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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' REPLY BRIEF

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INTRODUCTION

In early 2018, Meso discovered that Roche's attorney, Andre Bouchard, had been representing Vice Chancellor Parsons in another matter at *the same time* that Roche and Meso were litigating their case in front of Vice Chancellor Parsons. Thus, during the time period when the parties were briefing and arguing a motion for summary judgment and conducting a five-day bench trial in front of Vice Chancellor Parsons, Roche's attorney was defending Vice Chancellor Parsons against allegations that he was conducting arbitrations in secret in violation of the First Amendment of the U.S. Constitution. Not once did either Vice Chancellor Parsons or Roche's attorney disclose their relationship to Meso.

Roche disputes none of this. Yet it continues to believe that this Court (like the court below) should feel so comfortable in what happened that Meso's complaint should be dismissed without permitting *any* factual inquiry into the matter. That is wrong.

Although Roche defends the trial court's denial of Meso's Rule 60(b)(4) claim, Roche devotes the bulk of its brief to urging affirmance on *alternative* grounds. This is not surprising. Meso alleged that its due process rights were violated, and, contrary to the decision below, a denial of due process like the one alleged here is a long-recognized ground for finding a judgment "void" under Rule 60(b)(4). Nor should this Court reach Roche's alternative arguments. This is a Court

of first review, and the trial court never determined whether Meso was denied due process due to Vice Chancellor Parsons' conflict of interest. Meso's Rule 60(b)(4) claim should be resolved by the trial court in the first instance and after full factfinding and discovery have occurred.

Roche's defense of the trial court's Rule 60(b)(6) determination is equally unavailing. Meso's request for relief was not untimely. Meso was unaware of the conflict until early 2018—because neither Vice Chancellor Parsons nor Roche disclosed the relationship—and it moved for relief as soon as it secured Delaware counsel. These well-pleaded facts must be accepted as true. Meso also did not fail to plead "extraordinary circumstances." As alleged in its complaint, Meso faces a high risk of injustice if the judgment is allowed to stand, there is little risk of injustice in other cases if the judgment is vacated, and the public's confidence in the judicial process will be damaged without vacatur. Roche's arguments to the contrary either depend on facts that were not alleged in the complaint or are legally flawed.

Try as it might, Roche cannot dispose of the case at this stage. Meso's allegations, if accepted as true, would entitle it to relief under both Rule 60(b)(4) and Rule 60(b)(6). The decision below should be reversed.

ARGUMENT

I. MESO STATED A CLAIM FOR RELIEF UNDER RULE 60(B)(4).

A. ROCHE'S LIMITED DEFENSE OF THE DECISION BELOW FAILS.

The Court of Chancery assumed that Meso's due process rights were violated, yet it held that the type of due process violation Meso alleged could never render the judgment "void" under Rule 60(b)(4). As explained, this holding was in error. (Meso Br. 12-17). In response, Roche barely defends the trial court's decision (devoting a mere three pages to the issue) and never even mentions the key case on which the trial court relied. (Ex. B at 10-11 (citing *Harris v. Gordy*, 2017 WL 4945211 (N.D. Ala. Nov. 1, 2017))). Roche's limited attempt to defend the trial court's opinion misses the mark.

Roche repeatedly insists that mere "recusal violations" do not render a judgment "void." (Roche Br. 13-14). But Meso has never disputed this. (Meso Br. 16). The fact that Vice Chancellor Parsons should have recused is *evidence* that "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 877 (2009). If a judge's failure to recuse is so severe that it deprives a litigant of *due process*, then the judgment is "void." *See id.* That is what Meso alleged here.

Roche chides Meso for relying on *Caperton* and *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016) because "these decisions arose, not on collateral attacks on

final, preclusive judgments under Rule 60(b) or comparable rules, but on direct review of the judgments themselves." (Roche Br. 14). This is a distinction without a difference. *Caperton* and *Williams* held that a party is denied due process when its case is heard by a judge with an "unconstitutional 'potential for bias.'" *Williams*, 136 S. Ct. at 1905 (quoting *Caperton*, 556 U.S. at 881). And it is well-established that a judgment is "void" when the court "acted in a manner inconsistent with due process of law." *Kile v. United States*, 915 F.3d 682, 686 (10th Cir. 2019) (citation omitted); (Meso Br. 12-13) (listing cases). Thus, if a party shows a due process violation under *Caperton*, the judgment will be "void" under Rule 60(b)(4). Roche provides no rationale for why *Caperton* and *Williams* would not apply in the context of Rule 60(b)(4).

