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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE BAKER HUGHES, A GE COMPANY, DERIVATIVE LITIGATION	No. 169, 2023 On Appeal From: Court of Chancery Consol. C.A. No. 2019-0201-LWW PUBLIC VERSION FILED AUGUST 15, 2023

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NATURE OF PROCEEDINGS[1]

Baker Hughes Company is the second largest oilfield equipment and services company in the world. In 2018, GE owned 62.5% of Baker Hughes, then called BHGE. On November 13, 2018, BHGE announced the Transactions.

The Transactions had four parts. *First*, BHGE and GE amended the agreements that governed their commercial relationship. *Second*, the Conflicts Committee of the BHGE board waived the contractual lockup that prevented GE from selling any BHGE shares. *Third*, GE sold a portion of its BHGE shares to third parties in a secondary public offering. *Fourth*, BHGE repurchased a portion of its shares from GE. Investors and analysts reacted favorably to the Transactions.

Despite the positive market reaction, Plaintiffs sued four months later. Their core theory was that big brother GE robbed little brother BHGE to alleviate its purported liquidity crisis.

The complaint was long on rhetoric but short on specific allegations of unfairness. However, five of the nine members of the demand board had pleading-stage conflicts due to their past or current relationships with GE. The Court

[1] Undefined capitalized terms have the meanings from the Glossary in Appellant's Opening Brief. *See* Dkt. 9 ("OB"). This brief refers to GE affiliates by their 2018 names.

of Chancery ruled that demand was futile and that Plaintiffs stated breach of fiduciary duty claims against GE and the five GE-affiliated directors.

Baker Hughes faced the unenviable prospect of advancing litigation costs for multiple groups of defendants, committees, and advisors in a case with shallow allegations of unfairness. The BHGE board (the "Board") elected to delegate its authority concerning Plaintiffs' derivative claims to a special litigation committee (the "SLC"). The Board placed on the SLC an independent, disinterested director who had no involvement in the challenged conduct, Greg Ebel.

Mr. Ebel retained independent advisors and investigated the Transactions for more than nine months. The SLC's Counsel reviewed more than 111,000 documents. The SLC interviewed twenty-two witnesses. Mr. Ebel participated in all but two interviews.

The SLC determined Plaintiffs' claims were not worth pursuing. In October 2020, the SLC filed a motion to terminate the action (the "Motion to Terminate"). In support, the SLC filed a 320-page report, which cited 242 exhibits and 22 detailed interview memoranda.

In December 2022, the Court of Chancery held a hearing on the Motion to Terminate (the "Hearing"). Mr. Ebel provided live testimony. Plaintiffs cross-examined him.

The Court of Chancery carefully considered the *Zapata* record and determined there were no genuine issues of material fact concerning Mr. Ebel's independence, good faith, or reasonableness. The Court of Chancery granted the Motion to Terminate.

The *Zapata* process worked like it should have. The objective investigation of an independent director showed the absence of any "there" there. Extensive evidence, including ***internal GE documents***, showed the Transactions were favorable for BHGE. The Court of Chancery efficiently terminated derivative claims that were not in the company's best interests—claims that proceeded solely due to pleading-stage conflicts.

Plaintiffs do not like the result. They do not like *Zapata*. They would prefer to investigate and control their claims. However, Delaware law gives directors the authority to manage litigation assets. Here, the Board resolved its pleading-stage conflict by delegating its authority concerning this derivative action to the SLC.

Before the Court of Chancery, Plaintiffs leveled more than fifteen challenges to the SLC's independence, good faith, and reasonableness. On appeal, Plaintiffs repeat several of those challenges—and a new one they did not fairly present below. Plaintiffs couch their challenges in *Zapata* language. But the challenges are thinly veiled requests for this Court to alter *Zapata* and reverse the Court of Chancery's

ruling based on nothing more than Plaintiffs' disagreement with the SLC's process and conclusions.

SUMMARY OF ARGUMENT

1. **Denied**. The Court of Chancery has discretion to hear live testimony in connection with a *Zapata* motion to terminate. For that evidentiary tool to be meaningful, the Court of Chancery must make credibility determinations. That court must then determine from the testimony and the paper record whether there are genuine issues of disputed material fact about the SLC's independence, good faith, and reasonableness.

Here, Mr. Ebel testified at the Hearing. Plaintiffs never objected. Instead, they cross-examined him. The Court of Chancery observed Mr. Ebel and evaluated his credibility. This Court routinely defers to credibility determinations based on live witness testimony. This deference should apply here.

In any event, the pre-Hearing written record amply supports the Court of Chancery's decision.

2. **Denied**. The SLC adequately investigated and evaluated all material issues, including potential advisor conflicts. Plaintiffs never asserted advisor conflicts as a basis for the claims in their complaints or in their counsel's meetings with the SLC's Counsel. The SLC investigated the issue anyway. The SLC reasonably determined that the Transactions were fair.

3. **Denied**. The SLC acted reasonably regarding document collection and witness interviews. The Court of Chancery correctly rejected Plaintiffs' assertion that their preferred investigation playbook was mandatory for the SLC.

4. **Denied**. The SLC acted reasonably when it relied on the SLC's Advisors and when it withheld drafts of the SLC Report as work product. These actions were consistent with standard *Zapata* practice.

STATEMENT OF FACTS

A. BHI and GE O&G Combine Their Assets Under BHGE

The Transactions began with the failed merger of Baker Hughes, Inc. ("BHI") and Halliburton Company ("Halliburton"). In 2014, Halliburton agreed to acquire BHI for more than $34.6 billion. A0331–32. BHI expected anti-trust regulators to require BHI to divest assets, and GE Oil & Gas UK Limited ("GE O&G") expressed interest in certain BHI assets. A0332. BHI and Halliburton failed to obtain regulatory approval. *Id*.

In October 2016, BHI and GE O&G agreed to combine their assets. A0333. The combination transactions closed on July 3, 2017 (the "2017 Transactions"). A0339. Jeffrey Immelt, GE's then-CEO and Chairman, was the key transaction architect. A0333.

Leveraging GE's technology in the petroleum industry was a key rationale for the transaction. A0334; A0337. GE O&G contributed its successful turbomachinery and process solutions ("TPS") business to the newly formed BHGE. For decades, the TPS business had offered compression and power solutions built around GE turbines. A0337. GE's superior turbine technology gave BHGE an advantage in the growing liquefied natural gas market. A0334–35.

Among the 2017 Transactions, BHGE entered into more than a dozen agreements with GE and its subsidiaries that established the commercial and supporting relationships reflecting BHGE's status as a majority-owned GE subsidiary (the "Master Agreement Framework" or "MAF"). A0346–53. A key agreement in the MAF was a supply agreement governing BHGE's access to a range of GE products on preferential terms (the "2017 Supply Agreement"). A0347. For example, BHGE could purchase AGTs from GE Aviation at cost. *Id*.

BHGE's access to turbines manufactured by GE Aviation and GE Power gave it a significant competitive advantage. The planners behind the July 2017 Transactions thought the combination was a "marriage made in heaven." A0580.

After the 2017 Transactions, GE held approximately 62.5% of BHGE's voting rights. Public stockholders held the rest. A0341. The Stockholders Agreement gave GE the right to nominate a Board majority. A0343. However, the Stockholders Agreement contemplated a "Conflicts Committee" of independent directors. A0344–45. GE could not sell BHGE shares before July 3, 2019 without Conflicts Committee approval (the "Lockup). A0345.

