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Case Number 648,2012

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GYÖRGY B. BESSENYEI AND ROBERT S. GOGGIN, III,	:	No. 648, 2012
Plaintiffs-Below, Appellants,	:	Court Below:
v.	:	Court of Chancery of the State of Delaware, Honorable John W. Noble (C.A. No. 7572-VCN)
VERMILLION, INC., BRUCE A. HUEBNER, WILLIAM C. WALLEN, PH.D, JAMES S. BURNS, PETER S. RODDY, CARL SEVERINGHUAS, JOHN F. HAMILTON, and GAIL S. PAGE,	:	
Defendants-Below, Appellees.	:	

APPELLANTS' OPENING BRIEF (SECOND CORRECTED)

Dated: February 14, 2013

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NATURE OF PROCEEDINGS

This action was initiated when Plaintiffs-below György B. Bessenyei and Robert S. Goggin, III ("Plaintiffs") filed their original Complaint in the Court of Chancery on May 25, 2012, challenging the Vermillion, Inc. ("Vermillion" or the "Company") Board of Directors' (the "Board") decision, in the midst of a highly contested proxy contest, to eliminate one of the two contested board seats shortly before the shareholder meeting to elect directors to those seats could be held. Plaintiffs then filed an Amended Complaint on June 4, 2012, which Defendants answered on June 13, 2012.

On July 26, 2012, Defendants filed their Motion to Dismiss Pursuant to Court of Chancery Rule 41(b), in which they sought dismissal of all claims based on the use of defective notarizations for certain verifications used in this action. The Trial Court granted Defendants' motion by Memorandum Opinion and Order dated November 16, 2012. Plaintiffs timely filed their Notice of Appeal on December 10, 2012. This is Plaintiffs' Opening Brief on Appeal.

SUMMARY OF ARGUMENT

1. None of the factors Delaware courts consider when analyzing a Rule 41(b) motion support the dismissal of Plaintiffs' Complaint.

2. Dismissal of Plaintiffs' Complaint finds no support in *Parfi Holdings AB v. Mirror Image Internet, Inc.*, 954 A.2d 911 (Del. Ch. 2008).

3. To the extent Plaintiffs' conduct warranted sanctions, the Trial Court abused its discretion by not adopting or even considering whether less severe sanctions would be effective.

STATEMENT OF FACTS

I. The Parties

A. Goggin and Bessenyei

Plaintiffs Goggin and Bessenyei have at all relevant times been Vermillion shareholders. (A058, ¶¶ 10-11) On February 15, 2012, Mr. Bessenyei notified the Company that he would nominate Mr. Goggin and non-party Gregory Novak to serve as Vermillion directors at the next shareholder election. (A060, ¶24)

B. Defendants

1. The Vermillion Board

Vermillion's Board is made up of three separate classes of directors, which have staggered three-year terms. (A060, ¶ 23) Until recently, the Board consisted of seven members that were divided as follows: Class I - Defendants Huebner and Wallen; Class II - Defendants Burns, Roddy and Severinghaus; and Class III - Defendants Hamilton and Page (who also served as Vermillion's President and Chief Executive Officer). (*Id.*) At the 2012 annual stockholder meeting which was expected to be held in June 2012 (the "Election"), the two Class III director(s), Mr. Hamilton and Ms. Page, were to stand for election. (*Id.*)

2. The Company

Vermillion develops and commercializes novel high-value diagnostic tests that help physicians diagnose and treat

patients. (A059, ¶ 20) Vermillion's business is potentially very lucrative. (*Id.*) The Company's OVA1 test, the first blood test cleared by the U.S. Food & Drug Administration (FDA) for the evaluation of an ovarian adnexal mass prior to a planned surgery, could potentially generate millions of dollars in revenue. (*Id.*) Vermillion's other product in the pipeline, the Peripheral Artery Disease test, addresses a minimum $1 billion market opportunity which has largely been ignored by the investment community. (*Id.*)

The Board has, by and large, failed to realize the upside of Vermillion's products and has presided over a severe erosion of shareholder value. (A059, ¶ 21) Vermillion filed for relief under Chapter 11 of the Bankruptcy Code on March 30, 2009 and emerged from bankruptcy protection on January 22, 2010. (*Id.*) Since then, the value of the Company's stock has plummeted. (*Id.*) In the first quarter of 2010, the stock traded as high as $34.00/share. (*Id.*) As of May 24, 2012, the stock traded at less than $2.72 per share, less than 10% of its value from only two years prior. (*Id.*)

The devaluation of its stock price is not Vermillion's only problem. The Company's 10-K filed on March 27, 2012 states that the Company continues to experience significant operating losses, as it has each year since its inception, and is expected to incur a net loss for fiscal year 2012. (A059-60, ¶ 22)

According to that filing, there is "substantial doubt regarding [Vermillion's] ability to continue as a going concern." (*Id.*)

II. Facts Giving Rise to this Action.

A. The Proxy Contest

Plaintiffs notified the Company on February 15, 2012 that Mr. Bessenyei would nominate Mr. Goggin and Gregory Novak to serve as Vermillion's Class III directors. (A060, ¶ 24) Vermillion nominated its own slate of two incumbent directors. (*See, e.g.*, A060-62, ¶¶25-27, 29) As a heated proxy contest was waged by both sides for a period of months, Plaintiffs believe that Defendants knew, based on information from their proxy solicitor, that at least Ms. Page was unlikely to maintain her Board seat and that *Messrs.* Goggin and Novak may have had enough votes to prevail in obtaining both seats. (*See* A062, ¶¶ 30-32) If successful in obtaining two Board seats in 2012, the majority voice on the Board would have been in play in 2013, when two more of Vermillion's Board seats are up for election. (*See, e.g.*, A057, A065-66, ¶¶ 5, 47)