Roche finally contends that the judgment could never be "void" because a litigant is not denied an "opportunity to be heard," *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270-71 (2010), when the judge is not "actually biased" but has only an unconstitutional "potential for bias." (Roche Br. 14-15). But the Supreme Court rejected this argument in *Caperton* and *Williams*. Because bias "is easy to attribute to others and difficult to discern in oneself," courts must apply "an objective standard" that "avoids having to determine whether actual bias is present." *Williams*, 136 S. Ct. at 1905. A litigant's due process rights are violated when "as an objective matter, . . . there is an unconstitutional 'potential for bias.'" *Id.* (quoting

Caperton, 556 U.S. at 881). Because Meso alleged a violation of its due process rights under this objective standard, it can obtain relief under Rule 60(b)(4).

B. THE COURT SHOULD NOT AFFIRM THE DECISION BELOW ON ALTERNATIVE GROUNDS.

Roche spends the bulk of its argument urging the Court to affirm the decision below on alternative grounds. (Roche Br. 15-22). The Court should decline the invitation. As this Court has recognized, "[i]t is preferable as a matter of the orderly administration of justice for the trial courts of this State to decide in the first instance all questions of law … so that this Court will have the benefit of the reasoning and analysis of the trial court." *State Farm Mut. Auto. Ins. Co. v. Dann*, 953 A.2d 127, 128 (Del. 2001). Only in "compelling instances," where "there are important and urgent reasons requiring an exception to this principle," should this Court decide an issue in the first instance. *Id.*

Here, because the trial court determined that the due process violation Meso alleged could never render the judgment "void," the court never considered whether Meso adequately alleged that its due process rights were violated. (Ex. B at 8-9). No compelling reasons justify this Court reaching this issue. The Court should remand the case to the trial court so that it can decide the issue in the first instance. *See, e.g.*, *Averill v. Bradley*, 2013 WL 603065 at *1, *disposition reported at* 62 A.3d 1223 (Del. 2013) ("[W]e do not address any of the alternative grounds argued by the State

to support dismissal of Averill's complaint because those issues, though raised below, were not addressed by the Superior Court in the first instance").

If the Court chooses to reach the issue, however, it should hold that Meso adequately pled that its due process rights were violated. As explained, the risk of bias from Vice Chancellor presiding over the case was simply "'too high to be constitutionally tolerable.'" *Williams*, 136 S. Ct. at 1903 (quoting *Caperton*, 556 U.S. at 872). (*See* Meso Br. 17-23). Roche contends that Meso's due process rights were not violated because the facts here were not as "extreme" as those in *Caperton* and *Williams*. (Roche Br. 18). That is both legally and factually wrong. To begin, the Court need not find the identical "extreme" facts that occurred in *Caperton* and *Williams* to find that Meso's due process rights were violated. Although *Caperton* and *Williams* are recent examples of due-process violations caused by a judge's failure to recuse, they are by no means the only ways in which a party can be deprived of due process. As the Supreme Court explained, it is irrelevant whether "[t]he Court's due process precedents … set forth a specific test governing recusal" in this precise situation because "[t]he principles on which [the Court's] [due process] precedents rest dictate the rule that must control." *Williams*, 136 S. Ct. at 1905. Here, Meso is entitled to relief if, "as an objective matter, 'the average judge in [Vice Chancellor Parsons'] position" would have had "an unconstitutional

'potential for bias.'" *Id.* (quoting *Caperton*, 556 U.S. at 881). Meso meets that standard.

Regardless, the facts here are "extreme" by any measure. Meso brought a case against Roche that was worth hundreds of millions of dollars. Under the Due Process Clause, it had the right to expect "a fair trial in a fair tribunal." *Caperton*, 556 U.S. at 876 (citation omitted). That is especially true where, as here, the bench trial put the ultimate decision "in the hands of the trial judge." *Stevenson v. Delaware*, 782 A.2d 249, 258 (Del. 2001). Yet Meso was forced to litigate this case before a judge who issued decisive pretrial rulings, post-trial findings of fact, and conclusions of law while simultaneously being represented by Roche's counsel. That was "constitutionally [in]tolerable." *See Caperton*, 556 U.S. at 877 (citation omitted).[1]