If, at some point after the Lockup expired, GE reduced its BHGE ownership below 50% (the "Trigger Date"), the MAF would start to unravel. A0352.

B. GE Reevaluates Its BHGE Position, and BHGE Responds Proactively

In June 2017, GE announced that John Flannery would replace Mr. Immelt as CEO, effective August 1. A0338–39. On October 2, GE announced that Mr. Flannery had replaced Mr. Immelt as Chairman. A0354.

New management had a different view of BHGE. A0355. In November, Mr. Flannery announced a process to assess the potential monetization of GE's "non-core" businesses, including BHGE. A0358–59.

Mr. Flannery's announcement was important to BHGE's customers, employees, and investors. A0359–64. Long-term access to GE technology was critical to the TPS business's success, both for new unit sales and the long-term services business, which was a stable source of high-margin revenue. A0337; A0414–16.

BHGE quickly identified key areas of the MAF to address in the event of a separation from GE. A0364. The Conflicts Committee and BHGE management met to discuss advisors and key negotiating points in December. A0364–65. The Conflicts Committee retained Lazard and STB. A0365. BHGE retained JPM and DPW. A0366.

On January 17, 2018, the Conflicts Committee and BHGE management held a kickoff meeting for "Project SAW"—the codename for BHGE's and the Conflicts

Committee's process for evaluating a potential separation from GE. A0367. The Conflicts Committee received presentations on the Lockup and BHGE's key objectives in any potential separation from BHGE. A0366–67.

Although the Conflicts Committee recognized that its control of the Lockup prior to July 3, 2019 gave BHGE leverage in negotiations with GE, it also recognized that BHGE would lose that leverage if negotiations took too long. A0381–82. BHGE's leverage was a "melting ice cube" that required action. A0410.

On June 5, 2018, BHGE proposed to GE a three-part approach: (1) an amended MAF; (2) capital markets transactions providing liquidity to GE; and (3) public disclosure of a "mutually agreed path to separate." A0388–90.

C. BHGE Negotiates Better-Than-Market Terms with GE

On August 3, 2018, BHGE sent GE a detailed term sheet outlining proposed MAF amendments. A0397.[2] The parties engaged in extensive negotiations during September, October, and early November. Those familiar with the negotiations described them as "painful," "acrimonious," "very, very long," "protracted," "night and day," a "cat and mouse game" with each side seeking an advantage in the

[2] BHGE sent this term sheet the day after Mr. Beattie wrote the email purportedly showing GE's desire to avoid negotiation. *See* OB at 13. Assuming for the sake of argument that Plaintiffs interpret the email correctly, BHGE disregarded GE's wishes and negotiated hard.

negotiations, and filled with "tension and emotional energy." A0403–04; A0435; A0442; A2336.

BHGE Chairman and CEO Lorenzo Simonelli and BHGE CFO Brian Worrell oversaw day-to-day negotiations on the BHGE side. A0405. The Conflicts Committee met fourteen times during this period and remained in regular contact with BHGE management regarding the status of the negotiations. *Id.* GE Aviation CEO David Joyce oversaw day-to-day negotiations on the GE side. A0393.

GE internal emails and GE-affiliated witnesses confirmed that BHGE negotiated effectively. One GE Power negotiator explained:

B0001. The industry expertise of BHGE's negotiators was an important factor in BHGE's ultimate success. A561–62; A2342–43.

John Rice, a BHGE director and long-time GE executive, stated that BHGE management [redacted] A0404. Jamie Miller, GE's CFO, stated that [redacted] *Id*. When asked how BHGE benefitted from the Transactions, one GE negotiator responded, [redacted] A0480.

BHGE management was motivated to negotiate hard because they [redacted] and run BHGE afterward. A0405–06; A2341–42. Their compensation would be based on BHGE's, not GE's, performance. A0405.

The most important negotiations occurred over turbines. BHGE sold compression systems engineered around GE turbines and then serviced them. Continued access to GE turbines was critically important for BHGE. A0414. There were no practical alternatives. A0593–94. BHGE knew of more than 5,000 installed GE turbines in the oil and gas industry, and turbines could last for more than forty years. A0415. BHGE management estimated up to $1 billion of lost contribution margin if BHGE lost access to GE products. A0417.

Under the 2017 Supply Agreement, BHGE purchased AGTs at cost.[3] The Conflicts Committee and BHGE management realized that at-cost pricing would not make sense if BHGE were no longer a majority-owned GE subsidiary. Without a

[3] BHGE paid margins on repairs. A0433.

profit, GE Aviation would have little incentive to fulfill BHGE orders. That dynamic was especially unattractive given the constrained AGT market at the time. A0406-07, A0429–30.

BHGE negotiated vigorously over the margin it would pay GE Aviation for new AGTs. A0434–35. BHGE ultimately obtained a margin much closer to BHGE's opening negotiating position than GE's. A0430–33. An analysis BCG created for GE Aviation showed that BHGE received better terms than GE Aviation provided to third parties. A0433. Participants in the negotiations believed BHGE received better-than-market terms. A0438–39; A2338. BHGE also obtained GE's agreement to cover warranty and liability claims that were BHGE's responsibility under the 2017 Supply Agreement. A0433–34; A0439.

A GE Power accountant was [redacted] B0023. [redacted] *Id.*

Other internal GE communications confirm that BHGE negotiated hard and received better-than-market terms. *See, e.g.*, B0027 [redacted]

[redacted]; B0006 [redacted]; B0020 [redacted]

Other MAF Amendments had less effect on BHGE. The Conflicts Committee, BHGE management, GE, and advisors concluded that BHGE obtained favorable agreements in those areas as well. A0479–81.

On November 13, 2018, BHGE announced the Transactions. BHGE personnel, GE personnel, Conflicts Committee members, advisors, stock analysts, and investors overwhelmingly concluded that the Transactions were favorable for BHGE. A0477–82; A0604–05; A2344–45.[4]

D. Plaintiffs Challenge the Transactions Using the Wrong Frame of Reference

The operative complaint (the "Complaint"), filed on March 13, 2019, alleged unfairness by comparing the MAF to the MAF Amendments. A0073. That was the wrong comparison.

The MAF reflected BHGE's status as a majority-owned GE subsidiary. BHGE could not expect to receive such preferential treatment after the Trigger Date. The correct frame of reference required comparing the MAF Amendments to

[4] One analyst criticized aspects of the Transactions, but he also identified positive aspects. A2277–78. Plaintiffs cherry-pick from his report. *See* OB at 17–18.

commercial terms BHGE would have received if the Trigger Date occurred and the MAF unwound. A0581–84; A0588; A2276–79.

E. An Independent SLC Carefully Investigates Before Moving to Terminate

Four of the nine directors on the demand board were GE executives or board members. Plaintiffs did not allege conflicts concerning four others. Accordingly, the demand futility analysis turned on whether a prior career at GE subsidiaries was a pleading-stage conflict for Mr. Simonelli. On October 8, 2019, the trial court ruled that Mr. Simonelli had a pleading-stage conflict and denied the defendants' motions to dismiss. *See* A0222–27.