B. Defendants Eliminate a Board Seat in the Midst of the Proxy Contest.

On May 15, 2012, months into the proxy contest, but shortly before the annual shareholder meeting's likely date, Vermillion announced that Ms. Page had resigned from the Board. (A062, ¶ 31) On the very same day, as disclosed by Vermillion in a Form

8-K filed with the SEC on May 16, 2012, the Board also amended the Company's bylaws to reduce the size of the Board from seven to six members (the "Amendment"). (*Id.*) This change took effect immediately. (*Id.*) The Amendment eliminated the seat vacated by Ms. Page and left only one Class III director, Mr. Hamilton, who was not nominated for reelection. (*Id.*) According to Vermillion's 8-K filed on May 16, 2012, the Board reduced the number of authorized directors from seven to six persons to further "ongoing attempts to streamline the organization of the Company and to extend its cash runway." (A063, ¶35) Because the reduction in the Board's size was accomplished by eliminating a Class III seat, the Board is now as unbalanced as it can be - Class III has just one seat, while Class II (which does not stand for election until 2014) has three seats. (*See* A057, A060, A063, A065-66, ¶¶ 5, 23, 33, 47)

III. Plaintiffs File this Narrowly-Focused, Expedited Action.

Plaintiffs initiated this action shortly thereafter, on May 25, 2012, alleging that the Board had breached its fiduciary duties and requested declaratory and injunctive relief nullifying the Amendment and requiring the Company to allow its shareholders to elect two Class III directors. (*See* D.I. 1, ¶¶ 40-65) After the parties agreed that expedited proceedings were necessary, a two-day trial was scheduled for July 31 and August 1, 2012. (*See* D.I. 15, ¶ 1)

Plaintiffs' Amended Verified Complaint, filed on June 1, 2012 (the "Complaint"), contains two substantive claims. First, Plaintiffs asserted that the Amendment eliminating the Board seat must be invalidated under *Blasius Indus. Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988) because the incumbent directors breached their duties of loyalty by unjustifiably adopting the Amendment for the primary purpose of interfering with the Election. (A064-65, ¶¶ 40-45) Second, they claimed that the Board breached their fiduciary duties under *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) because the Amendment was an unreasonable and disproportionate defensive response to what Defendants believed was the imminent election of *Messrs.* Goggin and Novak. (A065-66, ¶¶ 46-51)

Both Plaintiffs filed verifications with the Amended Complaint as required by Court of Chancery Rule 3(aa). (*See* A071-72) It is undisputed that Mr. Goggin's verifications were proper and valid. (*See, e.g.*, Mem. Op. p. 19) Although Defendants contend that Mr. Bessenyei's verifications were technically defective, it is not disputed that Mr. Bessenyei read and approved the Complaint (including the Amended Complaint) before providing his verification, that he approved of the facts and that he has appeared as a Plaintiff in this action, including appearing in Delaware for a deposition.

IV. The Verifications At Issue

A. The Verification Filed With The Complaint On May 25, 2012.

On May 25, 2012, the day Plaintiffs filed their original Complaint, Plaintiffs' counsel sent Plaintiffs "draft verifications" and asked that they "fill in the state and country information, sign them and have then notarized and then email [him] a signed copy." (A038) Mr. Bessenyei, who was traveling at the time, contacted Mr. Goggin and asked if he could assist him in getting his verification notarized. (A106, 14:10-21) As Mr. Goggin testified, he did not know the answer, so he inquired of a notary, Ms. Bennett:

> I believe he called me and said, "Is it possible for you guys to notarize this?" I think at the time - he travels an awful lot. I think at the time he was down in the islands and didn't know where he could get anything notarized. So I said, "I don't know," and if memory serves, that's when I asked Jennifer if she could do it.

(A106, 14:11-17)[1]

The notary, Ms. Bennett, testified that she believed that she could notarize Mr. Bessenyei's verification even though he was not physically present so long as there was a "credible witness" before her to vouch for him:

> Q. Now, when you say your process for notarization, either have the person there or

[1] All deposition transcripts cited herein were submitted to the Trial Court in consideration of the motion to dismiss.

representative, do you mean having the person there in person, live before you?

A. Yes, or a credible witness.

Q. And walk me through what a credible witness is.

A. It would be an attorney-at-law who can vouch for the person who had signed the document.

Q. And can it only be an attorney-at-law?

A. I believe so, yes.

Q. And is that a notary rule in Pennsylvania?

A. Yes. I believe so.

Q. Do you know what rule that is by citation?

A. No.

Q. When did you first come to learn of that rule?

A. When I took the exam. They talk about credible witnesses.

Q. And now if you have a credible witness who is an attorney-at-law and they vouch for the person who signed the document, what would you have to do? You said something about checking IDs and signatures?

A. Well, I would check the signature. I would need to see some sort of identification with, you know, a signature on it so I can match it with the document that I have.

(A094, 14:6-15:9)

After Mr. Goggin asked whether she could notarize Mr. Bessenyei's verification, Ms. Bennett conducted internet research and spoke with a colleague to make sure that her understanding of the "credible witness" rule was correct and ultimately determined that she could perform the notarization. (A096-97, 22:8-23:12, 27:13-22) Ms. Bennett then told Mr.

Goggin that she could notarize Mr. Bessenyei's verification. (A096, 23:16-17) Mr. Goggin, who was deposed outside the presence of Ms. Bennett, described the exchange as follows:

> I asked her if she was able to notarize a document with an electronic signature, and she said something - I am not going to quote, but she said, "I believe that I can. Give me a few minutes and I will get back to you." She walked in my office and said, "It's not a problem. I can do it."