Roche next argues the risk of bias was low because Mr. Bouchard "represented all the members of the Court of Chancery in their official capacities only, in a case where they had no financial stake and where none of their individual actions was challenged." (Roche 20). That is wrong. The fact that Mr. Bouchard was representing Vice Chancellor Parsons in his official capacity does not lessen the conflict of interest. (Meso Br. 22-23, 35-36). The attorney-client relationship that

[1] Contrary to Roche's assertion, Meso does not seek a rule requiring "mandatory due-process recusal" whenever the "attorney representing a party is also representing the trial judge in another matter." (Roche Br. 18-19). Parties may always waive the conflict of interest. *See, e.g.*, *Plaza-Ramirez v. Sessions*, 908 F.3d 282, 286 (7th Cir. 2018) (due process claim based on bias can be waived).

results is incompatible with the court's duty to ensure the appearance of impartiality. *Id.*

That Vice Chancellor Parsons had no apparent "financial stake" in the *DelCOG* litigation also is not dispositive. (Roche Br. 20). It is often true that government officials are invested in the outcome of litigation in which they are named only in their official capacity and have no financial stake in the outcome. *See, e.g.*, *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013) (lawsuit against Governor Walker in his official capacity over a statute restricting collective bargaining rights of public unions); *Scott Walker Says Timing Was 'Just Right' for Right-to-Work Bill*, Pioneer Press (Feb. 25, 2015) (noting that Governor Walker, a "likely 2016 presidential candidate," has "staked his political profile on his confrontation with public unions"); *United States v. California*, 921 F.3d 865 (9th Cir. 2019) (lawsuit against Governor Newsom in his official capacity over California statutes relating to the enforcement of federal immigration law); Marissa Wenzke, *California Lawmakers Vow to Fight Trump Administration's Lawsuit Targeting 'Sanctuary State' Bills*, KTLA5 (Mar. 6, 2018) (then-candidate Newsom reacting to lawsuit and promising that "California won't be bullied by Donald Trump and Jeff Sessions, and we won't back down from defending law abiding residents"). Although these lawsuits were brought against the defendants in their official capacity and they had no apparent financial stake in the cases, no one would ever

suggest that these individuals had no interest in these cases. Indeed, the available evidence suggests that Vice Chancellor Parsons *would* have been invested in the outcome of the lawsuit against him. (Meso Br. 34-35).

Moreover, Roche is simply incorrect that "none of [Vice Chancellor Parsons'] individual actions was challenged." (Roche Br. 20). The *DelCOG* lawsuit challenged the constitutionality of the State's arbitration law, as well as the judges' *actions*. The plaintiffs in the *DelCOG* litigation were seeking a declaration that the rules that Vice Chancellor Parsons and the other judicial officers adopted (Chancery Court Rules 96, 97, and 98) were unconstitutional and an injunction enjoining the judges from conducting arbitrations in secret. (A034).

Roche finally argues that "the mere fact that a rule requires recusal says nothing about whether the Constitution does." (Roche Br. 21-22). Not so. The Supreme Court in *Caperton* made clear that 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." *Caperton*, 556 U.S. at 888. The Court in *Caperton* described in detail state codes of conduct because they were additional evidence that Caperton's due process rights had been violated. *Id.* at 888-89. Indeed, the dissent in *Caperton* specifically criticized the majority's use of state codes of conduct to find a due process violation. *See id.* at 892-93 (Roberts, C.J., dissenting) ("States are, of course, free to adopt broader recusal rules than the Constitution

requires … but these developments are not continuously incorporated into the Due Process Clause"). Meso adequately alleged that its due process rights were violated.[2]

[2] Contrary to Roche's assertion, Meso has not "recognized that the risk of actual bias in this situation is minimal." (Roche Br. 20-21 n.4). That "Mr. Bouchard's former firm" had 25 cases in the Chancery Court during the time is different from here, where Mr. Bouchard *himself* was representing Roche. *Id.*; (B337). It would not be surprising that some litigants in these cases would waive the potential conflict. *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").

