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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MESO SCALE DIAGNOSTICS, LLC., et al., Plaintiffs Below, Appellants, v. ROCHE DIAGNOSTICS GMBH, et al., Defendants Below, Appellees.	No. 200, 2020 Court Below: Court of Chancery C.A. No. 2019-0167-JRS

APPELLANTS' OPENING BRIEF

David L. Finger (#2556)
FINGER & SLANINA, LLC
One Commerce Center
1201 N. Orange St., 7th fl.
Wilmington, DE 19801
302-573-2525
dfinger@delawgroup.com

William S. Consovoy
J. Michael Connolly
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, Virginia 22209
703-243-9423
will@consovoymccarthy.com
mike@consovoymccarthy.com

Patrick Strawbridge
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
617-227-0548
patrick@consovoymccarthy.com

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On February 27, 2019, Appellants ("Meso") filed a complaint seeking to vacate the judgment in *Meso Scale Diagnostics, LLC. v. Roche Diagnostics GMBH*, No. 5589-VCP. Appellees ("Roche") filed a motion to dismiss on April 22, 2019. After briefing and oral argument, the Court of Chancery issued a ruling from the bench and entered an order granting the motion to dismiss on May 18, 2020. This appeal followed.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in dismissing Meso's claim for relief under Chancery Court Rule 60(b)(4). Rule 60(b)(4) allows a judgment to be vacated if the judgment is "void." For purposes of Rule 60(b)(4), the court assumed that Meso's due process rights were violated when its case was decided by a judge with an "unconstitutional potential for bias." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016). Yet the court dismissed the complaint because, in its view, that due process violation could never render the judgment "void." That was error. It is hornbook law that a judgment is void if it was rendered in a manner inconsistent with due process of law. None of the court's authorities require a different result.

2. The Court of Chancery erred in dismissing Meso's claim for relief under Chancery Court Rule 60(b)(6) on the ground that it was untimely. The request for relief was untimely, according to the court, because Meso did not specifically allege in its complaint that its attorneys had been unaware of the conflict of interest. But nothing in the Chancery Court Rules required Meso to make such an allegation. Regardless, as it advised the court, Meso alleged in the verified complaint that its attorneys had no knowledge of the conflict of interest. The court also found that Meso's claim was untimely because it did not file the complaint quickly enough after discovering the conflict of interest in 2018. But Meso alleged that it was unable to

secure Delaware counsel and that it filed its complaint as promptly as it could. The Court of Chancery erroneously failed to accept these well-pleaded allegations.

3. The Court of Chancery erred in dismissing Meso's claim for relief under Rule 60(b)(6) on the ground that there were no "extraordinary circumstances" justifying such relief. There is little dispute that Vice Chancellor Parsons acted improperly in presiding over the case. The court saw the error as excusable because Roche's counsel was representing Vice Chancellor Parsons in his official capacity. But recusal is required regardless of whether the judge is being represented in an official or personal capacity. For good reason. The attorney-client relationship that results is incompatible with the court's duty to ensure the appearance of impartiality. None of the other justifications, such as the inconvenience to Roche of having to conduct another trial, support upholding the judgment against Meso.

STATEMENT OF FACTS

A. BACKGROUND

On June 22, 2010, Meso filed a lawsuit against Roche alleging, among other things, that Roche had breached two agreements related to the licensing of various diagnostic and assay technologies. *See Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, No. 5589-VCP ("*Meso* Litigation"). Roche's counsel was Andre G. Bouchard, then-managing partner of Bouchard, Margules & Friedlander. The case was assigned to Vice Chancellor Donald Parsons. As counsel for Roche, Mr. Bouchard appeared numerous times before Vice Chancellor Parsons. (A18, ¶ 3).

Unbeknownst to Meso, Mr. Bouchard was simultaneously representing Vice Chancellor Parsons in an unrelated matter in Delaware federal court ("DelCOG Litigation"). On October 25, 2011, the Delaware Coalition for Open Government ("DelCOG") sued Vice Chancellor Parsons, the other four judicial officers of the Court of Chancery, the Court of Chancery, and the State of Delaware, contending that by conducting arbitrations that were closed to the public, they were violating the First Amendment. (A18, ¶ 5). While Mr. Bouchard formally represented only the State of Delaware in the district court, he appeared and submitted filings on behalf of all the defendants, including Vice Chancellor Parsons. Mr. Bouchard submitted letters on Vice Chancellor Parsons' behalf (A36-37), filed briefs on his behalf, (A42), and argued summary-judgment motions on his behalf (A53).

On August 30, 2012, the federal District Court ruled against Vice Chancellor Parsons and the other judicial officers of the Court of Chancery, enjoining them from conducting any further arbitrations in secret and declaring that the statute and rules under which the arbitrations were being conducted were unconstitutional. *DelCOG v. Strine*, 894 F. Supp. 2d 493 (D. Del. 2012), *aff'd*, 733 F.3d 510 (3d Cir. 2013). At the same time, the District Court dismissed the claims against the Court of Chancery and the State of Delaware on sovereign immunity grounds. *Id.* at 494 n.1.

Vice Chancellor Parsons and the other four Court of Chancery judicial officers appealed to the U.S. Court of Appeals for the Third Circuit. (A135). In that appeal, Mr. Bouchard formally represented Vice Chancellor Parsons and the other judges. (A138). After the Third Circuit affirmed, Vice Chancellor Parsons and the other judicial officers filed a petition for certiorari to the Supreme Court of the United States, wherein Mr. Bouchard continued to represent Vice Chancellor Parsons. (A141, A144). The Court denied the petition.

In all, Mr. Bouchard represented Vice Chancellor Parsons from 2011 until March 24, 2014. (A19, ¶ 10). Thus, while he represented Vice Chancellor Parsons, Mr. Bouchard also represented Roche before Vice Chancellor Parsons in the *Meso* Litigation, including during the briefing and argument of a summary-judgment motion that resulted in partial summary judgment for Roche on February 22, 2013, a five-day bench trial, and post-trial arguments on November 29, 2013. (A20, ¶ 12).