(A105, 11:10-15)

Mr. Goggin then called Mr. Bessenyei and told him that Ms. Bennett could notarize his verification. (*See* A106, 15:9-10) Mr. Bessenyei emailed Plaintiffs' counsel and advised that the "[n]otarization problem [had been] solved" and that his verification would be sent "in an hour or so." (A036)

Mr. Bessenyei then emailed a scanned copy of his passport to Mr. Goggin so Ms. Bennett would be able to verify his signature and notarize his verification. (*See* A034; A098, 29:21-30:1) (Q. How did you receive a copy of that passport? A. He forwarded it by email. Q. 'He' being Mr. Bessenyei? A. Yes. I am sorry.")

Shortly thereafter, Mr. Bessenyei emailed a signed copy of his verification to Mr. Goggin. (*See* A105, 12:3-8) ("Mr. Bessenyei "signed [the verification] physically, scanned it, and emailed it back to me. I printed it out in Jennifer's office -

that's where the printer is - and handed it to Jennifer, along with the phone.") (A038-39; A098, 29:2-9)

After sending his signed verification, Mr. Bessenyei spoke with Mr. Goggin on the telephone and was transferred to Ms. Bennett so she could perform the notarization:

> Q. So then walk me through the process you undertook once you received this signed verification.
>
> A. Sure. Well, I spoke to Mr. Bessenyei to make sure that everything, the contents of the document was okay with him and that he agreed and that he was the actual person that had signed it. I had his passport as proof of his signature and proof of who he was, and I had Mr. Goggin, and I, you know, saw the emails behind it, so I believed it was efficient.

(A098, 29:10-20; *see also* A105, 9:21-11:6) Within thirty minutes of Mr. Goggin's receipt of Mr. Bessenyei's signed verification, its notarization was complete and the verification was sent to Plaintiffs' counsel. (*See* A041)

B. The Verifications Filed With The Amended Complaint.

On May 31, 2012, Plaintiffs' counsel sent *Messrs.* Bessenyei and Goggin a copy of the Amended Complaint and new verification forms. (*See* A046) After reviewing and discussing the Amended Complaint with Mr. Goggin, Mr. Bessenyei signed a new verification form and emailed a signed copy to Mr. Goggin. (A107-108, 23:5-25:22; *see* A048-49) The next morning, on June 1, 2012, Plaintiffs' counsel forwarded a slightly revised

version of the Amended Complaint. (A051) Mr. Bessenyei responded a few minutes later and said "Complaint is fine, Bob is dealing with notarizations." (*Id.*) In other words, Mr. Goggin was making arrangements with Ms. Bennett to notarize Mr. Bessenyei's verification, just as she had done with the original Complaint. (A108, 27:16-18)

The notarizations signed the day before on May 31, 2012 had not yet been notarized. Therefore, because both he and Mr. Bessenyei had reviewed the revisions to the Amended Complaint, Mr. Goggin did not believe that new verifications had to be signed. (A108-109, 28:6-29:18)

Mr. Goggin asked Ms. Bennett if she could notarize Mr. Bessenyei's new verification and she did so following the same process that she had used in connection with the original Complaint; *i.e.*, she spoke with Mr. Bessenyei on the telephone and verified that he had signed the form. (A098-99, 32:19-33:15)

Even though the verification had been signed the day before, Ms. Bennett testified that it could properly be notarized because she had verified that its terms were still correct. (A100, 37:4-11) When the notarization was complete, Mr. Goggin sent the verifications to Plaintiffs' counsel. (*See* A053)

C. The Verification For Plaintiffs' Interrogatory Responses.

Upon receiving Defendants' interrogatories, Plaintiffs' counsel prepared objections and answers and forwarded them to Plaintiffs to review. Mr. Bessenyei reviewed those responses and discussed them with Mr. Goggin:

> Q. Do you know if Mr. Bessenyei reviewed the plaintiffs' responses to defendants' first set of interrogatories to plaintiffs prior to signing this verification?
>
> A. I know that he did.
>
> Q. How do you know that?
>
> A. We discussed it.

(A109, 32:10-16) On June 21, 2012, Plaintiffs' counsel sent a new "[v]ersion with changes reflecting . . . comments" that had been made by Mr. Bessenyei. (A074) Mr. Bessenyei reviewed and responded a few hours later to let Plaintiffs' counsel know that the "Document [was] fine." (*Id.*)

Shortly after Mr. Bessenyei signed-off on the answers, Plaintiffs' counsel sent new verification forms for Plaintiffs to sign. He said, "[a]ttached are verification pages for our interrogatory answers. If you could please fill in the missing location info and sign and notarize, then send to me as soon as possible, that would be great." (A076)

Mr. Bessenyei signed the new verification and sent it to Mr. Goggin for Ms. Bennett to notarize. (*See* A110, 35:5-9) The verification was not notarized, however, until June 26, 2012

because Mr. Goggin was out of town on business. Upon returning to the office, he printed out the verification and gave it to Ms. Bennett for notarization. (A110, 36:2-14; *see also* A101, 45:17-20)

Ms. Bennett testified that she notarized this verification in the same manner that she had notarized Mr. Bessenyei's previous two verifications by calling Mr. Bessenyei and confirming his identity and his signature on the date she notarized it. (A100, 38:22-39:10; *see also* A109-110, 32:24-33:10)

Although Mr. Bessenyei had signed the verification on June 21, Ms. Bennett believed that she could notarize the document on June 26 because she verified that its contents were still accurate:

> Q. And in your opinion, it is appropriate to notarize a document even though it was clearly signed five days before; is that correct? . . .
>
> A. I went through the same verification. He said it was the document that he signed and didn't have any objections to the way it was, so yes.

(A101, 46:5-15)

D. Ms. Bennett's Deposition Testimony.

As set forth above, Ms. Bennett explained during her deposition the process she followed to verify Mr. Bessenyei's identity, both by obtaining a copy of his passport and by getting verification from Mr. Goggin, a licensed attorney. Ms.