On October 31, the Board unanimously formed the SLC and appointed Mr. Ebel as its sole member. A0496–97. Mr. Ebel is an accomplished executive with extensive board experience. A0497–98. He currently serves as the CEO of Enbridge, Inc. ("Enbridge"), the largest energy infrastructure company in North America. A0498; A2302–03. When he joined the SLC, he was the Chairman of Enbridge and the Mosiac Company, a Fortune 500 company. A0498; A2302–03.

Mr. Ebel was the only director who was not involved in the approval of the Transactions. A0497. He was independent of GE. A2304; A2400–01. He had no views concerning the merits of the derivative action when he joined the SLC. A2307.

The SLC retained Quinn Emanuel Urquhart & Sullivan, LLP and Abrams & Bayliss LLP as its legal advisors. The SLC retained The Brattle Group Inc. ("Brattle") as its financial expert (together with the SLC's Counsel, the "SLC's Advisors"). The SLC investigated Plaintiffs' claims for nine months.

On December 17, 2019, the SLC's Counsel met in person with Plaintiffs' counsel. A0280. Plaintiffs' counsel walked through a fifty-five-slide PowerPoint presentation explaining Plaintiffs' claims and identifying their key issues. B0109.

The SLC's Counsel reviewed more than 111,000 documents, spanning more than 865,000 pages. A0301. These documents came from: (1) Conflicts Committee members; (2) Lazard; (3) STB; (4) current and former Baker Hughes directors; (5) current and former Baker Hughes officers and employees; (6) JPM; (7) DPW; (8) current and former GE directors, officers, or employees; (9) Morgan Stanley, GE's financial advisor; and (10) Shearman & Sterling LLP, GE's legal advisor. *Id.*

The SLC and its counsel interviewed twenty-two witnesses, including: (1) Baker Hughes's Chairman and CEO; (2) Baker Hughes's CFO; (3) current and former Baker Hughes directors, including all three members of the Conflicts Committee; (4) Baker Hughes employees involved in negotiating the Transactions; (5) GE's former CFO; (6) a senior GE attorney involved in negotiations; (7) a senior GE Aviation employee involved in negotiations; (8) representatives of the financial

advisors for Baker Hughes, the Conflicts Committee, and GE; and (9) a DPW attorney. A0302–03. Mr. Ebel attended and asked questions at twenty of the interviews. A0303; A2315; A2399.

In September 2020, the SLC's Advisors began drafting the fact section of the SLC's report. A1825–27; A1958–59; A2039; A2402. The SLC received that document before meeting with the SLC's Advisors, including Brattle, on September 22. *See* B0334.[5] On September 24, the SLC resolved to move to terminate the litigation as not in Baker Hughes's best interests. *See* A0513.

On October 14, the SLC filed the Motion to Terminate and a 320-page report of its findings and conclusions (as amended on January 15, 2021, the "SLC Report"). A0035; A0315. The SLC report included twenty-three pages of appendices and cited 242 exhibits and twenty-two interview memoranda. A0283. On January 15, 2021, the SLC filed its opening brief in support of the Motion to Terminate. A0037; A0240.

F. The SLC Provides Extensive *Zapata* Discovery

In *Zapata* discovery, the SLC voluntarily produced 12,190 pages of documents, including: (1) all SLC Report exhibits; (2) all other documents the SLC

[5] The SLC held seventeen formal meetings with the SLC's Counsel. A0512–13.

reviewed and relied upon in making its determinations; (3) all documents provided to interview witnesses; (4) detailed memoranda for each witness interview, including exhibits; (5) all minutes, exhibits to minutes, and resolutions for the SLC meetings; (6) minutes reflecting Mr. Ebel's appointments to the Board and SLC; (7) Mr. Ebel's Board questionnaires; and (8) all communications during the relevant time period between the SLC and/or its advisors, on the one hand, and the defendants, defendants' counsel, Baker Hughes, and Baker Hughes's counsel, on the other hand, concerning the merits of the litigation or the status or conclusions of the SLC's investigation. A0697.

On January 12, 2022, Plaintiffs moved to compel the SLC to produce additional documents. A0677. After briefing and argument, the Court of Chancery largely denied that motion. A0677; A0693; A0715. The SLC then produced eleven additional documents consisting of forty-six pages. B0337.

Plaintiffs deposed three witnesses in *Zapata* discovery:

- Mr. Ebel: SLC (A2006);
- Yvette-Austin Smith: team lead for Brattle's evaluation of the Capital Markets Transactions (A1913); and
- David Hutchings: most knowledgeable individual concerning Brattle's analysis of the MAF Amendments (A1791).

On June 3, 2022, the SLC's Counsel informed Plaintiffs' counsel that the SLC sought an extended hearing to provide time for Mr. Ebel to testify. B0339.

On June 6, the SLC produced five sets of SLC meeting minutes and one SLC interview memorandum pursuant to a Rule 510(f) order with attorney work-product redactions lifted. B0340; B0346.

On June 23, the SLC's Counsel and Plaintiffs' counsel called chambers to request a hearing date. At the SLC's request, chambers scheduled a three-hour hearing. B0348.

On August 25, Plaintiffs filed their answering brief. A0778. Plaintiffs "pull[ed] out all stops and [ ] thr[e]w every possible argument imaginable into the controversy, no matter how minor or picayune." *Kaplan v. Wyatt*, 484 A.2d 501, 511 (Del. Ch. 1984), *aff'd*, 499 A.2d 1184 (Del. 1985).

On October 4, the SLC filed its reply brief. A2239. In its brief, the SLC explained: "At the hearing in December, Mr. Ebel will testify about his independence, investigation, and conclusions." A2246.

On December 14, the SLC's Counsel confirmed for Plaintiffs' counsel that Mr. Ebel would testify at the Motion to Terminate. B0349. On December 15, the SLC's Counsel confirmed for chambers that Mr. Ebel would testify. B0350.

G. The Court of Chancery Grants the Motion to Terminate

On December 19, 2022, the Court held the Hearing. A2296; B0351. Mr. Ebel testified, A2299–390, including in response to Plaintiffs' cross-examination, A2348–89.

On April 17, 2023, the Court issued its opinion. *See* OB Ex. A. On April 18, the Court entered an order granting the Motion to Terminate. *See* OB Ex. B.

ARGUMENT

"Like a fleet of trucks or a factory, a lawsuit is a corporate asset that must be managed by the board consistent with its fiduciary duties." *Diep ex rel. El Pollo Loco Hldgs., Inc. v. Trimaran Pollo Pr's, L.L.C.*, 280 A.3d 133, 149 (Del. 2022). Here, an independent, disinterested director performed a thorough investigation in good faith. He reasonably determined that pursuing Plaintiffs' derivative claims was not in Baker Hughes's best interests. The Court of Chancery correctly granted the Motion to Terminate. This Court should affirm.

I. THE COURT OF CHANCERY GAVE MR. EBEL'S LIVE TESTIMONY THE WEIGHT IT DESERVED

A. Questions Presented

What weight may the Court of Chancery give live testimony in granting a motion to terminate? The Court of Chancery properly heard and weighed Mr. Ebel's live testimony at the Hearing. A2300–90. Plaintiffs failed to preserve any error regarding that issue. The parties briefed and argued the general *Zapata* standard below, and the Court of Chancery explained the standard in its opinion. *See* OB at 27 (citing Op. at 26–28; A2420–21). At no time did Plaintiffs object to Mr. Ebel's testimony or address what weight the Court of Chancery could or should give it. *See* S. Ct. R. 8; *Protech Mins., Inc. v. Dugout Team, LLC*, 284 A.3d 369, 378 (Del. 2022) (declining to apply "interests of justice" exception to Rule 8).