Neither Vice Chancellor Parsons nor Mr. Bouchard ever disclosed the representation to Meso. (A19, ¶ 11).

On March 20, 2014, Mr. Bouchard was nominated to be the Chancellor of the Court of Chancery. (A20, ¶ 13). He was confirmed on April 9, 2014 and withdrew as counsel on April 29, 2014. *Id.* Vice Chancellor Parsons issued judgment in Roche's favor on June 25, 2014. (A20, ¶ 14). The Delaware Supreme Court affirmed on June 18, 2015. *Meso Scale Diagnostics, LLC. v. Roche Diagnostics GMBH*, 116 A.3d 1244 (Del. 2015).

In early 2018, Jacob Wohlstadter, the President and Chief Executive Officer of Meso, was conducting Internet research and discovered for the first time that Mr. Bouchard had represented Vice Chancellor Parsons in the DelCOG Litigation during his representation of Roche in the *Meso* Litigation. (A20, ¶ 15). Mr. Wohlstadter immediately notified Jonathan Klein-Evans, the Vice President and General Counsel of Meso, and Meso's Chief Legal Officer of this revelation, about which all were previously unaware. (A20, ¶ 16). They were shocked that Vice Chancellor Parsons had never disclosed this fact or recused himself from the *Meso* Litigation. *Id.*

After Meso learned of this conflict of interest, and despite its involvement in another trial at the time, Mr. Klein-Evans led a careful investigation of the issue. (A21, ¶ 17). The investigation confirmed that no one at Meso was aware of Mr.

Bouchard's representation of Vice Chancellor Parsons. *Id.* Nor was there any indication that it had been disclosed. *Id.*

At that point, Mr. Klein-Evans undertook a search for counsel to determine whether Meso had grounds for judicial relief. (A21, ¶ 18). Over the following months, Mr. Klein-Evans reached out to numerous law firms (other than several of which he would have consulted but which he knew would be conflicted), in an attempt to obtain representation with regard to this matter. (A21, ¶ 19). With the exception of one firm, which immediately declined representation upon hearing the issue implicated by the case, each encounter included multiple communications, and involved that firm's analysis of conflicts and the various issues raised by the case. Each time, the firm ultimately reached the conclusion that it was either unwilling or unable to undertake representation. (A21, ¶ 20). And each time a firm reached that conclusion, Mr. Klein-Evans promptly renewed his search for legal representation. (A21-22, ¶ 21).

It was not until July 2018—after six firms had declined representation—that Meso found a firm willing to represent it in this matter. (A22, ¶ 22). Upon agreeing to undertake representation, Consovoy McCarthy PLLC[1] had to conduct its own investigation of these issues in order to determine that Meso had grounds to set aside

[1] After the complaint was filed, the law firm changed its name from Consovoy McCarthy Park PLLC to Consovoy McCarthy PLLC.

the judgment. *Id.* But Consovoy McCarthy does not have an office in Delaware or an attorney admitted to the Delaware bar. (A22, ¶ 23). Hence, Meso still needed to secure Delaware counsel in order to seek judicial relief. *See* Ch. Ct. R. 170. Five additional Delaware firms were approached but ultimately declined to undertake representation. (A22, ¶ 23). In other words, even after Consovoy McCarthy had been retained and had adequately familiarized itself with the record, Meso was still unable to file this action. On January 24, 2019, Meso finally secured David L. Finger of Finger & Slanina, LLC to represent it in this matter. *Id.*

B. PROCEEDINGS BELOW

On February 27, 2019, Meso filed a complaint in the Court of Chancery seeking to vacate the judgment in the *Meso* Litigation.[2] Meso claimed relief under Chancery Court Rules 60(b)(4) and 60(b)(6). Meso argued that the judgment was "void" under Rule 60(b)(4) because it was rendered in a manner inconsistent with due process, as Vice Chancellor Parsons had adjudicated the case despite the unconstitutional appearance of bias. Meso also argued that it was entitled to relief under Rule 60(b)(6), which authorizes courts to set aside a judgment for "any other reason justifying relief from the operation of the judgment," as Vice Chancellor

[2] Meso originally filed a Rule 60(b) motion to vacate the judgment in Case No. 5589-VCP on February 22, 2019. The clerk of the Court of Chancery thereafter instructed Meso to seek relief through a new action. (*See* A17, n.*). Meso promptly filed a new complaint promptly after receiving that instruction. *Id.*

Parsons' undisclosed conflict of interest created the "extraordinary circumstances" warranting relief.

Roche moved to dismiss the complaint under Chancery Court Rule 12(b)(6), arguing that Meso had failed to state a claim for relief under either Rule 60(b)(4) or Rule 60(b)(6). The court granted the motion and dismissed the complaint with prejudice. (Ex. B at 4).

First, the court held that Meso had failed to state a claim for relief under Rule 60(b)(4). The court assumed that Meso's due process rights were violated because of the appearance of judicial bias. (Ex. B at 9). According to the court, however, only *certain* violations of due process could render a judgment "void." (Ex. B at 10-16). For a judgment to be "void," the court concluded, a party had to be denied due process through deprivation of "notice or an opportunity to be heard." (Ex. B at 12). Because the court concluded that Meso's due process violation did not fit within these parameters, it held that the judgment could never be "void" under Rule 60(b)(4). (Ex. B at 16).

Second, the court held that Meso had failed to state a claim for relief under Rule 60(b)(6). According to the court, Meso's request was untimely because Meso had not specifically alleged that its attorneys were unaware of the conflict during the *Meso* Litigation. (Ex. B at 17). The court also found that Meso's explanation for not seeking relief sooner—that Meso could not secure local counsel despite diligent

efforts—were "weak excuses." (Ex. B at 20). In addition, the court concluded that the relevant circumstances did not support relief under Rule 60(b)(6). In the court's view, Roche would be "severely prejudice[d]" if the judgment was vacated, Meso would suffer no injustice if it was denied relief, and the judicial ethics violation Meso identified was "technical" and not "serious." (Ex. B at 21-22).