II. MESO STATED A CLAIM FOR RELIEF UNDER RULE 60(B)(6).

A. MESO'S CLAIM WAS TIMELY.

Roche argues that Meso's request for relief under Rule 60(b)(6) was untimely because Meso "allowed nearly five years to pass" between the judgment and filing this complaint. (Roche Br. 24). But Meso did not "allow" this to happen. Meso was unaware of the conflict until early 2018—because neither Vice Chancellor Parsons nor Roche's attorney disclosed their relationship—and Meso was unable to secure Delaware counsel once it discovered the conflict. (Meso Br. 6-8). None of Roche's cases support finding Meso untimely here. (Roche Br. 24-25). *See, e.g.*, *Shipley v. New Castle Cty*., 975 A.2d 764, 771-72 (Del. 2009) (motion untimely because the movants provided no evidence showing "excusable neglect nor any other basis to relieve them of the consequences of unexcused delay").

Roche criticizes Meso's "sparse and carefully worded" allegations about its investigation into the conflict. (Roche Br. 25). But Meso properly alleged that it had spoken with its attorneys and they were unaware of the conflict. (Meso Br. 30-31). Nor was Meso's counsel evading the issue at oral argument. (*See* Roche Br. 26-27). Counsel spoke carefully in order to not waive attorney-client privilege. *See, e.g.*, (B351) ("I want to be careful how I answer [your question] because there are tricky issues of privilege, Your Honor. So I want to answer you directly but carefully").

Roche finally argues that Meso "allowed yet another year to elapse" after it discovered the conflict before filing. (Roche Br. 27). Again, Meso did not "allow" this to happen. Meso worked diligently to find local counsel but (not surprisingly) had difficulty securing representation. (Meso Br. 31). Roche's only argument is that Meso's version of events is not believable. Meso welcomes the opportunity to refute Roche's position under proper factfinding. In the meantime, Meso's allegations must be accepted as true at this stage. *See Feldman v. Cutaia*, 951 A.2d 727, 730-31 (Del. 2008). Meso's request for relief was timely.

B. MESO ALLEGED EXTRAORDINARY CIRCUMSTANCES WARRANTING RELIEF.

Roche next argues that Meso is not entitled to relief because it did not allege the factors necessary to show "extraordinary circumstances" justifying relief. (Roche Br. 29) (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988)). That is wrong.

Roche first contends that Meso has not shown a "risk of injustice" because it has not identified "any particular indicia of injustice resulting from Vice Chancellor Parsons' failure to recuse himself." (Roche Br. 29-30). But Meso need not identify a particular ruling or point in the case when it was prejudiced by Vice Chancellor Parsons' bias. (Meso Br. 32-33). Nor did Meso "effectively acknowledg[e] that [it] received a fair trial" in the *Meso* litigation. (Roche Br. 30). Vice Chancellor Parsons issued pretrial rulings, post-trial findings of fact, and conclusions of law while

simultaneously being represented by Roche's counsel. (Meso Br. 4-6). This high potential for bias denied Meso a fair trial, regardless whether actual bias caused particular judicial decisions. Roche also cannot dispute that the "injustice" it will suffer—expending resources to retry a case—exists in *every* case in which relief under Rule 60(b)(6) is granted.[3]

Roche next asserts that providing relief to Meso "would create a serious risk of injustice in each of the [25] cases in which Mr. Bouchard's firm appeared in the Court of Chancery while he and others in the firm were representing members of that court." (Roche Br. 32). But these cases will not be "automatically subject to relitigation." (*Id.* at 33). There are likely numerous distinctions between those cases and here, including whether the parties were aware of the conflict and the extent of Mr. Bouchard's involvement in the case. (Meso Br. 17).

Roche finally finds it "absurd" to conclude that upholding the judgment will undermine the public's confidence in the judicial process. (Roche Br. 34). But this Court should not be so flippant. This Court (rightly) prides itself on being the preeminent forum for businesses to resolve their disputes. Correcting this troubling result will go a long way toward ensuring other businesses that Delaware courts

[3] For the first time on appeal, Roche asserts that "contested facts underlying the 2014 judgment relate to events in 2003, meaning important evidence is no longer available." (Roche Br. 31). Roche forfeited this argument by not raising it below. Moreover, Roche provides no evidence to support its bold assertion that "important evidence is no longer available." *Id.*

remain a fair arbiter of disputes. Upholding the judgment below also will not "serve as a caution to other judges facing similar recusal issues." (*Id.* at 32 (citation omitted)). Quite the opposite, it will send the message that recusal obligations are not of the highest priority. Regardless, a stern reminder to other judges is cold comfort to Meso. The point of Rule 60(b)(6) is to relieve a party from a final judgment "upon such terms as are just," Ch. Ct. R. 60(b)(6), not merely to "serve as a caution" for the future, (Roche Br. 32) (citation omitted). Meso has alleged "extraordinary circumstances" justifying relief under Rule 60(b)(6).