Bennett confirmed directly with Mr. Bessenyei, whose voice she recognized from previous telephone conversations, that the signature on the document he had emailed was his, and then notarized the verifications. (A095, A098, 18:2-6, 29:13-20)

Nowhere in Ms. Bennett's deposition is there any basis for the notion that Mr. Goggin or Mr. Bessenyei asked her to do anything improper or that either knew or believed that she had done anything wrong. Mr. Goggin asked Ms. Bennett if she could perform the notarizations for Mr. Bessenyei, and it was Ms. Bennett who determined that she could and so notified Mr. Goggin. (A097, 26:23-28:9; A105, 11:10-15) Mr. Bessenyei never asked or instructed Ms. Bennett to do anything, but instead interacted with Ms. Bennett only for purposes of Ms. Bennett confirming his signature. (*See, e.g.*, A098, 29:10-20; A105, 9:21-12:11) Ms. Bennett never testified that she was asked or instructed to do anything wrong (or anything that she believed was wrong), and the entirety of the exchanges about the notarizations were whether she could perform them and then doing so.

E. Mr. Goggin's Deposition Testimony

Mr. Goggin's deposition testimony likewise shows that there is no factual basis for the notion that he engaged in any wrongdoing, that he directed Ms. Bennett to do anything wrong, or that he was aware that Ms. Bennett's conclusion about her

ability to perform the notarization was incorrect. Mr. Goggin testified that he fielded a call from Mr. Bessenyei about whether he could help with a notarization.[2] Mr. Goggin asked Ms. Bennett if she could notarize Mr. Bessenyei's verification,[3] Ms. Bennett told Mr. Goggin that she could and she then interacted directly with Mr. Bessenyei to complete the notarizations.[4] Mr. Goggin relied on Ms. Bennett as his notary, as he had for years in the past, when she told him that based on her research and inquiry she could perform a notarization for Mr. Bessenyei.[5]

Defendants have not and could not point to anything in Mr. Goggin's testimony that is inconsistent with the documentary evidence and the independent testimony of Ms. Bennett.

F. The Chancery Court's Ruling.

At no point in the Trial Court's Opinion did the Court ever reject the Plaintiffs' or Ms. Bennett's testimony. Nor did the Court ever conclude that Plaintiffs or Ms. Bennett actually knew

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[2] (*See* A106, 14:11-12)("I believe he called me and said, 'Is it possible for you guys to notarize this?'")

[3] (*See* A106, 14:15-17) ("I said, 'I don't know,' and if memory serves, that's when I asked Jennifer if she could do it")

[4] (*See* A105, 9:24-10:11, 11:10-15) (testifying that Ms. Bennett notarized Mr. Bessenyei's verification while speaking to him on the telephone after she told Mr. Goggin that to do so was appropriate)

[5] (*See* A105, 11:10-15) ("I asked her if she was able to notarize an electric signature, and she said . . . 'I believe that I can. Give me a few minutes and I will get back to you.' She walked in my office and said, 'It's not a problem. I can do it.'")

that the notarizations failed to comply with Pennsylvania law. Rather, the Court held that their level of knowledge "does not matter because . . . the requirement that the person whose signature is to be notarized personally appeared before the notary is both clear and readily accessible to anyone who undertakes any sort of effort to find out." (Mem. Op p. 20) The Court further noted, as it relates to Mr. Bessenyei, that, as a Hungarian national living abroad, he "probably knew (or should have known) the least about American notary procedures." (Mem. Op. p. 20)

Although the Court found that "[t]he Plaintiffs achieved short-term tactical benefits by avoiding compliance with the notary laws," the Court never identified what those benefits were (Mem. Op. p. 22), and Defendants never argued that Plaintiffs achieved any.

ARGUMENT

I. NONE OF THE FACTORS DELAWARE COURTS CONSIDER WHEN ANALYZING A RULE 41(b) MOTION SUPPORT THE DISMISSAL OF PLAINTIFFS' CLAIMS.

A. QUESTION PRESENTED.

Whether the factors Delaware courts consider when analyzing a motion brought under Rule 41(b) support the dismissal of Plaintiffs' claims? The issue was presented in Plaintiffs' Answering Brief (D.I 97, pp. 30-38) and at oral argument on the motion to dismiss. (D.I. 116, Tr. pp. 29:6-32:11)

B. STANDARD OF REVIEW.

The Court's decision to dismiss a case under Rule 41(b) is reviewed by the standard of whether the action taken was within the realm of judicial discretion. *Smith v. Williams*, 2007 Del. Super. LEXIS 394, at *9 (July 27, 2007). "Notwithstanding the breadth of a court's inherent power to deal with abuses of the judicial process, a trial court's discretion is not without limits." *Id.* at **9-10. Accordingly, the sanction of dismissal "is generally reserved for instances where the defaulting party's misconduct is particularly egregious." *Id.* (citations omitted).

However, the question of whether the trial court utilized the proper legal standard in its analysis is a question of law, subject to *de novo* review. *See e.g., Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999)

C. MERITS OF ARGUMENT.

Court of Chancery Rule 41(b) provides that a defendant may move for dismissal of an action for "failure of the plaintiff to prosecute or to comply with these Rules or any order of court. . ." Ct. Ch. R. 41(b). Where, as here, a defendant has moved to dismiss under Rule 41(b) due to a purported fraud on the court, the defendant has a heavy burden:

> [E]ven assuming that Rule 41(b) is the procedurally proper mechanism to assert a claim of fraud on the Court, to succeed on this motion, [a defendant] must show by clear and convincing evidence that Plaintiffs' and their counsel's conduct **unfairly prevented him from presenting his defense**.

Paron Capital Mgmt., LLC v. McConnon, 2012 Del. Ch. LEXIS 13, at *26 (Jan. 24, 2012)(emphasis added).