The court dismissed Meso's complaint with prejudice, and Meso appealed.

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY FINDING THAT MESO FAILED TO STATE A CLAIM FOR RELIEF UNDER RULE 60(B)(4).

A. QUESTION PRESENTED

The question presented is whether a party who was denied due process because its case was decided by a judge with "an unconstitutional potential for bias," *Williams*, 136 S. Ct. at 1905, can obtain relief under Chancery Court Rule 60(b)(4) because the judgment is "void." The issue was raised in Meso's Answering Brief in Opposition to Motion to Dismiss. (D.I. 12 at 9-32).

B. STANDARD OF REVIEW

"The decision of the Court of Chancery granting a motion to dismiss under Court of Chancery Rule 12(b)(6) is reviewed by this Court de novo." *Feldman v. Cutaia*, 951 A.2d 727, 730 (Del. 2008). "This Court, like the Court of Chancery, is required to accept the well-pled allegations of the [complaint] as true and draw reasonable inferences in favor of the plaintiff." *Id.* at 731. "Dismissal is appropriate only after a judicial determination 'with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiff would not be entitled to relief.'" *Id.* (quoting *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 610-11 (Del. 2003)).

C. MERITS OF THE ARGUMENT

1. The Court of Chancery Erred in Holding that Meso's Deprivation of Due Process Did Not Render the Judgment "Void."

The Court of Chancery assumed that Meso's due process rights were violated when its claims were decided by a judge with an unconstitutional potential for bias. (Ex. B at 9). Yet the court held that the type of due process violation Meso alleged could never render the judgment "void." (Ex. B at 16). This was error.

Under Chancery Court Rule 60(b)(4), relief from a final judgment is required if "the judgment is void." A void judgment, in turn, is one "affected by a fundamental infirmity," which renders the judgment a "legal nullity." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010) (citing Black's Law Dictionary 1822 (3d ed. 1933)).

The standard for determining whether a judgment is "void" is well known. A judgment is "void" if "the court which rendered it lacked jurisdiction of the subject matter, or of the parties, or *acted in a manner inconsistent with due process of law*." *Kile v. United States*, 915 F.3d 682, 686 (10th Cir. 2019) (emphasis added) (citation omitted). Myriad state and federal courts have recognized and applied this standard. *See, e.g.*, *Trade Well Int'l v. United Cent. Bank*, 825 F.3d 854, 859 (7th Cir. 2016) ("[A] judgment is void if it was rendered in a manner inconsistent with due process of law." (citation omitted)); *City of N.Y. v. Mickalis Pawn Shop, LLC*, 645 F.3d 114,

138 (2d Cir. 2011) (same); *In re Sasson*, 424 F.3d 864, 876 (9th Cir. 2005) (same); *In re C.L.S.*, 225 A.3d 644, 649 (Vt. 2020) (same); *Essex Holding, LLC v. Basic Properties, Inc.*, 427 P.3d 708, 728 (Wyo. 2018) (same); *In re Marriage of Wendt*, 329 P.3d 567, 569 (Mont. 2014) (same). *See also* 11 Charles Alan Wright et al., *Federal Practice and Procedure: Federal Rules of Civil Procedure* § 2862 (2018) (collecting cases).

Despite this overwhelming authority, the court held that that only *certain* due process violations render a judgment "void." For support, it relied on an unpublished decision from the Northern District of Alabama, *Harris v. Gordy*, which rejected the argument that "literally any due process violation that occurs in relation to a judicial proceeding automatically renders void an ensuing judgment or order." 2017 WL 4945211, at *10 (N.D. Ala. Nov. 1, 2017). *Harris*, however, involved a *criminal* conviction in state court. *Id.* The court in *Harris* made clear that it was not questioning the long-recognized rule that *civil* judgments rendered in violation of due process can be vacated as "void." *See id.* (holding that the "commonly articulated formulation" that "a judgment is 'void' if the court rendering it … 'acted in a manner inconsistent with due process" applies only to "*civil* judgment[s]" and not to "a *criminal* judgment entered by a State court") (emphasis in original). *Harris* provides no support for the Court of Chancery's conclusions here.

The court also relied on *United Student Aid Funds, Inc. v. Espinosa*, where the U.S. Supreme Court held that relief under Rule 60(b)(4) is available "only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." 559 U.S. at 271. But in so holding, the Supreme Court did not carve out due process violations like the one that occurred here as incapable of being "void." It instead simply made clear that Rule 60(b)(4) applied to *procedural* due process violations—not substantive due process violations. "'[D]ue process,' in the context of providing a foundation for declaring a judgment void, refers to *procedural*, rather than *substantive*, due process …." *Ex parte Third Generation, Inc.*, 855 So.2d 489, 492 (Ala. 2003) (emphasis in original). And the "hallmarks of procedural due process" are "notice and a meaningful opportunity to be heard." *Austin v. Univ. of Or.*, 925 F.3d 1133, 1139 (9th Cir. 2019) (citation omitted). Because Meso suffered a procedural due process violation, it is entitled to relief under Rule 60(b)(4). *See Heyne v. Metro. Nashville Pub. Schs.*, 655 F.3d 556, 566 (6th Cir. 2011) ("Procedural due process is not satisfied when a person has a protected interest under the Due Process Clause and the individual responsible for deciding whether to deprive that person of his interest is biased.").

But even if *Espinosa* articulated a new, more limited standard, Meso satisfied it because Meso had no "opportunity to be heard." As the U.S. Supreme Court has

long recognized, an "opportunity to be heard" requires "an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (citation omitted). "The mere fact that a hearing was held … does not mean that [a litigant] was provided with the opportunity to be heard 'at a meaningful time and in a meaningful manner' as required to satisfy due process." *C. Line, Inc. v. City of Davenport*, 957 F. Supp. 2d 1012, 1040 (S.D. Iowa 2013) (citation omitted). "To ensure that the opportunity is meaningful," there are "aspects of due process [that are] irreducible minimums," including that "whenever due process requires a hearing, the adjudicator must be impartial." *Today's Fresh Start, Inc. v. L.A. Cnty. Off. of Educ.*, 303 P.3d 1140, 1149 (Cal. 2013) (citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009)) (quotation marks omitted). Because Meso was denied this impartial judge, it had no "opportunity to be heard" in violation of its due process rights.