Did the pre-hearing record show genuine issues of disputed material fact concerning Mr. Ebel's independence, good faith, and reasonableness? The pre-Hearing record established the absence of any material fact issue concerning Mr. Ebel's independence, good faith, and reasonableness. *E.g.*, A0291–312; A2248–91.

B. Scope of Review

This Court reviews legal questions, like the weight the Court of Chancery may give live testimony from an SLC member, *de novo*. *See Diep*, 280 A.3d at 149. This

Court reviews *de novo* the Court of Chancery's findings under the first *Zapata* step when those findings are based on a paper record. *See id*. If the Court of Chancery makes factual findings based on live testimony, this Court reviews those findings under an enhanced clearly erroneous standard. *CDX Hdlgs., Inc. v. Fox*, 141 A.3d 1037, 1041 (Del. 2016).

C. Merits of Argument

1. The Court of Chancery May Rely on Live Testimony in Connection with a *Zapata* Motion to Terminate

Zapata review is a judicial construct. *See Zapata Corp. v. Maldonado*, 430 A.2d 779, 781–90 (Del. 1981). A *Zapata* motion to terminate "finds no ready pigeonhole[.]" *Id.* at 787. The motion resembles aspects of motions under Court of Chancery Rules 12(b), 41(a)(2), and 56. *See id.* at 787–88; *see also Diep*, 280 A.3d at 151.

Rather than focusing on the merits of the plaintiffs' claims, the motion focuses on whether the SLC "was independent and showed reasonable bases for good faith findings and recommendations[.]" *Zapata*, 430 A.2d at 789; *see also Diep*, 280 A.3d at 151.

An SLC that moves to terminate must "be prepared to meet the normal burden under Rule 56 that there is no genuine issue as to any material fact and that the [SLC] is entitled to dismiss as a matter of law" concerning independence, good faith, and

reasonableness. *Zapata*, 430 A.2d at 788. "[T]he granting of the SLC's motion using the Rule 56 standard does not mean that the court has made a determination that the claims the SLC wants dismissed would be subject to termination on a summary judgment motion, only that the court is satisfied that there is no material factual dispute that the SLC had a reasonable basis for its decision to seek termination." *Diep*, 280 A.3d at 155 (citation omitted).

A motion to terminate "should include a thorough written record of the investigation and [the SLC's] findings and recommendations." *Zapata*, 430 A.2d at 788. SLCs typically meet this requirement through a written report and briefs in support of the motion.

The plaintiffs have "an opportunity to make a record on the motion[.]" *Id*. That record is "akin to proceedings on summary judgment," *id.*, and may include "pleadings, depositions, answers to interrogatories and admissions on file, together with [ ] affidavits," Ct. Ch. R. 56(c). However, the Court of Chancery may hear live testimony to resolve factual issues. *See Zapata*, 430 A.2d at 788 n.15 ("We do not foreclose a discretionary trial of factual issues but that issue is not presented in this appeal.").[6] In this way, a motion to terminate differs from a Rule 56 motion.

[6] *Zapata* cited *Lewis v. Anderson*, 615 F.2d 778 (9th Cir. 1979), for this proposition. *Lewis* noted the trial court's decision to "reserve[] for trial the question whether the committee did exercise good faith business judgment." *Id.* at 780.

SLCs rarely present live testimony in support of motions to terminate. *See In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 942 (Del. Ch. 2003) (explaining why decision "to eschew any live witness testimony" can be a "sensible choice"). A motion to terminate tracks a Rule 56 motion most closely when the SLC presents only a paper record.

Live witness testimony can assist the Court of Chancery in reaching its decision. *See, e.g.*, *Carlton Invs. v. TLC Beatrice Int'l Hldgs., Inc.*, C.A. No. 13950, at 182–83 (Del. Ch. Apr. 16, 1997) (TRANSCRIPT) (noting potential need for live SLC testimony). The analogy to a Rule 56 motion weakens when the Court of Chancery hears live testimony at a motion to terminate hearing.

2. The Court of Chancery May Rely on Its Credibility Determinations

The SLC has not identified any appeal from a *Zapata* case involving live testimony. Accordingly, this Court has not yet defined the contours of the Court of Chancery's consideration of live testimony in this context.

Live testimony is valuable because a judge can evaluate credibility while observing a witness's demeanor, including on cross-examination. *See Nixon v. Blackwell*, 626 A.2d 1366, 1378 n.16 (Del. 1993) ("This Court respects and gives

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Zapata's citation of *Lewis* confirms the Court of Chancery's discretion to consider live testimony in addressing one or more of the *Zapata* inquiries.

deference to findings of fact by trial courts when . . . based in part on testimony of live witnesses whose demeanor and credibility the trial judge has had the opportunity to evaluate.").

Here, the Court of Chancery identified the correct standard and applied it accurately. Under the first *Zapata* step,[7] the Court of Chancery "consider[ed] whether there [were] disputed issues of material fact about the SLC's independence, the scope of its investigation, or the reasonableness of its conclusions[.]" Op. at 28. The Court of Chancery considered "[t]he record before [it], including live testimony of the committee member[.]" *Id.* at 3. Based on that record, the Court of Chancery concluded that "the committee's independence, the thoroughness of its investigation, and the reasonableness of its conclusions [were] not in doubt." *Id.*

That meets the *Zapata* requirements. *See, e.g.*, *Kaplan*, 484 A.2d at 508 ("[T]he Court must be satisfied ***from the record presented by the motion*** that" the SLC met the *Zapata* requirements. (emphasis added)).

On appeal, Plaintiffs ask this Court to hamstring the Court of Chancery and prevent it from relying on live testimony. According to Plaintiffs, the Court of Chancery must deny a motion to terminate if the motion "depends to any material extent upon a determination of credibility[.]" OB at 3. Plaintiffs also assert that the

[7] Plaintiffs have not appealed under the second *Zapata* step.

Court of Chancery may never weigh evidence on a motion to terminate, even when it hears live testimony. *See id.* at 3, 38–39.

The authorities on which Plaintiffs rely are not *Zapata* authorities. They are Rule 56 authorities. They are inapposite to the extent they describe Rule 56 standards without live testimony.[8]

Allowing credibility determinations based on live testimony will preserve the proper *Zapata* balance. The Court of Chancery routinely places more weight on documentary evidence than self-interested testimony. *See, e.g.*, *Snow Phipps Gp. LLP v. KCake Acq., Inc.*, 2021 WL 1714202, at *50 (Del. Ch. Apr. 30, 2021); *Paige Cap. Mgmt., LLC v. Lerner Master Fund, LLC*, 2011 WL 3505355, at *11 (Del. Ch. Aug. 8, 2011). If live testimony contradicts the documentary record, the Court of Chancery is well-positioned to find a genuine issue of material fact and deny the motion to terminate. If, as here, live testimony supplements and aligns with the documentary record, the Court of Chancery should consider it.

[8] This Court recently cited *Williams v. Geier*, 671 A.2d 1368 (Del. 1996) when describing the appellate standard of review for *Zapata*'s first step on a paper record. *See Diep*, 280 A.3d at 149 n.93. In *Williams*, this Court explained: "On a summary judgment record (***which is essentially a paper record not involving credibility assessments***), we are free to draw our own inferences in making factual determinations and in evaluating the legal significance of the evidence[.]" 671 A.2d at 1375 (emphasis added).