C. THE CODE OF JUDICIAL CONDUCT REQUIRED RECUSAL.

1. Rule 2.11 Required Recusal.

Roche contends that Vice Chancellor Parsons did not violate Code of Judicial Conduct Rule 2.11 because he had no obligation to recuse. (Roche Br. 35-40). That is wrong. As an initial matter, Roche entirely ignores a critical error that occurred during the *Meso* litigation—Vice Chancellor Parsons never disclosed the conflict of interest. (Meso Br. 25-27). "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. Only then should the judge conduct the two-part analysis into whether disqualification is appropriate. *See id.* Roche has no defense for Vice Chancellor Parsons' failure to disclose the conflict.

Roche contends that Vice Chancellor Parsons had no duty to recuse because he was a "nominal" defendant who had no connection to the *DelCOG* litigation since the State was the "real party in interest." (Roche Br. 35-36). Roche similarly speculates that there never was (and never could have been) any "personal involve[ment]" between Vice Chancellor Parsons and Roche's attorney, Mr. Bouchard. (*Id.*). These assumptions and factual assertions contradict the allegations in Meso's complaint. (A023-24, ¶¶31-33). The Court cannot assume that Vice Chancellor Parsons' relationship with Roche's attorney did not contain all the hallmarks of the traditional attorney-client relationship, including, for example, that Vice Chancellor Parsons selected or advocated for Mr. Bouchard as his counsel, *see* Del. Rule of Prof. Conduct 1.16, comment 4; that he maintained frequent communication with Mr. Bouchard about the status of the litigation, *see id.* 1.4 & 1.4, comment 4; and that he made decisions about the direction of the lawsuit against him. *See id.* 1.2(a).

Roche relies heavily on various Delaware cases in which the judge had no obligation to recuse as evidence that Vice Chancellor Parsons did not need to recuse. (Roche Br. 37). But these cases are inapposite. *See Los v. Los*, 595 A.2d 381, 385 (Del. 1991) (holding that a party could not force a judge to recuse by suing him in federal court over his rulings, as doing so would allow a litigant to "'judge shop' through the disqualification process"); *Jones v. State*, 940 A.2d 1, 17-19 (Del. 2007)

(no appearance of bias merely because the judge "discuss[ed] the case in a public setting where she could be overheard and misconstrued"); *Gattis v. State*, 955 A.2d 1276, 1284-86 (Del. 2008) (no disqualification required where trial judge made "reference in her ruling to an unrelated case involving the same counsel … (in dicta)…"). Numerous courts—including in Delaware—have held that judges must recuse in precisely this situation. (Meso Br. 24-27) (listing cases).

Roche claims that the Judicial Conference of the United States "adopted [Roche's] position with respect to U.S. Department of Justice attorneys representing federal judges in official-capacity suits." (Roche Br. 38) (citing U.S. Jud. Conf. Comm. on Codes of Conduct, *Disqualification Issues Relating to Judge Being Sued in Official Capacity, Including Representation by Department of Justice,* Advisory Op. No. 102, 2009 WL 8484596 (June 2009)). Not only is this wrong, but the Conference's opinion *supports* Meso's position. In Advisory Opinion No. 102, the Judicial Conference concluded that because "[n]umerous lawsuits against judges are filed by disgruntled litigants and are patently frivolous," and the Department of Justice is statutorily obligated to represent the judge when sued in an official capacity, there were some cases (*i.e.*, "patently frivolous" cases) in which a local DOJ attorney may be able to represent the judge without requiring recusal. *Id.* at *1. That, of course, is not the case here. Moreover, the Conference cautioned that "when a judge accepts government representation, he or she must be attentive to situations

that require disqualification." *Id.* To avoid these conflicts, the judge should be represented by an attorney "from outside the judge's district" because that "would reduce the potential for disruption of the judge's docket stemming from multiple disqualifications that might otherwise occur if the assigned attorney had an extensive docket before the judge." *Id.* at *2. That is precisely what Vice Chancellor Parsons should have done.