Defendants did not and cannot meet this standard and the Trial Court never considered it in its analysis, which in and of itself, requires reversal. Defendants have never argued, much less demonstrated by clear and convincing evidence, that the use of defective notarizations somehow prevented them from presenting any defenses they may have. Nor could Defendants credibly advance such an argument. Defendants in fact presented their defenses, fully engaged in discovery and filed their motion to dismiss on the eve of trial shortly before their pretrial brief was due. The defective notarization for Mr. Bessenyei could not and did not impact any substantive issues in

the case, let alone impede Defendants' ability to present their defenses to the claims against them. Dismissal was therefore improper. *See id.* at *27 (denying motion to dismiss under Rule 41(b) because defendant "presented no clear and convincing evidence that any trick, artifice, or fraud on the part of Plaintiffs prevented him from arguing his defense.")

Nor do any of the other factors Delaware courts look to support the dismissal of Plaintiffs' claims. In determining whether dismissal is an appropriate sanction, Delaware courts have considered: "(1) the existence of certain extraordinary circumstances, (2) the presence of willfulness, bad faith, or fault by the offending party, (3) the consideration of lesser sanctions to rectify the wrong and to deter similar conduct in the future, (4) the relationship or nexus between the misconduct drawing the dismissal sanction and the matters in controversy in the case, (5) prejudice and the public interest, and (6) the degree of the wrongdoer's culpability." *Postorivo v. AG Paintball Holdings, Inc.*, 2008 Del. Ch. LEXIS 120, at *75 (Aug. 20, 2008) (citations omitted).

None of these factors support the dismissal of Plaintiffs' claims. First, there are no "extraordinary circumstances" presented here. Nor was there any "willfulness, bad faith, or fault" on the part of Plaintiffs. Although Plaintiffs are ultimately responsible for ensuring that they have complied with

all applicable rules, the Trial Court specifically declined to find that Plaintiffs knew that the notarizations failed to comply with Pennsylvania law. Going one step further, with respect to Mr. Bessenyei, the Court held that, as a Hungarian national living abroad, he had *no reason to know* that the verifications were defective.

The Court never considered whether lesser sanctions would rectify the wrong and deter future similar conduct,[6] and there is no reason why a lesser sanction, such as fee-shifting for the motion to dismiss, would not have proven effective.[7] There is no relationship nexus between the defective notarizations and the underlying action, nor can Defendants credibly claim to have been prejudiced. Finally, considering that Plaintiffs are not seeking monetary damages, but instead are seeking to restore a Board seat in advance of the upcoming election for the benefit of all Vermillion shareholders, the public interest is better served by permitting the action to be heard on its merits.

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[6] As discussed *infra* p. 30, the Court's failure to consider whether lesser sanctions would be appropriate alone justifies reversal.

[7] Long before Defendants filed their motion to dismiss, Mr. Bessenyei had provided a substitute verification for his notarization of the Amended Complaint.

II. DISMISSAL OF PLAINTIFFS' COMPLAINT FINDS NO SUPPORT IN *PARFI*.

A. QUESTION PRESENTED.

Whether the Court's decision in *Parfi Holdings AB v. Mirror Image Internet, Inc.*, 954 A.2d 911 (Del. Ch. 2008) supports the dismissal of Plaintiffs' claims? The issue was presented in Plaintiffs' Answering Brief (D.I 97, pp. 32-38) and at argument on the motion to dismiss. (D.I. 116, Tr. pp. 29:6-32:11)

B. STANDARD OF REVIEW.

The Court's decision to dismiss a case under Rule 41(b) is reviewed by the standard of whether the action taken was within the realm of judicial discretion. *Smith,* 2007 Del. Super. LEXIS 394 at *9 citations omitted). "Notwithstanding the breadth of a court's inherent power to deal with abuses of the judicial process, a trial court's discretion is not without limits." *Id.* at **9-10. Accordingly, the sanction of dismissal "is generally reserved for instances where the defaulting party's misconduct is particularly egregious." *Id.* (citations omitted). Because there was no evidentiary hearing, all disputed facts must be resolved in favor of the Plaintiffs as the non-moving party.

C. MERITS OF ARGUMENT.

1. The *Parfi* Standard.

The Trial Court only analyzed Defendants' Motion to Dismiss under the standard announced in *Parfi Holdings AB v. Mirror*

Image Internet, Inc.,. (Mem. Op. p. 4) In *Parfi*, a plaintiff who wished to have the Chancery Court lift a stay that was in place pending the completion of a closely related arbitration made false representations of fact to the court about why it had failed to prosecute the arbitration on the schedule it had previously submitted. *Id.* at 914. The plaintiff in that case claimed that it was "impossible" for the plaintiff to fund the arbitration because of a recent adverse financial development and suggested that the plaintiff had not been aware of the size of the required arbitration filing fee. *Id.*

Discovery revealed those factual claims to be false. *Id.* The *Parfi* Court concluded that plaintiff had long known about the size of the required filing fee and had sufficient funds to initiate and prosecute the arbitration. *Id.* But, desiring to have the Chancery Court reverse its prior decision to stay its case until the arbitration was completed, the plaintiff attempted to mislead the Court into believing that the plaintiff was too impoverished to prosecute the arbitration and allow the case to move forward first. *Id.* at 914-15.

In essence, according to the *Parfi* Court, the plaintiff sought to have a motion for reargument granted, not by way of proper argument, but instead on the basis of a misleading recitation of the facts. *Id.* at 915. Ultimately dismissing plaintiff's claim, the court held that "the harsh sanction of

dismissal" under Rule 41(b) is proper where "a party knowingly misleads a court of equity In order to secure an unfair tactical advantage." *Id.* at 932-33. Neither of these factors are present in the case at hand.

