an appellant waives an argument if he does not argue its merits within the body of his opening brief. Our case law holds that the opening brief must "fully state the grounds for appeal, as well as the arguments and supporting authorities on each issue or claim of reversible error." If a party only casually mentions an issue, that cursory treatment is insufficient to preserve the issue for appeal. "In order to develop a legal argument effectively, the [o]pening [b]rief must marshal[ ] the relevant facts and establish reversible error by demonstrating why the action at trial was contrary to either controlling precedent or persuasive decisional authority from other jurisdictions." If a party fails to cite any authority in support of a legal argument, we will deem that argument waived.

Ploof v. State, 75 A.3d 811, 822 (Del. 2013) (footnotes and citations omitted).

For the above reasons, DEF and GHI's appeal of the September 25, 2013 Order Imposing Sanctions and Directing Discovery should be denied and the Trial Court's order should be affirmed.

4. The Appeal of the Sanctions Order is Moot

Appellants primarily[7] complain of the portion of the Trial Court's Order stating "***Pending further order of this Court,*** [DEF] shall not, directly or indirectly, exercise any control over [GHI]." (emphasis added). Appellants' Br. at pp. 2, 28.

At the hearing the Trial Court explained that this relief was an extension of the Seizure Order (A919 [17:2-13]) ("Finally, there's sufficient evidence of a close interrelationship between [GHI] and [XYZ] that at this point I believe it's necessary to preserve the status quo to extend the seizure order and to enjoin [DEF] from taking any action to interfere with the company through [GHI]").[8] For the reasons discussed in Section IV(A)(2), above, the appeal of the Sanctions Order should be dismissed as moot based upon the entry of the Rehabilitation Order which vacated the Seizure Order as a matter of law.

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[7] DEF also perfunctorily complains of the Trial Court's imposition of the costs of discovery, including the fees of XYZ and DOI, into corporate separateness. While this argument is not moot, as discussed in Section IV(B)(3) above, it is not meritorious.

[8] Even if this were not a further amendment of the Seizure Order, and thus vacated by entry of the Rehabilitation Order, this provision has been supplanted by a further order of the Trial Court--the Rehabilitation Order--which specifically prohibits DEF and GHI "in any way interfering with the Receiver, the Deputy Receiver(s) or the Designees either in their possession and control of the Assets or in the discharge of their duties hereunder." (B584 at ¶ 14.) Thus, this portion of the Sanction Order is no longer amenable to a judicial resolution.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEF'S MOTION TO AMEND THE SANCTIONS ORDER WITHOUT PREJUDICE BASED ON THE CONCLUSORY NATURE OF THE ASSERTIONS UNSUPPORTED BY ANY DETAILS

Questions Presented

Whether the Trial Court's denial of a motion to modify a sanctions order was clearly erroneous where the motion consisted of conclusory assertions lacking detail and the principal movant chose not to attend the hearing to present evidence? (No.)

Scope and Standard of Review

This Court reviews decisions of trial courts on motions for reargument for abuse of discretion. "To the extent a decision to impose sanctions is factually based, we accept the trial court's factual findings so long as they are sufficiently supported by the record, are the product of an orderly and logical reasoning process, and are not clearly erroneous." *Genger v. TR Investors, Inc.*, 26 A.3d 180 (Del. 2011).

Merits of Argument

1. The Trial Court Did Not Abuse its Discretion by the Rehearing Denial

On October 7, 2013, twelve days after the entry of the Sanctions Order on September 25, 2013, DEF and GHI filed an Expedited Motion to Modify or Alternatively for Relief from Order Imposing Sanctions (A929), in which they

argued that the Trial Court's Order that "[p]ending further order of this Court, [DEF] shall not, directly or indirectly, exercise any control over [GHI]", "has severe and unintended consequences." (A930). The Trial Court pointed out the deficiencies of the motion, but granted leave for DEF to refile the Motion if it corrected the deficiencies the Trial Court identified. (Ex. "C" to Appellants' Br.).

Appellants' Brief merely repeats in one paragraph the unsupported assertions that the Trial Court found to be not sufficiently specific.[9] (Appellants' Brief at pp. 33-34). DEF and GHI do not quarrel with, ***or even acknowledge***, the Trial Court's determination that the motion was insufficiently specific.[10] On its face, the motion for reconsideration did not comply with Chancery Court Rule 7(b)(1), which requires a motion to "state with particularity the grounds therefor."