Kentucky Ethics Opinion 96, on which the court in *Alred v. Commonwealth, Jud. Conduct Comm'n*, 395 S.W.3d 417, 431-32 (Ky. 2012), relied, is similarly distinguishable. In that opinion, a "narrow majority of the Committee" concluded that there is no "automatic, mandatory disqualification" as long as "the fact of representation … [is] disclosed on the record so that opposing parties may voice an objection." Ky. Jud. Ethics Op. JE-96, 2002 WL 34944002, at *1 (June 26, 2002). Again, that did not happen here. Nor were the facts in *Alred* "very close on its facts to the allegations here." (Roche Br. 37). In *dicta*, the *Alred* court noted that a judge need not recuse merely because an attorney appearing before the judge in an adversarial proceeding "represented the judge *at another time* in his official capacity." 395 S.W.3d at 432 (emphasis added). Mr. Bouchard's representations of Vice Chancellor Parsons and Roche, by contrast, occurred *simultaneously*. *Compare with* N.Y. Ethics Op. 92-54 ("A judge may permit his or her prior private attorney to appear before the judge *if more than two years have passed* since the

representation, and if the judge has no doubt about his or her impartiality." (emphasis added)).

Roche also contends that Meso's authorities "do not address the type of official-capacity representation at issue here, where the judge is a purely nominal defendant and the State is the real party in interest." (Roche Br. 39). As explained above, Vice Chancellor Parsons was not a "purely nominal defendant," *id.*, as the plaintiff in the *DelCOG* litigation was challenging the rules Vice Chancellor Parsons adopted implementing the arbitration law. Moreover, none of the authorities Roche cites justify the type of conflict at issue here. *See* Ky. Jud. Ethics Op. JE-102 Revised, 2003 WL 26088459, at *1 (Mar. 19, 2003) (addressing whether a judge should be "automatically disqualified" when the Attorney General represents the judge); *In re Disqualification of Reinbold*, 94 N.E.3d 570, 571 (Ohio 2017) (disqualification not required because there was "no evidence of any ongoing attorney-client relationship between" the judge and attorney). As Roche recognizes, the numerous state ethics opinions Meso provides draw no distinction based on the "type of official-capacity representation" that occurred. (Roche Br. 39-40). At bottom, there is not a single judicial ethics regime (including Delaware) under which Vice Chancellor Parsons' failure to disclose and failure to recuse were proper.

2. The Rule of Necessity Is Inapplicable.

Roche finally contends that Vice Chancellor Parsons was *forbidden* from recusing because of the rule of necessity. (Roche Br. 40-42). That is wrong too. (Meso Br. 33-34). 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). "Because the disqualification rule rests on sound public policy, the rule of necessity is strictly construed" and applies "only when the occasion truly requires." *In re Howes*, 880 N.W.2d 184, 201 (Iowa 2016) (citing *State ex rel. Brown v. Dietrick*, 444 S.E.2d 47, 55 (W. Va. 1994)); *State ex rel. Miller v. Aldridge*, 103 So. 835, 838 (Ala. 1925) ("The policy of the rule of disqualification is of paramount importance, and if it is to yield in any case it is only when there exists therefor a very great necessity to prevent a failure of justice").

Here, there were other judges "available to hear and decide the case." *Nellius*, 402 A.2d at 360. The Delaware Constitution authorizes the Chief Justice "upon 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 Cty. v. Christiana Town Ctr., LLC*, 2004 WL 1835103, at *1 n.1 (Del. Ch. Aug. 16, 2004)

(Judge Gebelein, Superior Court Judge, "sitting by designation as Vice Chancellor under Del. Const., Art. IV § 13(2)"); *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).

Roche's arguments against this approach are meritless. That this Court has declined to appoint a three-judge panel composed entirely of judges who are not on the Supreme Court says nothing about whether a single judge from outside of the Court of Chancery could have been appointed here. *See, e.g., Crosse v. BCBSD, Inc.*, 836 A.2d 492, 493 n.1 (Del. 2003). Roche simply asserts—without evidence—that it would have been "impracticable" to appoint another judge to this case. (Roche Br. 41). The rule of necessity has no application here.

CONCLUSION

WHEREFORE, for the reasons set forth above, as well as for the reasons set forth in its opening brief, Meso respectfully requests that this Court reverse the judgment of the Court of Chancery in its entirety.

Dated: September 15, 2020

Respectfully submitted,

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