3. This Court Should Defer to the Court of Chancery's Credibility Determinations

This Court applies a deferential standard when reviewing the Court of Chancery's credibility determinations. *See, e.g.*, *In re Tesla Motors, Inc. S'holder Litig.*, --- A.3d ----, 2023 WL 3854008, at *18 n.113 (Del. June 6, 2023). Here, the Court of Chancery observed Mr. Ebel. It evaluated his demeanor and made judgments about his credibility. Those judgments warrant deference.

4. Plaintiffs Tacitly Agreed to Mr. Ebel's Testifying

The SLC gave ample notice that Mr. Ebel would testify. *Supra* § F. Instead of objecting to his testimony or arguing that the Court of Chancery could not rely on it, Plaintiffs cross-examined him. A2348–89. In doing so, Plaintiffs tacitly acceded to Mr. Ebel's testimony and failed to preserve any right to challenge on appeal the Court of Chancery's reliance on that testimony.

5. The SLC Met the *Zapata* Standard Based on the Pre-Hearing Paper Record

The Court of Chancery found Mr. Ebel's testimony helpful. The opinion cites Mr. Ebel's testimony in various places. *See* OB at 29–30. In three places, the opinion calls out Mr. Ebel's credibility. *See* Op. at 34, 37, 39.

Plaintiffs assert the Court of Chancery gave Mr. Ebel's Hearing testimony dispositive weight. They point to five communications between Mr. Ebel and Mr.

Simonelli (the "Challenged Communications"). OB at 22–26, 31–39.[9] They assert that the only way the Court of Chancery "found no material fact dispute regarding these communications" was by "weighing evidence, rendering determinations regarding Ebel's credibility, and drawing inferences in his favor[.]" OB at 25–26.

In fact, the SLC met its burden even without Mr. Ebel's hearing testimony. The context and plain language of the Challenged Communications are clear. Standing alone, the pre-Hearing record demonstrated Mr. Ebel's independence, good faith, and reasonableness.

March 6 Email, April 19 Email, and May 21 Text Message

Three Challenged Communications address the potential expansion of the SLC. On March 2, 2020, Mr. Ebel and his counsel discussed whether to expand the SLC if new directors joined the Board. B0174–75. On March 6, Mr. Ebel emailed Mr. Simonelli: "Btw – I do need to speak to you about an SLC matter. Your thoughts would be helpful before I reach out to Geoff B[eattie]." A2088. Mr. Simonelli was the Board Chair, and Mr. Beattie was the lead independent director. Both were involved in new director recruitment. B0051.

[9] The parties briefed these five communications on a paper record in connection with Plaintiffs' motion to compel, *see, e.g.*, A0705–06, and again in connection with the Motion to Terminate, *see, e.g.*, A2248–55.

On March 16, Mr. Ebel and his counsel again discussed a potential SLC expansion. B0177. On March 26, Baker Hughes disclosed two new director candidates in its annual meeting proxy statement. B0307.

On April 9, faced with the June 1 expiration of the Court of Chancery's stay of the litigation pending the SLC's investigation, the SLC's Counsel informed Plaintiffs' counsel the SLC would need additional time. B0270. On April 13, Mr. Ebel and his counsel discussed the need for an extension of the stay. B0272; B0373. On April 19, Mr. Ebel followed up with Mr. Simonelli about the new directors because "the SLC's "lawyers [were] wondering whether we should revisit membership given [Board] changes." A2252.[10]

On May 14, stockholders elected two new directors to the Board. B0274. On May 20, the Court of Chancery extended the stay for the SLC's investigation. B0277. The next day, Mr. Simonelli texted Mr. Ebel "to connect on [the] SLC." A0842; A2253.

The purpose of these communications—to address the logistics of a potential SLC expansion based on the addition of new directors relative to the deadlines the

[10] Plaintiffs accuse Mr. Ebel of divulging legal advice about a "critical issue" to Mr. Simonelli. OB at 35. The potential advantages of a multi-member SLC are well-known. Mr. Ebel did not disclose sensitive information by asking Mr. Simonelli when new directors might join the Board.

SLC faced for completing its investigation—is evident from their timing, plain language, and the contemporaneous documents. The Court of Chancery cited these documents in finding no genuine issues of material fact about Mr. Ebel's independence. *See* Op. at 33–38 (citing Challenged Communications, SLC meeting minutes, and public filings). Mr. Ebel's pre-Hearing deposition testimony and the declaration that he submitted in connection with briefing on the Motion to Terminate, which were part of the written *Zapata* record, confirmed the purpose of the Challenged Communications.

Plaintiffs speculate that Mr. Ebel might have discussed more than logistics with Mr. Simonelli. *See* OB at 31–32, 36. Nothing in the record supports that speculation, and Mr. Ebel denied doing so. A0709; A0712; *see also* A2034–36.

At his deposition, Mr. Ebel could not remember precise details from every conversation he had with Mr. Simonelli. *Cf.* OB at 35–36. However, Mr. Ebel was certain he never discussed substantive SLC issues with Mr. Simonelli. *See* A2248–51.

In Plaintiffs' view, ***any*** communication between an SLC member and a defendant requires the Court of Chancery to deny a motion to terminate. *See* OB at 33. That is not the law. *See Diep*, 280 A.3d at 143–44, 152–55 (affirming Court of Chancery's independence finding despite fact that principal of defendant:

(1) recruited two SLC members for board; (2) discussed derivative action with SLC member; and (3) attended board meeting with SLC members where derivative action was addressed); *see also* Op. at 33 n.163 (discussing *Diep*).

Plaintiffs compare Mr. Ebel to "a prosecutor . . . consult[ing] *an investigation target* regarding whether and/or how another prosecutor would join the investigation." OB at 33. A better comparison would be in-house counsel asking an HR employee about the start date for a new legal employee.

April 8 Email

The fourth Challenged Communication addressed the emerging COVID-19 pandemic. *See* A2251. In it, Mr. Ebel noted he was able to complete the interview of an employee in Florence, Italy, despite the lockdown. A02091. The Court of Chancery concluded the communication was "non-substantive and innocuous." Op. at 39. The Court of Chancery found Mr. Ebel's testimony on the document credible, *id.*, but the testimony was unnecessary. Mr. Ebel's testimony was "corroborated by the documentary evidence," including the Challenged Communication and a written interview memorandum. *Id.*; *see* B0260 n.2.

Plaintiffs assert the communication shows "an improper familiarity" between Messrs. Ebel and Simonelli concerning the SLC investigation. OB at 34. The communication merely reflects the unprecedented nature of the pandemic. Two

executives communicated about it, and one of them mentioned an experience from that day related to the Italian lockdown.

June 30 Text Message

The fifth Challenged Communication addressed a Baker Hughes executive candidate. In response to a request that Mr. Ebel follow up with the candidate, Mr. Ebel noted he would be "on an slc video interview for next 3 hours with Geoff Beattie and a bunch of lawyers (lucky me)." A2106. Plaintiffs assert the statement shows a lack of vigor in the SLC's investigation. OB at 37–38. The Court of Chancery found the assertion "belied by the record." Op. at 40.