Appellants do not assert in their Brief that the trial Court was incorrect in stating that the motion was deficient. Indeed, Appellants ignore the Trial Court's explanation that:

> The motion is denied without prejudice. Having reviewed it, the Court regards the motion as another unfortunate example of the improvident

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[9] Appellants' claim of "new evidence" is incorrect. The "new" evidence was composed of letters sent or copied to DEF on September 19, 2013, which was five days before the date of the hearing. (A1134-35). Appellants do not explain how such would constitute " the availability of new evidence not previously available" required for a motion to alter or amend under Rule 59(e). *See Chrin v. Ibrix, Inc.*, 2005 WL 3334270 * 1 (Del. Ch. Nov. 30, 2005).

[10] Although not mentioned in the Trial Court's Order, the Trial Court makes reference to a "lack of specifics" and missing support. (Ex. "C" to Appellants' Brief).

> filings from [DEF] that have burdened this case to date. Citing two examples of motions to withdraw by counsel, [DEF] makes the broad claim that [XYZ] employees cannot protect [GHI's] interests. There are no specifics to back this up. There are no details about the status of the underlying actions, whether the withdrawals actually threaten harm to [GHI], or whether successor counsel can be retained. There are likewise no specifics about the "substantial, unintended collateral damage that the injunction provision is causing." There is no indication that, as to matters such as the withdrawals or the depositing of [GHI] checks, [DEF] has made any effort to contact [XYZ] and solve the problem before attempting to create an issue for the Court to resolve. It is also troubling that there continues to be no acceptance of any responsibility by [DEF] for the situation he has created. The main reason why the Court's questions could not be answered on September 24 was because [DEF] chose not to show up for a hearing about whether he was in contempt of an order from this court. Having chosen to send his lawyers and not appear personally, [DEF] cannot complain about their inability to answer questions.
>
> [DEF] may renew his motion, but only if he (i) grounds it on specifics facts and (ii) demonstrates that he has met and conferred with [XYZ] before seeking relief. (Ex. "C" to Appellants' Br.).

An examination of the Docket shows that neither DEF nor GHI took up the Trial Court's invitation to file a motion supported by specific facts showing the harm which they claimed. (A31-50). Instead, two days later DEF and GHI appealed the Sanctions Order and Rehearing Denial.

Appellants' sole argument is contained in a single paragraph which only consists of conclusory statements that the denial of the motion "denied DEF and GHI their opportunity to be fairly heard" and they "did not have an opportunity to present evidence of the harmful effects of the Sanctions Order." (Appellants' Br.

at p. 34). Similarly, the only argument that the Trial Court abused its discretion is contained in a single sentence: "Furthermore, given the fact that the Trial Court stated that the motion was simply 'another unfortunate example of the improvident filings from [DEF] that have burdened this case to date,'" DEF maintains that the Trial Court abused its discretion." (Appellants' Br. at p. 34).

The merits section of Appellants' Brief on this issue is entirely devoid of citations to authority. Other than the broad statement that the Trial Court abused its discretion, there is no attempt to explain *how* the Trial Court abused its discretion. As discussed in Section IV(B)(3) above, DEF and GHI's cursory treatment of this issue, and failure to cite authority in support of their legal argument, constitute a waiver. *Ploof*, 75 A.3d at 822.

Further, Appellants acknowledge that the standard of review is for abuse of discretion. (Appellants' Br. at p. 33, citing *Poe v. Poe*, 872 A.2d 960 (Del. 2005)). An abuse of discretion occurs when "a court has ... exceeded the bounds of reason in view of the circumstances, [or] ... so ignored recognized rules of law or practice so as to produce injustice." *Lilly v. State,* 649 A.2d 1055, 1059 (Del. 1994) (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988)). The Trial Court did not abuse its discretion by determining that the motion before it was insufficiently specific, pointing out exactly what facts it believed were insufficiently presented, but granting leave to refile. The appeal of the Expedited

Motion to Modify or Relief From Order Imposing Sanctions should be denied and the Trial Court's order should be affirmed.

2. The Appeal of the Rehearing Denial is Moot

The only portion of the September 25, 2013 Sanctions Order which was sought to be reargued was the portion related to DEF's control over GHI. See Appellants Br. at p. 33. For the same reason that the appeal of the Sanctions Order is moot, the appeal of the Rehearing Denial is also moot.

V. CONCLUSION

For the foregoing reasons, the Court should find that due process was not denied and should affirm the Trial Court's Orders of September 10 and 25, 2013 and October 7, 2013.

Respectfully submitted,

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