2. No Finding the Plaintiffs or Ms. Bennett Committed Intentional Misconduct.

In *Parfi*, the lower case found as a factual matter that the plaintiff *knowingly, and in bad faith*, misled the lower case. In contrast, the Trial Court in the present case specifically noted that it made no finding whatsoever as to whether the Plaintiffs or Ms. Bennett knowingly misled the Court. (Mem. Op. p. 20) Indeed, the Court held no evidentiary hearing and all of the unrebutted deposition testimony and contemporaneous documentary evidence submitted with the briefing demonstrated that the Plaintiffs acted in good faith.[8]

Instead, the Court, after analyzing Pennsylvania notarial law, merely held that Mr. Goggin *should have known* that the

[8] To believe otherwise, one would have to conclude that: 1) Ms. Bennett fabricated her entire testimony about the notarial process; 2) the emails about the process knowingly omitted references to some knowledge by Ms. Bennett, Mr. Goggin and Mr. Bessenyei that the notarizations were not valid; 3) Mr. Goggin never actually asked Ms. Bennett whether she could perform the notarization or knew that the conclusions reached by Ms. Bennett were wrong; and 4) Messrs. Goggin and Bessenyei nevertheless proceeded rather than simply having Mr. Bessenyei find another notary or dropping Mr. Bessenyei, who was not a necessary party, as a plaintiff. Defendants have cited to no facts from which these conclusions can be drawn, and instead the testimony of Ms. Bennett and Mr. Goggin completely undermines any such conclusions.

notarizations were invalid under Pennsylvania law. (Mem. Op. pp. 13, 20) But dismissal under Rule 41(b) because a party should have known (as opposed to actually knew) its actions were incorrect finds zero support and is highly distinguishable from *Parfi*.

Considering the severe nature of dismissal, it is unsurprising that it is near-universally recognized that nothing short of intentional misconduct is required before dismissal under Rule 41(b) is warranted. *See Smith*, 2007 Del. Super. LEXIS 394 at **10-11 (denying defendants' motion to dismiss under Rule 41(b) and noting that the concept of "fraud on the court" should be "construed narrowly" and "is typically confined to the more serious, but fortunately rare, cases involving a corruption of the judicial process itself, such as bribery of a judge or juror, improper influence exerted on the court by an attorney, or involvement of an attorney as an officer of the court in the perpetration of fraud."); *Mann v. Lewis*, 108 F.3d 145, 147 (8th Cir. 1997)("Dismissal with prejudice" under F.R.C.P. 41(b) "is an extreme sanction and should be used only in case of willful disobedience of a court order or . . . persistent failure to prosecute a complaint") (quoting *Givens v. A.H. Robins Co., Inc.*, 751 F.2d 261, 263 (8th Cir. 1984)) (alterations in original) (emphasis added); *Gardner v. United States*, 211 F.3d 1305, 1309 (D.C. Cir. 2000) (deterrence of

future misconduct justifies dismissal under F.R.C.P. 41(b) only "when there is some indication that the client or attorney consciously fails to comply with a court order cognizant of the drastic ramifications") (emphasis added); *Conkle v. Potter*, 352 F.3d 1333, 1337 (10th Cir. 2003) (Under Rule 41(b), "because dismissal with prejudice defeats altogether a litigant's right to access to [sic] the courts, it should be used as a weapon of last, rather than first, resort, and it is appropriate only in cases of willful misconduct.") (quotations omitted) (emphasis added); *Goforth v. Owens*, 766 F.2d 1533, 1535 (11th Cir. 1985) ("The legal standard to be applied under Rule 41(b) is whether there is a clear record of delay or willful contempt and a finding that lesser sanctions would not suffice. Dismissal of a case with prejudice is considered a sanction of last resort, applicable only in extreme circumstances.") (quotations and citations omitted) (emphasis added); *Keocher v. Fannie Mae*, 2012 U.S. Dist. LEXIS 104351, at *11 (D. Minn. July 9, 2012) ("Dismissal with prejudice" under F.R.C.P. 41(b) "is only available for willful disobedience of a court order or where a litigant exhibits a pattern of intentional delay.") (quotations, citations, and alterations omitted) (emphasis added); *Lockhart v. Coastal Int'l Sec.*, 2012 U.S. Dist. LEXIS 166330, at *19 (D.D.C. Nov. 21, 2012) (dismissal under Rule 41(b) "is ordinarily limited to cases involving egregious conduct by

plaintiffs, who are particularly dilatory, act in bad faith, or engage in deliberate misconduct, particularly when such conduct results in prejudice to the opposing party that is 'so severe as to make it unfair to require the other party to proceed with the case.") (quoting *Peterson v. Archstone Cmtys. LLC*, 637 F.3d 416, 418 (D.C. Cir. 2011)) (emphasis added); *Allen v. First Mort. Co., LLC*, 2011 U.S. Dist. LEXIS 151021, at **3-4 (D. Neb. Sept. 27, 2011) (same).

The unrebutted deposition testimony and contemporaneous documents demonstrate that Plaintiffs, in good faith, believed that the notarizations complied with Pennsylvania law. Even more important for present purposes, the Court never held otherwise.[9] This case is therefore vastly distinct from *Parfi*.

3. The Court Specifically Found that Mr. Bessenyei Had No Reason to Know that the Notarizations Failed to Comply with Pennsylvania Law.