The court's decision also contravenes *Williams*. In *Williams*, the U.S. Supreme Court held that it is "structural error" when a judge with an "unconstitutional potential for bias" renders a judgment. 136 S. Ct. at 1905, 1909. It is inconceivable that a due process violation that is "structural error," *id.*, would not also cause the case to be "affected by a fundamental infirmity," *Espinosa*, 559 U.S. at 270. Indeed, under the court's reasoning, a judge could admit to taking a bribe to rule against a party, and the resulting judgment would not be "void" if the biased

judge gave the party "notice, reasonably calculated to afford the parties an opportunity to be heard." (Ex. B at 11-2). That cannot be right. *See Williams*, 136 S. Ct. at 1909. *See also Margoles v. Johns*, 660 F.2d 291, 298 (7th Cir. 1981) ("Had the trial judge in fact been corrupt, the plaintiff would have been entitled, on due process grounds, to have the judgment set aside" under Rule 60(b)(4)).

The Court of Chancery found it "unlikely" that the Supreme Court in *Williams* intended to implicitly "overrule settled precedent" that "failures to recuse" are not a basis to vacate a judgment as "void." (Ex. B at 12-15). But the Court needed to do no such thing. To be sure, mere recusal violations do not create "void" judgments under Rule 60(b)(4). *See Copeland v. Manuel*, 1994 WL 665257, at *2 (Del. Nov. 22, 1994) ("At common law, the judgments of disqualified judges were deemed as voidable but not void, thus allowing for subsequent decisions based on such rulings to stand."); *Morrison v. Walker*, 2016 WL 7637672, at *6 & n.3 (E.D. Tex. Dec. 7, 2016) (same). But Meso has never claimed otherwise. The fact that Vice Chancellor Parsons should have recused under every relevant authority is *evidence* that "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Caperton*, 556 U.S. at 877. If the failure to recuse is so severe that it deprives a litigant of *due process*, then the judgment is "void." *See id*.

The court also criticized Meso's request for relief as "unworkable" because "ruling in Meso's favor would mean that any decision or judgment in cases before

Chancery in which now-Chancellor Bouchard was involved during the coalition litigation are instantly void without any additional analysis." (Ex. B at 15). But that is not true. There are a host of other factors that could distinguish this case from others, including whether the judge or Mr. Bouchard disclosed the representation, *see, e.g.*, *Plaza-Ramirez v. Sessions*, 908 F.3d 282, 286 (7th Cir. 2018) (due process claim based on bias can be waived), and the level of Mr. Bouchard's "involvement" in the underlying litigation, *see, e.g.*, Ala. Jud. Inquiry Comm'n Op. 96-616 (disqualification "only applies to the particular attorney who represents the judge and not to other members of that attorney's firm"); Ariz. Ethics Op. 02-05 (disqualification required "only when it is the judge's own lawyer who appears" and not "when it is another member of the Attorney General's Office that appears before the judge"). In any event, the fact that other litigants also may have been denied due process is not a valid reason to ignore the law. *See McGirt v. Oklahoma*, 2020 WL 3848063, at *19, 21 (U.S. July 9, 2020) (fear of "unsettl[ing] an untold number of convictions and frustrat[ing] the State's ability to prosecute crimes in the future" is "not a license for us to disregard the law"). The court erred in denying Meso relief under Rule 60(b)(4).

2. The Judgment Against Meso Was Rendered in a Manner Inconsistent with Due Process.

As noted, the Court of Chancery did not reach the merits of Meso's *Caperton* claim. If this Court reaches the merits in the first instance, it should hold that Meso's

due process rights were violated. The Due Process Clause of the Fourteenth Amendment prohibits the States from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV. "It is axiomatic that 'a fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton*, 556 U.S. at 876 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). The Due Process Clause guarantees "an absence of actual bias" on the part of a judge. *Williams*, 136 S. Ct. at 1905 (citation omitted). But bias "is easy to attribute to others and difficult to discern in oneself." *Id.* To establish "an enforceable and workable framework," therefore, the U.S. Supreme Court applies "an objective standard" that "avoids having to determine whether actual bias is present." *Id.* Courts must ask "not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, 'the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Id.* (quoting *Caperton*, 556 U.S. at 881). "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Murchison*, 349 U.S. at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

Here, the risk of bias was simply "'too high to be constitutionally tolerable.'" *Williams*, 136 S. Ct. at 1903 (quoting *Caperton*, 556 U.S. at 872). For several

reasons, a reasonable observer would conclude that there is a serious potential for bias when the attorney representing a party is also representing the trial judge in another matter.

First, as in *Caperton*, the judge may feel a "debt of gratitude" to the attorney even if the judge believes he can remain impartial. *Caperton*, 556 U.S. at 882. A client usually will know and be grateful when his attorney, for example, put in long nights to draft a brief, took an especially effective deposition, or went above and beyond to win an important motion. *See* Gilbert B. Feibleman, *Client Relations and Attorney Fees: Tips from the Trenches*, Family Lawyer Magazine (Oct. 31, 2011), familylawyermagazine.com/articles/client-relations-and-attorney-fees-tips-from-the-trenches/ ("Cultivating a happy client takes more than just doing your job well. It takes the creation of a partnership with your client. … When you work late or on the weekend, make it a habit to call the client. They will appreciate that you are working hard for them."). A judge, in particular, likely can recognize when his attorney has done his duty to "zealous[ly] advocate on behalf of [his] client." Del. Lawyers R. of Prof. Cond., Preamble at 8. The judge also might feel gratitude if the lawyer is minimizing legal bills by writing off time or charging a reduced rate, especially if those bills are being paid by the judge personally or are being paid out of the court's budget. *See* Feibleman, *Client Relations and Attorney Fees: Tips from the Trenches*.