The Court of Chancery was correct. Mr. Ebel demonstrated his engagement by attending twenty of the twenty-two witness interviews. A0281; *see*, *e.g.*, *Kikis v. McRoberts*, C.A. No. 9654-CB, at 93 (Del. Ch. May 19, 2016) (TRANSCRIPT) ("*Kikis* Tr.") (citing SLC attendance at interviews as demonstrating engagement). Mr. Ebel reviewed and approved a memorandum for each interview. *See* A0282. He asked questions at each interview he attended. A0303.

The SLC's Counsel reviewed more than 111,000 documents. A0503–04. The SLC and its advisors spent more than 6,300 hours investigating Plaintiffs' claims and preparing the 320-page SLC Report. A0328.

The SLC Report spent fifteen pages discussing the weaknesses in the process that led to the Transactions. A0563–77; A2397–98. The SLC's willingness to uncover and consider the "warts on the factual situation" is evidence of a thorough, good-faith investigation. *In re Primedia Inc. Deriv. Litig.*, C.A. No. 1808-VCL, at 74 (Del. Ch. June 14, 2010) (TRANSCRIPT); *see also Diep*, 280 A.3d at 157 ("The SLC did consider facts pointing in the other direction.").

In the June 30 text message, Mr. Ebel also wrote: "Thanks for the wine [by the way]!" A2106. Plaintiffs concede that Mr. Ebel and every other Baker Hughes director received wine to share during a virtual board happy hour during the pandemic. *See* OB at 39; A2335. The text message shows gratitude for a common courtesy. It does not show a lack of independence. *See Diep*, 280 A.3d at 152 ("[I]t would be a strained and artificial rule which required a director to be unacquainted or uninvolved with fellow directors in order to be regarded as independent." (internal quotation marks and citation omitted)).

* * *

Zapata discovery revealed five sets of communications between Messrs. Ebel and Simonelli over a four-month period. The communications did not address the substance of the SLC's investigation, nor did they show a lack of independence

between Messrs. Ebel and Simonelli.[11] The SLC's Counsel instructed Mr. Ebel not to discuss the substance of the SLC investigation with anyone at Baker Hughes. A2033; A2061. Mr. Ebel abided by that instruction.

The Court of Chancery described the Challenged Communications as a "flaw" in the SLC's process. Op. at 2–3. With the benefit of hindsight, the SLC would have asked its counsel to handle all logistical issues concerning a potential expansion of the SLC. However, the Court of Chancery correctly concluded that "the committee's independence, the thoroughness of its investigation, and the reasonableness of its conclusions are not in doubt." *Id.* at 3. The connections and communications in *Diep* were much more significant than Mr. Ebel's connections and communications with Mr. Simonelli. Nevertheless, this Court held that the *Diep* SLC met its burden. *See* A2255–56.

Mr. Ebel's testimony corroborated the pre-Hearing record. The Court of Chancery would have reached the same conclusions without the testimony. *See, e.g.*, Op. at 40–41 (citing the written record, then the testamentary record). *Cf.* OB

[11] Mr. Simonelli was the only Board member Mr. Ebel recalled texting. That did not compromise his independence. *Cf.* OB at 38. Like many people, Mr. Ebel used text messages to coordinate schedules. Mr. Ebel contacted Mr. Simonelli because Mr. Simonelli was the Board Chair. Mr. Ebel did not need to set up calls with other Board members to discuss new director onboarding.

at 30 (asserting without support that Court of Chancery "base[d] key factual findings and ultimate conclusions on Ebel's self-serving testimony alone").

This Court should affirm, even if it determines that the Court of Chancery improperly relied on Mr. Ebel's live testimony. *See Smith v. Del. State Univ.*, 47 A.3d 472, 480 (Del. 2012) ("An appellee is entitled to argue any theory in support of the judgment in its favor, even if that theory was not relied upon in the decision on appeal." (cleaned up)); *see also Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 141 (Del. 2012).

II. THE SLC ADEQUATELY INVESTIGATED AND REASONABLY EVALUATED POTENTIAL ADVISOR CONFLICTS

A. Question Presented

Did the SLC adequately investigate and reasonably evaluate potential advisor conflicts? *E.g.*, A0852–55; A2265–71.

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's findings under the first *Zapata* step when those findings are based on a paper record. *See Diep*, 280 A.3d at 149. If the Court of Chancery makes factual findings based on live testimony, this Court reviews those findings under an enhanced clearly erroneous standard. *CDX Hdlgs.*, 141 A.3d at 1041.

C. Merits of Argument

The SLC adequately investigated potential advisor conflicts. It reasonably found that BHGE's and the Conflicts Committee's advisors helped BHGE negotiate entirely fair Transactions. Plaintiffs assert the SLC should have done more to investigate and should have reached different conclusions regarding advisor independence. But Plaintiffs' disagreement does not create a genuine issue of material fact concerning the SLC's good faith or reasonableness.

1. The SLC Investigated Potential Advisor Conflicts

In the complaints and during their meeting with the SLC's Counsel, Plaintiffs and their counsel never identified potential advisor conflicts as a point of concern. *See supra* § E. Nevertheless, the SLC investigated the issue anyway.

Plaintiffs cherry-pick questions from Mr. Ebel's deposition to pretend the SLC made no attempt to investigate advisor conflicts. *See* OB at 42, 45–46. The record shows otherwise.

The SLC's Counsel identified documents addressing potential advisor conflicts in the document productions. They set these documents aside for potential use in witness interviews, and they sent the documents to the SLC. A2311. The SLC produced these documents in *Zapata* discovery. *See, e.g.*, A1078; A1080; A1084; A1086.

The SLC's Counsel asked numerous interviewees about advisor retention and potential conflicts. A1260–62; A1645–46; A2110; B0169; B0180–82; B0294; B0306 n.11; B0324–25; B0313; A2343–44; A2402–06. The SLC found the interviewees credible. A0507; A2268; A2270.

2. The SLC Reasonably Concluded That Potential Advisor Conflicts Did Not Undercut the Fairness of the Transactions

Leading law firms and investment banks have numerous clients. This is "one of the facts of business life[.]" *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 582

(Del. Ch. 2010). An advisor's past or present work on behalf of a transactional counterparty does not automatically create a disabling conflict. *See, e.g.*, *In re Match Gp., Inc. Deriv. Litig.*, 2022 WL 3970159, at *25 (Del. Ch. Sept. 1, 2022) ("A financial advisor's independence turns on whether its interest in the transaction is material[.]").

Fiduciaries must disclose potential advisor conflicts when they seek stockholder action because it ***may*** affect "how much credence to give [the advisor's] analysis." *David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *8 (Del. Ch. June 27, 2008). However, when evaluating the fairness of a transaction, a factfinder must determine whether a potential conflict ***actually*** affected negotiations. *Cf. In re Toys 'R' Us, Inc. S'holder Litig.*, 877 A.2d 975, 1006 (Del. Ch. 2005) ("My job, however, is not to police the appearances of conflict that, upon close scrutiny, do not have a causal influence on a board's process."); A2454–55.

Here, the SLC assumed leading advisory firms would have connections with GE. *See* A0501 (describing vetting process for SLC's financial experts). Accordingly, the SLC evaluated whether potential advisor conflicts ***undercut*** the fairness of the Transactions.

The SLC concluded they did not. That conclusion was reasonable. The interviewees uniformly and credibly explained that they had no concerns about the

loyalties of BHGE's and the Conflicts Committee's advisors. *E.g.*, A1645–46; B0294; B0306 n.11. The parties and their advisors engaged in intense negotiations over the Transactions. *Supra* § C. BHGE rejected multiple GE proposals, including with respect to AGTs, A0428–35, and the Capital Markets Transactions, A0265; A0461–65; A2339. BHGE obtained favorable terms in the Transactions. *Supra* § C.