As with Mr. Goggin, the Trial Court never found that Mr. Bessenyei had any knowledge that the notarizations were

[9] Nor could the Court have reached any other result in light of the fact that no evidentiary hearing was conducted. To the extent there are any disputes of material fact, the Court must resolve them in favor of the Plaintiffs. *C.f. Judah v. Delaware Trust Co.*, 378 A.2d 624, 632 (Del. 1977) (in considering motion for summary judgment, "[t]he facts must be viewed in the manner most favorable to the nonmoving party, with all factual inferences taken against the moving party and in favor of the nonmoving party.") (internal citations omitted).

defective. However, unlike Mr. Goggin,[10] the Court went one step further - finding that Mr. Bessenyei *did not even have a reason to know* that the notarizations were defective:

> As a non-lawyer and as a Hungarian national residing in Switzerland, it is understandable if Bessenyei did not have an appreciation for the notary laws of Pennsylvania, or that he did not know that under Pennsylvania law he was required to appear personally before the notary public in order for notarizations to be valid.

(Mem. Op. p. 10)

However, despite expressly finding little to no culpability on the part of Mr. Bessenyei - and in lieu of permitting Mr. Bessenyei to amend his verifications or otherwise adopt a less drastic sanction - the Court nonetheless dismissed his claims as well.[11] (*Id.* at 21) Dismissal under these circumstances finds no support in *Parfi* or in seemingly any other case to have granted a motion to dismiss under Rule 41(b).

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[10] Although the Trial Court found that Mr. Goggin, as a Pennsylvania attorney, should have known the notarizations were defective, the Trial Court provided no factual basis for that conclusion. Indeed, unlike Delaware attorneys, Pennsylvania attorneys are not notaries.

[11] The only reason offered by the Court for the dismissal of Mr. Bessenyei was the bare conclusion that he is "fairly charged with the consequences of [Mr. Goggin and Ms. Bennett's] acts." (Mem. Op. p. 21) The Trial Court did not explain why Mr. Bessenyei was fairly charged with those acts, nor did the Trial Court cite to any rule, law or other precedent that would support that conclusion.

4. Plaintiffs Gained No "Unfair Tactical Advantage."

Parfi is also distinguishable from the present case because the lower case in *Parfi* found that the plaintiff knowingly misled the lower case to achieve an "unfair tactical advantage." *Parfi Holding AB*, 954 A.2d at 933. Although the Trial Court in this case stated (in passing) that the "Plaintiffs achieved short-term tactical benefits by avoiding compliance with the notary laws" (Mem. Op. p. 22), neither the Court nor the Defendants have ever explained what those tactical benefits could have been.

It is undisputed that Plaintiffs were not faced with any statute of limitations at the time they filed their Complaint, nor was there any exigent reason why the Complaint had to have been filed on the day it was. In fact, had Plaintiffs so desired, the case could have proceeded without Mr. Bessenyei as a plaintiff altogether. The only possible "advantage" Mr. Bessenyei achieved by having Ms. Bennett notarize the verifications was that it prevented him from having to drive to a local notary and have the documents notarized there. To say the least, this is not a "tactical" advantage at all, let alone one comparable to the tactical advantage which justified dismissal in *Parfi*.

III. TO THE EXTENT THE PLAINTIFFS' CONDUCT WARRANTED SANCTIONS, THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ADOPTING OR EVEN CONSIDERING WHETHER LESS SEVERE SANCTIONS WOULD BE EFFECTIVE.

A. QUESTION PRESENTED.

Whether the Court abused its discretion by not adopting or even considering whether less severe sanctions would be effective? The issue was presented in Defendants' Answering Brief (D.I 97, pp. 30-38) and at oral argument on the motion to dismiss. (D.I. 116, Tr. pp. 29:6-32:11)

B. STANDARD OF REVIEW.

The Court's decision to dismiss a case under Rule 41(b) is reviewed by the standard of whether the action taken was within the realm of judicial discretion. *Smith,* 2007 Del. Super. LEXIS 394 at *9. "Notwithstanding the breadth of a court's inherent power to deal with abuses of the judicial process, a trial court's discretion is not without limits." *Id.* at **9-10. Accordingly, the sanction of dismissal "is generally reserved for instances where the defaulting party's misconduct is particularly egregious." *Id.* (citations omitted). Because there was no evidentiary hearing, all disputed facts must be resolved in favor of the Plaintiffs as the non-moving party.

C. MERITS OF ARGUMENT.

1. The Trial Court's Failure to Consider Lesser Sanctions Is Reversible Error.

In the context of a Rule 41(b) involuntary dismissal, "courts are mindful that dismissal is the ultimate blow to a lawsuit. . . . Accordingly, such a drastic sanction is generally reserved for instances where the defaulting party's misconduct is correspondingly egregious." Dismissal is inappropriate when lesser sanctions are satisfactory. 8 *Moore's Federal Practice* 3d. § 41-221[i].

Indeed, numerous courts have held that "consideration of lesser sanctions should appear in the record for the purposes of appellate review, and dismissal may be reversed when the record fails to show that the district court considered the possibility of lesser sanctions at all."[12] *Id.* (citations omitted) (emphasis added). *See e.g., Jackson v. City of New York*, 22 F.3d 71, 76 (2d Cir. 1994) (reversing dismissal when there was no indication trial court considered lesser sanctions for failure to obey pre-trial orders); *Alvarez v. Simmons Market Research Bureau, Inc.*, 839 F.2d 930, 932-33 (2d Cir. 1988) (reversing dismissal when it did not appear that court gave any consideration to efficacy of

[12] Because the Court of Chancery Rules are patterned upon the Federal Rules of Procedure, federal precedent construing those rules is persuasive authority. *See, e.g., Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund*, 624 A.2d 1199 (Del. 1993).

lesser sanctions); *Mingo v. Sugar Cane Growers Co-op of Fla.*, 864 F.2d 101, 102 (11th Cir. 1989) (court should look to efficacy of lesser sanctions); *Peterson v. Archstone Communities, LLC*, 637 F.3d 416, 419 (D.C. Cir. 2011) (dismissal vacated because Court did not try "less dire alternatives" before resorting to dismissal); *United States v. National Medical Enterprises, Inc.*, 792 F.2d 906, 912 (9th Cir. 1986) ("The district court abuses its discretion if it imposes a sanction of dismissal without first considering the impact of the sanction and the adequacy of less drastic sanctions.").