Second, that the attorney is representing the judge suggests that the judge has a favorable view of that attorney's character and legal skills, which may cause the judge to be particularly deferential to the lawyer's arguments. *See id.* (counseling lawyers to remember that "[t]he client came to you believing you are the best in the business and you should not give them any reason to doubt their own judgment"). Hence, a judge might be less likely to closely scrutinize his own lawyer's factual or legal assertions if he believes from his personal experience that the lawyer makes sound arguments. *See* John Cannizzaro, *Prosecutorial Ethics: New Insights after 75 Years of Jurisprudence*, 45-Jun Prosecutor 20, 27-28 (2011) ("It is your reputation that stays with all attorneys …. [I]f judges can trust you, you are going to have better results for you in your career."). The judge also could be less likely to issue judicial warnings or impose sanctions if doing so could undermine the lawyer's effectiveness in the judge's case.

Third, when an attorney is representing a judge, he or she likely will engage in ongoing, private conversations about the status of the judge's case. Del. R. of Prof. Cond. 1.4 ("A lawyer shall … keep the client reasonably informed about the status of the matter."); *id.* at comment 4 (encouraging lawyers to have "regular communication with clients"). It would be reasonable for an opposing party to be concerned that these communications may touch on that party's case before the judge. *See* Del. Judges' Code of Jud. Cond. R. 2.9 ("A judge … should neither

initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding"). At a minimum, a reasonable observer could conclude that there was a special relationship between the judge and his or her attorney that will cause the judge to be predisposed to decide the case in favor of his attorney's client.

Given the serious conflicts created by this relationship, it is no surprise that jurisdictions across the country require recusal in these situations. *See Caperton*, 556 U.S. at 888 (a court considering a due process claim must "take into account the judicial reforms the States have implemented to eliminate even the appearance of partiality"). Bar associations and ethics committees uniformly require a judge to recuse when his or her attorney appears before the judge in another matter. *See, e.g.*, ABA Informal Op. 1477 (1981) ("A judge must recuse himself or herself from adjudicating cases in which a litigant is represented by the judge's own attorney, whether the lawyer is representing the judge in a personal matter or in a matter pertaining to the judge's official position or conduct, subject to the rule of necessity."); Ala. Jud. Inquiry Comm'n Op. 96-616 (same); Mich. Bar Standing Comm. on Ethics Op. JI-39 (same).

Similarly, numerous courts—including courts in Delaware—have held that a judge is disqualified from serving in a case where a party's attorney is representing the judge in another matter. *Beebe Med. Ctr., Inc. v. InSight Health Servs. Corp.*, 751 A.2d 426, 432-39 (Del. Ch. 1999) (vacating an arbitral award because the

arbitrator failed to disclose that one of the lawyers was representing the arbitrator in another matter); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1110-12, 1120 (5th Cir. 1980) (despite already "lengthy litigation," ordering the case to be retried before a new judge and jury because "a reasonable person with knowledge of the … the legal representation of the judge by Brock might very well question the judge's impartiality in a trial involving Paul Brock as chief counsel for a litigant"); *In re Disqualification of Badger*, 546 N.E.2d 929, 929 (Ohio 1989) (disqualifying judge because the judge "is and has been represented in unrelated matters by counsel for one of the defendants in the instant case"); *Berry v. Berry*, 765 So.2d 855, 857 (Fl. Dist. Ct. App. 2000) (reassigning judge where "four months after the trial, the wife discovered that her husband's attorney also represented the judge in his own dissolution proceeding").

The ethical rules requiring recusal when a judge's attorney appears before the judge are broad and uncompromising. Recusal is required even if the attorney is representing the judge "in a matter pertaining to the judge's official position or conduct." ABA Informal Op. 1477; Ala. Jud. Inquiry Comm'n Op. 96-616 (same); *Badger*, 546 N.E.2d at 929 (same). Recusal is required even if the judge is not paying for the legal services and had no role in selecting the counsel. *Id.* And recusal is required even if there is no evidence that the judge is actually biased. *Potashnick*, 609 F.2d at 1112 (ordering the case to be retried even though the judge "tried the

case fairly and efficiently" and "none of the parties allege any bias or prejudice in his handling of the matter"); *Badger*, 546 N.E.2d at 929 (same); *Berry*, 765 So.2d at 858 (same); *Smith v. Sikorsky Aircraft*, 420 F. Supp. 661, 662 (C.D. Cal. 1976) (same).

Because Mr. Bouchard was representing Vice Chancellor Parsons in the DelCOG litigation, then, Vice Chancellor Parsons had an obligation to recuse from this case—period. At that point, another judge (*i.e.*, a judge not being represented by Mr. Bouchard) could have been designated to preside over the case—even one from outside the Court of Chancery, if necessary. Del. Const. art. IV, § 13(2) (the Chief Justice may "designate one or more of the State Judges … to sit in the Court of Chancery … to hear and decide such causes in such Court and for such period of time as shall be designated"); *New Castle Cnty. v. Christiana Town Ctr., LLC*, 2004 WL 1835103 at *1 n.1 (Del. Ch. Aug. 16, 2004). "Ample precedent shows that designation can be used effectively." *Mass. Mut. Life Ins. Co. v. Certain Underwriters at Lloyd's of London*, 2010 WL 3724745, at *4 & n.4 (Del. Ch. Sept. 24, 2010) (listing cases); ABA Informal Op. 1477 ("Adequate procedures are available for substitution of judges or transfer of cases when a judge is unable to or cannot properly sit in a particular case"). Instead, Vice Chancellor Parsons did not disclose the conflict and continued to preside over this case. That was a due process violation.

II. THE COURT OF CHANCERY ERRED IN FINDING THAT MESO FAILED TO STATE A CLAIM FOR RELIEF UNDER RULE 60(B)(6).

A. QUESTION PRESENTED

The question presented is whether the Court of Chancery erred in refusing to grant relief under Chancery Court Rule 60(b)(6) on the grounds that Meso's request was untimely and that no "extraordinary circumstances" warranted such relief. The issue was raised in Meso's Answering Brief in Opposition to Motion to Dismiss. (D.I. 12 at 32-44).