The SLC Report did not address the potential conflicts of each advisor because the SLC saw no evidence indicating that potential advisor conflicts were material or affected the Transactions. A2406.[12] The SLC reserved its analysis of potential weaknesses for issues the SLC thought were more material. *See* A0563–77.

3. There Is No Issue of Material Fact Regarding Advisor Conflicts

JPM

After the SLC completed its investigation and submitted its report, Plaintiffs identified an October 2, 2018 article from *The Financial Times* that purportedly showed a disabling conflict between GE and BHGE's financial advisor, JPM. A1071 (the "FT Article"). Plaintiffs had numerous chances during the SLC's

[12] The SLC Report commented on the Conflicts Committee's "Independent and Knowledgeable Advisors." A0542.

investigation to flag the FT Article. They strategically chose to wait until Mr. Ebel's deposition.[13]

The article reported on the fees JPM and its affiliates received from GE in the eighteen years before the Transactions. A1073. Those fees were large on a nominal basis. *See id.*; OB at 10. But they were only 0.7% of the investment banking fees JPM received during that period. A2267–68. Moreover, the article reported that the GE relationship partner at JPM's parent had died in 2015 and that GE "has turned to others." A1074.

Moreover, JPM did not represent the Conflicts Committee. Lazard did. The Conflicts Committee routinely met in executive session with only its advisors. A0540; A2267; A2269.

Most importantly, the FT Article showed only the ***potential*** for a conflict. The article lacked evidence indicating that JPM's historical relationship with GE somehow ***affected*** negotiations over the Transactions. Plaintiffs disparage this consideration as irrelevant. *See* OB at 44 ("Jannis's only 'explanation' for this lack of concern was an after-the-fact assessment that JPM 'did a good job for BHGE.'"

[13] Plaintiffs also relied on documents produced in *Zapata* discovery that addressed JPM's work for GE and its affiliates. A1078; A1080.

(citation omitted)). In fact, this consideration is paramount. *See Toys 'R' Us*, 877 A.2d at 1006; A2454–55.

DPW

In opposition to the Motion to Terminate, Plaintiffs pointed to documents showing that DPW performed unspecified work for GE and its affiliates at the same time it represented BHGE. The SLC knew about these documents. It ***produced them*** in *Zapata* discovery because the SLC's Counsel sent them to interviewees and provided them for the SLC's direct review.

These documents did not trouble the SLC. DPW did not represent the Conflicts Committee. STB did. Moreover, the SLC expected connections between GE and DPW. As BHGE's head of business development explained, "GE was probably working with every major law firm in New York City in some way." A1646. Most importantly, the SLC saw no evidence that these potential conflicts resulted in unfair Transactions. One document on which Plaintiffs rely shows that BHGE took DPW's conflicts into account in negotiations. *See* OB at 11 (citing A1087).

Lazard

Plaintiffs identified a handful of Lazard representations of GE and its affiliates. *See* OB at 11. Plaintiffs did not provide the fees Lazard received in

connection with those mandates or compare those fees to Lazard's overall fees. A2269. At most, those representations showed the potential for a conflict, not that the Transactions were unfair. *See Toys 'R' Us*, 877 A.2d at 1006; A2454–55

* * *

Plaintiffs disagree with how the SLC investigated advisor conflicts. They disagree with the conclusions the SLC drew. But Plaintiffs' disagreement does not make the SLC's investigation inadequate or its conclusions unreasonable. *See Kaplan*, 484 A.2d at 520 ("The broadside fired against it by the plaintiff based upon additional things which he feels the Committee should have done and the conclusions that he would have the Court draw by innuendo from the manner in which certain things were done is not sufficient to overcome the showing made by the Committee in my opinion.").

III. THE SLC MADE REASONABLE DECISIONS CONCERNING DOCUMENT COLLECTION AND WITNESS INTERVIEWS

A. Question Presented

Did the SLC act reasonably with respect to document collection and witness interviews? *E.g.*, A0856–57; A2271–72; A2375–77; A2441.

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's findings under the first *Zapata* step when those findings are based on a paper record. *See Diep*, 280 A.3d at 149. If the Court of Chancery makes factual findings based on live testimony, this Court reviews those findings under an enhanced clearly erroneous standard. *CDX Hdlgs.*, 141 A.3d at 1041.

C. Merits of Argument

1. The SLC Acted Reasonably Regarding Text Messages

The SLC requested text messages, but it ultimately did not insist on their production. A0506; A2395–96. The SLC considered six factors in making this decision. A0506. Three of the factors were: (1) "the extensive record available from emails and other electronic documents collected"; (2) "the fact that certain custodians were based in Europe, which provides stronger privacy protections and makes obtaining text messages more difficult"; and (3) "an assessment of the likelihood substantive text messages existed and would affect the SLC's evaluation

of material issues[.]" A0506; A2373; A2453–54. The SLC's decision was reasonable, particularly in light of the short time it had to complete its investigation at the time the decision was made.

Plaintiffs assert that an SLC must always collect text messages because an SLC purportedly must explore "all relevant facts and sources of information." OB at 53 (incorrectly citing *Zapata*). That quotation appears in several Court of Chancery opinions that admonished SLCs to explore "all relevant facts and sources of information ***that bear on the central allegations***" in the complaint. Op. at 44 (emphasis added) (internal quotation marks and citation omitted). But Delaware courts have never required SLCs to review every potential source of relevant information.[14] Otherwise, SLCs would cease to be an efficient way to investigate derivative claims. *Cf. Kindt v. Lund*, 2001 WL 1671438, at *1 (Del. Ch. Dec. 14, 2001) ("[A]llowing full-blown discovery into a special committee's investigation

[14] *See Kaplan*, 499 A.2d at 1190–91 (rejecting plaintiff's multi-pronged attack on SLC's investigation); *Kikis* Tr. at 102–03 (same); *see also Ironworkers Dist. Council of Phila. & Vicinity Ret. & Pension Plan v. Andreotti*, 2015 WL 2270673, at *26 n.255 (Del. Ch. May 8, 2015) (finding demand review committee's investigation reasonable even though committee did not interview current and former CEOs), *aff'd sub nom.*, 132 A.3d 748 (Del. 2016); *Carlton Invs. v. TLC Beatrice Int'l Hldgs., Inc.*, 1997 WL 305829, at *8 n.38 (Del. Ch. May 30, 1997) (approving settlement despite SLC's inability to interview six potentially relevant witnesses); *Katell v. Morgan Stanley Gp., Inc.*, 1995 WL 376952, at *9–10 (Del. Ch. June 15, 1995) (rejecting argument SLC's investigation was inadequate based on failure to interview specific witness).

would eviscerate the very purpose of having a special committee."); *Sutherland v. Sutherland*, 2007 WL 1954444, at *3 (Del. Ch. July 2, 2007) (referencing "perceived efficiencies generated by a committee's investigation").

Here, the collection of text messages was unnecessary for a reasonable investigation. There is no reason to think text messages would have revealed material information regarding the negotiations beyond what was in the 111,000 documents the SLC's Counsel reviewed. Those documents included candid internal communications from GE and BHGE. *See* A2399–2400; A2414.