B. STANDARD OF REVIEW

The Court of Chancery's decision granting a motion to dismiss is reviewed by this Court *de novo*. *Feldman*, 951 A.2d at 730.

C. MERITS OF THE ARGUMENT

1. Meso Adequately Alleged a Rule 60(b)(6) Violation.

Under Chancery Court Rule 60(b)(6), a court may set aside a judgment for "any other reason justifying relief from the operation of the judgment." Rule 60(b)(6), in other words, "vest[s] power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Senu-Oke v. Broomall Condo., Inc.*, 2013 WL 5232192 at *1 (Del. Sept. 16, 2013). Under this catch-all provision, relief is warranted if the party shows "extraordinary circumstances." *Jewell v. Div. of Soc. Servs*., 401 A.2d 88, 90 (Del. 1979). Put differently, Rule 60(b)(6) "acts as a safety valve allowing for final judgments to be

altered when there are compelling circumstances, including when the interests of justice demand." *O'Conner v. O'Conner*, 98 A.3d 130, 134 (Del. 2014).

A court deciding whether to grant relief under Rule 60(b)(6) when a judge has failed to recuse must "consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) (vacating a judgment under Federal Rule of Civil Procedure 60(b)(6) where the parties learned after the trial that the judge had a potential conflict that could have been the basis for disqualification at trial); *In re Estate of Melson*, 1998 WL 1033062 at *3 (Del. Ch. Dec. 3, 1998) (following the federal standard); *Stevenson v. Delaware*, 782 A.2d 249, 256, 258 (Del. 2001) (adopting *Liljeberg* standard). Meso met that standard here.

As an initial matter, there is no question that Vice Chancellor Parsons needed to recuse under the standards imposed by the Delaware Judges Code of Judicial Conduct Rules. Like the jurisdictions in the ethics opinions discussed above, Delaware requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Del. Judges Code of Jud. Cond. R. 2.11(A); *see* Rule 2.3(B) ("A judge should avoid impropriety and the appearance of impropriety in all activities."); *Stevenson*, 782 A.2d at 255 (noting

that the Delaware Judges Code of Judicial Conduct is "modeled after the American Bar Association's Model Code of Judicial Conduct").

These judicial rules of conduct established a clear path for Vice Chancellor Parsons to follow. "When a judge knows, or as soon as a judge discovers, facts that would lead a reasonable person to question his or her impartiality in a particular matter, it is essential that he or she promptly disclose that information." *Stevenson*, 782 A.2d at 256. "Prompt disclosure of such information permits the timely filing of a motion for recusal." *Id.* After the judge discloses the information, the judge should "engage in a two-part analysis to determine whether disqualification is appropriate." *Id.* at 255. The judge must first be satisfied, "as a matter of subjective belief, that he or she can proceed to hear the matter free of bias or prejudice." *Id.* (citation omitted). Second, even if the judge "believes that he or she is free of bias or prejudice," the judge must then "objectively examine whether the circumstances require recusal because there is an appearance of bias sufficient to cause doubt as to the judge's impartiality." *Id.* (citation omitted).

As explained, Vice Chancellor Parsons did not follow these requirements. He never disclosed the conflict. And, as explained above, the fact that Roche's attorney was also representing Vice Chancellor Parsons in another matter unquestionably created "an appearance of bias sufficient to cause doubt as to the judge's

impartiality." *Stevenson*, 782 A.2d at 255 (citation omitted). This failure to recuse was grave error.

This recusal violation is severe enough to warrant relief under Rule 60(b)(6). First, if the judgment stands, there is a "risk of injustice" to Meso in this case. *Liljeberg*, 486 U.S. at 864. Mr. Bouchard was representing Vice Chancellor Parsons while also appearing before him for *more than two years*. During that time period, Vice Chancellor Parsons dismissed one of Meso's claims on summary judgment and held a five-day bench trial and post-trial hearing in which he ultimately ruled for Roche. Vice Chancellor Parsons' extensive "personal involvement in the outcome" of this case thus "is an important factor" indicating that there is a high risk of injustice to Meso. *Stevenson*, 782 A.2d at 258. Indeed, this Court has cautioned that "the risk that injustice might result from a judge's participation in a proceeding despite the appearance of partiality" is "particularly acute" where the ultimate decision is "in the hands of the trial judge." *Id*. *Compare with United States v. Butcher*, 56 M.J. 87, 92 (C.A.A.F. 2001) (no risk of injustice because "[t]he military judge was not called upon to exercise discretion on any matter of significance"). For Meso, a small company litigating claims worth hundreds of millions of dollars, the risk of injustice here is unacceptable.

Second, granting relief to Meso would not "produce injustice in other cases." *Liljeberg*, 486 U.S. at 864. There is no indication that granting relief for Meso will

disrupt the resolutions of any other cases. Neither Roche nor the Court of Chancery identified any other parties seeking similar relief. There also are a host of other factors that could distinguish this case from others, including whether the judge or the attorney disclosed the representation and whether the party moved for relief in a timely fashion.

Third, refusing to grant relief to Meso "risk[s] undermining the public's confidence in the judicial process." *Liljeberg*, 486 U.S. at 864. Mr. Bouchard's representation of Vice Chancellor Parsons created a conflict of interest that Vice Chancellor Parsons was obligated to address. But, "by his silence," Vice Chancellor Parsons "deprived [Meso] of a basis for making a timely motion for a new trial and also deprived it of an issue on direct appeal." *Id.* at 867. *See also Stevenson*, 782 A.2d at 256 ("[T]he Court [in *Liljeberg*] noted that the judge's failure to disclose this information deprived the affected party of the timely opportunity to file a recusal motion before judgment"). Setting aside the judgment would likely "prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." *Liljeberg*, 486 U.S. at 868. Indeed, the need to ensure public confidence in the judicial process is especially strong here because Mr. Bouchard became Chancellor while Vice Chancellor Parsons was preparing his decision. Meso is entitled to relief under Rule 60(b)(6).

2. The Court of Chancery Erred in Finding Meso's Claim Untimely.

The Court of Chancery incorrectly found that Meso's Rule 60(b)(6) claim was untimely. (Ex. B at 17-20). "[T]here is no limitations period for filing a motion to reopen under Rule 60(b)." *O'Conner*, 98 A.3d at 134. "This is because Rule 60(b) acts as a safety valve allowing for final judgments to be altered when there are compelling circumstances, including when the interests of justice demand." *Id.* Although there is no set time limit, the movant still "must exercise diligence and act without unreasonable delay." *Shipley v. New Castle Cnty.*, 975 A.2d 764, 770 (Del. 2009).

Here, Meso's request for relief under Rule 60(b)(6) was timely because Meso exercised diligence and acted without unreasonable delay. *Id.* As set forth in the Complaint, Meso was unaware of the conflict of interest until early 2018, because neither Vice Chancellor Parsons nor Roche's attorney disclosed the relationship. (A19-21, ¶¶ 11, 15, 17); *see Bouret-Echevarría v. Caribbean Aviation Maint. Corp*., 784 F.3d 37, 44 (1st Cir. 2015) ("A reasonableness inquiry evaluates whether a movant acted promptly when put on notice of a potential claim."). Meso thoroughly investigated the undisclosed conflict of interest, and it sought relief once it was able to secure Delaware counsel. (A21-22, ¶¶ 17-24.) This plainly satisfies the diligence requirement. *See, e.g.*, *Bouret-Echevarría*, 784 F.3d at 44 (delay excused where

movants' "counsel was actively attempting to substantiate the motion and find local counsel with whom to associate").

The Court of Chancery found that Meso's request was untimely because Meso did not specifically allege that its attorneys were unaware of the conflict of interest. But Meso had no such obligation. Meso needed to provide only "a short and plain statement of the claim showing that [it was] entitled to relief," Ch. Ct. R. 8(a)(1), so that Roche had "fair notice of [the] claim," *VLIW Tech.*, 840 A.2d at 611. Meso had no obligation to specifically identify all individuals acting on Meso's behalf and allege that each one lacked knowledge of the conflict.

Regardless, Meso's complaint, fairly read, does allege that Meso's attorneys were unaware of the conflict. *See Feldman*, 951 A.2d at 731 (requiring the court to draw "reasonable inferences" in the plaintiff's favor). When Meso alleged that it "led a careful investigation of the issue" and that there was no "indication that [the conflict] had been disclosed," (A21, ¶ 17), Meso made clear that it had spoken with its attorneys about what they knew. No "careful investigation" could have occurred otherwise. Moreover, it is hornbook law that an attorney's knowledge is imputed to the client. (*See* Ex. B at 18). When Meso alleged that "no one at Meso was aware of Mr. Bouchard's representation of Vice Chancellor Parsons," (A21, ¶ 17), the allegation encompassed *everyone* whose knowledge could be imputed to Meso, including Meso's attorneys. And, if there were any doubt, Meso removed it at oral

argument when it made clear that "it had reached out to its agents, including its former counsel's law firms." (Ex. B at 18); *see, e.g.*, *MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at *7 n.41 (Del. Ch. May 5, 2010) (relying on clarification at oral argument to determine meaning of factual allegations). The court's constrained view of the complaint was error.

The Court of Chancery also found that Meso did not file soon enough after discovering the error in 2018. This too was error. As the complaint explains, Meso diligently (and unsuccessfully) searched for local counsel after discovering the conflict and sought relief promptly after securing representation.[3] (A21-22, ¶¶ 17-24). These were well-pleaded factual allegations that had to be accepted as true. *Feldman*, 951 A.2d at 731. Indeed, as the court recognized, Meso's complaint alleged serious ethics violations involving a former Vice Chancellor and the current Chancellor. (Ex. B at 22). It is hardly shocking that Meso had difficulty securing counsel to bring these claims. *See* James Edward McAleer, Jr., *Confessions of a South Georgia Lawyer* (2017), https://books.google.com/books/about/Confessions_of_a_South_Georgia_Lawyer.html?id=egRCDwAAQBAJ ("To sue a sitting judge before whom you will later have to appear is not the smartest thing a lawyer can do"). Meso's claims were timely.

[3] Although the Court of Chancery noted that Meso ultimately hired the same counsel who represented the plaintiff in the DelCOG litigation, the court correctly recognized that this fact was irrelevant to the timeliness inquiry. (Ex. B at 19).

3. The Court of Chancery Erred in Finding that Meso Failed to Allege Extraordinary Circumstances Warranting Relief.

The court also concluded that Meso had failed to allege the "extraordinary circumstances" necessary for relief under Rule 60(b)(6). None of the Court of Chancery's justifications are persuasive.

The Court of Chancery believed that vacating the judgment would require Roche to spend time and money to retry the case. (*See* Ex. B at 21). But this is true *every* time a judgment is vacated under Rule 60(b)(6). *See Liljeberg*, 486 U.S. at 868-69. Expending time and money to retry a case must be especially harmful to be a relevant factor. *See, e.g.*, *United States v. Cerceda*, 172 F.3d 806, 814-15 (11th Cir. 1999) (vacatur not warranted because retrying the case would divert resources from other cases, "seriously compromise the Government's ability to re-prosecute the defendants effectively," and cause "crime [to] go unpunished"). Here, the trial costs would pale in comparison to the hundreds of millions of dollars at stake in the underlying litigation. Moreover, Roche—a conglomerate worth billions of dollars—has not claimed that it could not afford the costs of a new trial.