The SLC identified and considered the weaknesses in the process that led to the Transactions. The absence of text messages did not create a genuine issue of material fact about the SLC's good faith or reasonableness. *See Diep*, 280 A.3d at 156 (affirming termination where "SLC reviewed many documents and sources, and fully considered material unhelpful to EPL such as the draft Q&A answers").

2. <u>The SLC Acted Reasonably Regarding Mr. Mulva</u>

Plaintiffs' arguments concerning Mr. Mulva are a reprise of their text messages arguments. The SLC carefully considered its options and responded reasonably to Mr. Mulva's interview. A0505–06; A2271–72; A2311–12.

Plaintiffs ask this Court to mandate a playbook in response to document custodians who delete documents and refuse to answer certain questions. *See* OB at

53–55. *Zapata* is not so constrained. *Supra* n.14. The SLC acted reasonably and in good faith in responding to Mr. Mulva's actions. That is all *Zapata* requires.

3. The SLC Acted Reasonably Regarding Interview Documents

The SLC interviewed witnesses by videoconference during the COVID-19 pandemic. To ensure that interview participants could reference documents in the event of a screen-sharing glitch—or if they joined by phone—the SLC provided documents electronically before the interview. That approach let interviewees refresh their recollection and provide more detailed explanations. A02376.

The SLC's approach was reasonable. The SLC was not required to assume interviewees were malefactors who would use the documents to concoct fabrications. *See Kikis* Tr. at 102–04 (rejecting argument that SLC relied on self-serving witness testimony and rejecting other quibbles with SLC's investigative approach). *Cf.* OB at 55.

IV. THE SLC MADE REASONABLE DECISIONS ABOUT ITS ADVISORS AND WORK PRODUCT

A. Questions Presented

Did the SLC reasonably rely on the SLC's Advisors? *E.g.*, A0304; A0849–51; A0870–72; A2263–65; A2276–79; A2288–91.

Did the SLC act reasonably by withholding drafts of the SLC Report as work product? *E.g.*, A2260–61.

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's findings under the first *Zapata* step when those findings are based on a paper record. *See Diep*, 280 A.3d at 149. If the Court of Chancery makes factual findings based on live testimony, this Court reviews those findings under an enhanced clearly erroneous standard. *CDX Hdlgs.*, 141 A.3d at 1041.

C. Merits of Argument

1. The SLC Reasonably Relied on the SLC's Advisors

Plaintiffs complain they did not receive all 111,000 documents the SLC's Counsel reviewed. OB at 57. However, they received substantial *Zapata* discovery of more than 12,000 pages. *Supra* § F. Plaintiffs tested that production by a motion to compel. Plaintiffs dislike the limited scope of *Zapata* discovery, but that does not reflect on the SLC's reasonableness. A2261–62.

Plaintiffs imply the SLC was over-reliant on the SLC's Counsel. OB at 57. Delaware courts have repeatedly rejected that challenge. *See Kikis* Tr. at 101–02; *Carlton Invs.*, 1997 WL 305829, at *12; *Katell*, 1995 WL 376952, at *10; *Kaplan*, 484 A.2d at 513, 519; A0304; A2263.

The SLC retained Brattle on May 7, 2020. A2264. At his regular meetings with the SLC's Counsel, Mr. Ebel identified analyses he would find useful. A2039; A2379; B0284; B0330; B0332. The SLC's Counsel worked with Brattle to prepare those analyses and reported back to Mr. Ebel. A2039; A2314.

Brattle assisted the SLC's Counsel in preparing a draft fact section of the SLC Report. *Supra* § E. Brattle was heavily involved in preparing the charts, figures, and tables in the draft, which Mr. Ebel received prior to the September 22, 2020 SLC meeting. A1825–27; A1959. At that meeting, Brattle summarized its analyses and views concerning the Transactions. Mr. Ebel questioned Brattle about its analyses, and Brattle provided further explanation in response. *See* B0334; A1839–40; A1962; A1965; A2040–46.

There was nothing remarkable about this procedure. Brattle typically provides its work product to counsel before meeting with its ultimate client. A1935; *see* A1814. Delaware courts have never required board committees to retain

financial experts—let alone review every analysis or draft the experts prepare. *See Oberly v. Kirby*, 592 A.2d 445, 472 (Del. 1991).

The SLC was entitled to rely on the materials Brattle contributed to the fact section of the SLC report as well as Brattle's oral opinions at the September 22 meeting.[15] Nothing required the SLC to review or second-guess Brattle's underlying analysis. *Kikis* is directly on point. There, the Court of Chancery held that SLC members were not required to double-check their experts' analyses to confirm their accuracy. *See Kikis* Tr. at 110 (identifying as "a fundamental point of Delaware law . . . that directors are allowed to rely on advisors in making judgments about matters").

Plaintiffs might be disappointed they could not do more "sidewalk superintending of [Brattle's] advice[.]" *In re Morton's Rest. Gp., Inc. S'holder Litig.*, 74 A.3d 656, 674 (Del. Ch. 2013). But that does not create a genuine issue of material fact about the SLC's investigation or conclusions.[16]

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[15] Plaintiffs assert Mr. Ebel "'relied on' material he refuses to produce.[]" OB at 59. The SLC assumes Plaintiffs are referring to the draft fact section of the SLC report. That document was work product, and Plaintiffs received the final version of that information in the SLC Report. A2380–81.

[16] Plaintiffs received Brattle's engagement letter in *Zapata* discovery, along with the minutes from the SLC meeting where Brattle presented its conclusions. Brattle's communications with the SLC's Counsel fell outside the scope of *Zapata* discovery. They were also work product.

2. The SLC Reasonably Withheld Drafts of the SLC Report

The SLC did not assert attorney-client privilege in *Zapata* discovery. It asserted only work product protection. A2260; A2409. Even then, the SLC produced minutes and interview memoranda without work product redactions pursuant to a Rule 510(f) order. A2261 n.7.

Draft SLC reports are work product and fall outside the scope of *Zapata* discovery. *See, e.g.*, *In re Oracle Corp. Deriv. Litig.*, 2020 WL 3867407, at *8–9 (Del. Ch. July 9, 2020); *Sutherland*, 2007 WL 1954444, at *4; *Kindt*, 2001 WL 1671438, at *2. The SLC acted reasonably by asserting work product over drafts of its report.

* * *

The heart of Plaintiffs' appeal is disagreement with the SLC's conclusions. Plaintiffs believe the Transactions were unfair under their preferred frame of reference. They also believe there were damages. *See* OB at 58.

The SLC explained in its report and before the Court of Chancery why Plaintiffs are wrong. *E.g.*, A2276–91; A2345–47; A2411–12. But this Court does not need to resolve that question.

> [T]he question is not whether there were disputed issues of material fact about the . . . merits-based issues raised by [the plaintiff]. Instead, the question is whether disputed issues of material fact were raised about the scope of the

> investigation and the reasonableness of the SLC's conclusions.

Diep, 280 A.3d at 155.

Here, "[t]he SLC's conclusion was supported by the record and reasonable." *Id.* at 156. That is all *Zapata* requires. *See Carlton Invs.*, 1997 WL 305829, at *16 (finding that the SLC's determinations were "one reasonable interpretation of the record"; "[w]hether they were correct is not in issue at this stage").

CONCLUSION

The Court should affirm the Court of Chancery's decision granting the Motion to Terminate.

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