The Court of Chancery next concluded that Meso would suffer no injustice if it was denied relief, as it could not identify a particular ruling or point in the case when it was prejudiced by Vice Chancellor Parsons's bias. (Ex. B at 21-23). But that is not the law. A party seeking vacatur "is not required to prove that the judge's potential bias actually prejudiced it by showing, for example, that certain rulings of

the judge were erroneous and that the errors were in some way attributable to the judge's potential bias." *Cerceda*, 172 F.3d at 813. Such a requirement would place a court in "the problematic position of determining whether the rulings indicated by the party were in fact erroneous even though the merits of the party's case were not properly before it." *Id.* "These uninformed or ill-considered determinations of error would have drastic consequences for subsequent appellate review of the party's case on the merits, and might have the effect of foreclosing such review altogether." *Id.* *See also Stevenson*, 782 A.2d at 258 ("[I]nquiry into the effect of participation by a judge under the appearance of partiality prong is not limited to a search for discrete rulings demonstrating prejudice"). Meso needed to show only that "the judge's impartiality 'might reasonably be questioned,'" *Stevenson*, 782 A.2d at 258, which it did.

The Court of Chancery, in passing, suggested the rule of necessity weighed against granting relief. (Ex. B at 21-22). But that rule is irrelevant here. The rule of necessity "means that a judge is not disqualified to (sit in) a case because of his personal interest in the matter at issue if there is no other judge available to hear and decide the case." *Nellius v. Stiftel*, 402 A.2d 359, 360 (Del. 1978) (citation omitted). But there were other judges available. The Delaware Constitution authorizes the Chief Justice "[u]pon written request made by the Chancellor … to designate one or more of the State Judges … to sit in the Court of Chancery … and to hear and decide

such causes in such Court and for such period of time as shall be designated." Del. Const. art. IV, § 13(2). Delaware courts regularly utilize this provision. *See, e.g.*, *New Castle*, 2004 WL 1835103 at *1 n.1.

The Court of Chancery determined that the ethics violation was merely "technical" because Vice Chancellor Parsons "would reap no personal benefit" if he prevailed in the lawsuit. (Ex. B at 21-22). But this is a factual finding that was inappropriate at the motion-to-dismiss stage. In any event, the available evidence suggests the opposite. In the DelCOG litigation, the plaintiffs were seeking to permanently enjoin Vice Chancellor Parsons and the other judges of the Court of Chancery from conducting any non-public proceedings under the new arbitration statute and rules. (A34). This private arbitration system was enormously important to the State of Delaware and the judicial officers of the Court of Chancery. *See* H.B. 49, 145th Gen. Assemb., 2009 Sess. (2009), legis.delaware.gov/BillDetail/19375 (establishing the new arbitration law to "preserve Delaware's pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters"). The plaintiffs also alleged that Vice Chancellor Parsons and the other judicial officers were unconstitutionally conducting proceedings in secret, and they sought to enjoin the rules that Vice Chancellor Parsons had adopted (Ch. Ct. R. 96, 97, and 98). (A34). It is unlikely that Vice Chancellor Parsons had no interest in

vindicating his actions in the wake of these public accusations. *See* Peg Brickley, *Secrecy Puts Judges on Defense in Delaware*, Wall Street Journal (Feb. 21, 2012), on.wsj.com/2Etg5MH ("Since 2009, the five judges of the Delaware Court of Chancery, one of the country's most powerful business courts, have been deciding certain big business cases in private. Now they are facing a lawsuit brought by a citizens group, questioning the legality of judge-run arbitrations and accusing the court of conducting secret proceedings.").

Last, the Court of Chancery concluded that the judicial ethics violation Meso identified was "technical" and not "serious" since Mr. Bouchard represented Vice Chancellor Parsons only in his official capacity. But this is a distinction without a difference. It is well recognized that recusal is required even when the attorney is representing the judge in an official capacity. *See* Ala. Jud. Inquiry Comm'n Op. 88-337 (disqualifying judge even though "[u]nder the facts stated the judge is named a party defendant in his official capacity only in a lawsuit pending in federal court"); Ala. Jud. Inquiry Comm'n Op. 96-616 ("[A] judge is disqualified from hearing cases in which a party is represented by an attorney who represents the judge in unrelated litigation and … such disqualification includes cases where the judge has been sued in his or her official capacity in the unrelated litigation"); Ariz. Ethics Op. 02-05 (judges represented "in litigation brought against them in a professional capacity" must "disqualify themselves in every case in which the lawyers representing them

appear" unless rule of necessity applies); Nev. Ethics Op. 99-007 (judges who are being represented in their "official, public capacity" must disqualify themselves when the attorney "appears before [the judge] as counsel of record in an unrelated matter"); N.Y. Ethics Op. 98-14 ("A judge who is being represented by the Attorney General of New York in a Federal District Court action [in his official capacity] must recuse in cases in which the attorney(s) handling that matter appear before the judge …."); Utah Ethics Op. 99-9 (whether the attorney is representing the judge in "personal [or] official matters" is "immaterial" to whether the judge must recuse); *Badger*, 546 N.E.2d at 929 (disqualifying Wisconsin judge even though "[t]he unrelated case pertains to the judge's official position"). *See also* ABA Informal Op. 1477 (requiring recusal when the judge is represented "in a matter pertaining to the judge's official position or conduct").

This is the rule for good reason. The attorney-client relationship that results is incompatible with the court's obligation to act impartially. The Court of Chancery erred in dismissing the complaint for failure to state a claim under Rule 60(b)(6).

CONCLUSION

For the reasons set forth above, Meso respectfully requests that this Court reverse the judgment of the Court of Chancery in its entirety.

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Respectfully submitted,

/s/ David L. Finger

David L. Finger (#2556)
FINGER & SLANINA, LLC
One Commerce Center
1201 N. Orange St., 7th fl.
Wilmington, DE 19801
302-573-2525
dfinger@delawgroup.com

William S. Consovoy
J. Michael Connolly
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, Virginia 22209
703.243.9423
will@consovoymccarthy.com
mike@consovoymccarthy.com

Patrick Strawbridge
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
617.227.0548
patrick@consovoymccarthy.com

Attorneys for Plaintiffs Meso Scale Diagnostics, LLC. and Meso Scale Technologies, LLC.

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