In its Opinion, the Trial Court appeared to give no consideration to whether any other sanction other than dismissal would be effective or warranted. (Mem. Op. p. 20) Such failure constitutes reversible error. *See Jackson*, 22 F.3d at 76; *Alvarez*, 839 F.2d at 932-33; *Peterson*, 637 F.3d at 419.

2. Plaintiffs' Conduct Did Not Justify Dismissal.

To the extent Plaintiffs' conduct justified sanctions, the imposition of dismissal was unduly harsh. It bears repeating that the Trial Court neither found that Plaintiffs knew the notarizations were defective, or, with respect to Mr. Bessenyei, *even had a reason to know* that the notarizations were defective. This fact alone makes dismissal improper.[13]

[13] *See Parfi*, 954 A.2d at 932-33; *see also Sundor Electric, Inc. v. E.J. T. Construction Co.*, 337 A.2d 651, 652 (Del. 1975)

Nor is this a case where Plaintiffs participated in any dilatory conduct or otherwise ignored Court orders. No litigation advantage was gained (or attempted) via the defective notarizations and Defendants cannot possibly argue that they have been prejudiced.

Courts have universally found dismissal to be inappropriate under similar circumstances. *See e.g., Lockhart*, 2012 U.S. Dist. LEXIS 166330 at *19 (dismissal under Rule 41(b) "is ordinarily limited to cases involving egregious conduct by plaintiffs, . . . particularly when such conduct results in prejudice to the opposing party that is 'so severe as to make it unfair to require the other party to proceed with the case.") (quoting *Peterson v. Archstone Cmtys. LLC*, 637 F.3d 416, 418 (D.C. Cir. 2011)) (emphasis added).

To the extent sanctions were warranted, it is unclear why a lesser sanction, such as subjecting Plaintiffs to fines and/or awarding Defendants the attorneys' fees expended for bringing the motion to dismiss, would not have adequately punished Plaintiffs and deterred future similar conduct. *See Postorivo*, 2008 Del. Ch. LEXIS 120, at *78 (denying motion to dismiss for a party's misconduct where "lesser sanctions than dismissal are

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(holding in context of discovery dispute that dismissal is improper absent "some element of willfulness or conscious disregard of [a court] order") (quoting 4A *Moore's Federal Practice* (2 ed) § 37.03[2.5])).

available to rectify the wrong here and deter similar conduct in the future."); *Calloway v. Perdue Farms, Inc.*, 313 Fed. Appx. 246, 249 (11th Cir. Ga. 2009) ("We have stated repeatedly that dismissal with prejudice is an 'extreme sanction' and 'is plainly improper unless and until the district court finds a clear record of delay or willful conduct and that lesser sanctions are inadequate to correct such conduct.'") (citations omitted); *Nowak v. Syva Co.*, 1992 U.S. Dist. LEXIS 19630, at *4 (W.D.N.Y. Dec. 18, 1992) ("[D]ismissal with prejudice is a harsh remedy which is to be used sparingly and in rare situations . . . when other and less drastic sanctions are inappropriate.").

Moreover, the sanction of dismissal is particularly inapt here in light of the claims at issue. This is not an action for monetary damages, but rather one brought under *Blasius* and *Unocal* to invalidate the Board's decision to eliminate a director seat it knew it would lose. It is not only Mr. Goggin and Mr. Bessenyei that are affected by the dismissal of Plaintiffs' claim, but all of Vermillion's shareholders, the majority of whom Plaintiffs believe would have voted against Vermillion's Board candidates. Given the totality of the circumstances, the Trial Court's order of dismissal in lieu of a lesser sanction constitutes an abuse of discretion.

CONCLUSION

For the foregoing reasons, Plaintiffs-below György B. Bessenyei and Robert S. Goggin, III respectfully request that the Chancery Court's Opinion and Order be reversed.

Dated: February 14, 2013

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Case No. 7572-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GYÖRGY B. BESSENYEI and ROBERT S. GOGGIN, III,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 7572-VCN**
VERMILLION, INC., BRUCE A. HUEBNER, WILLIAM C. WALLEN, PH.D, JAMES S. BURNS, PETER S. RODDY, CARL SEVERINGHAUS, JOHN F. HAMILTON and GAIL S. PAGE,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: August 22, 2012
Date Decided: November 16, 2012

Matt Neiderman, Esquire, Gary W. Lipkin, Esquire, and Benjamin A. Smyth, Esquire of Duane Morris LLP, Wilmington, Delaware, Attorneys for Plaintiffs.

James L. Holzman, Esquire, J. Clayton Athey, Esquire, Nichole M. Faries, Esquire, and Kevin H. Davenport, Esquire of Prickett, Jones & Elliott, P.A., Wilmington, Delaware, and Peter M. Stone, Esquire, Edward Han, Esquire, Janelle Sahouria, Esquire of Paul Hastings LLP, Palo Alto, California, Attorneys for Defendants.

NOBLE, Vice Chancellor

I. INTRODUCTION

Plaintiffs György Bessenyei ("Bessenyei") and Robert S. Goggin, III ("Goggin") (collectively, the "Plaintiffs"), shareholders of Defendant Vermillion, Inc. ("Vermillion" or the "Company"), a Delaware corporation, initiated this action against Vermillion and certain of its current and former directors (the "Individual Defendants").[1] Vermillion's Board of Directors (the "Board") is made up of three separate classes of directors, each of which has staggered three-year terms. Before May 15, 2012, there were seven director seats on the Board in total: two Class I directors, three Class II directors, and two Class III directors. At the June 2012 annual stockholder meeting, it was expected that the two Class III seats would be up for election.

On February 15, 2012, the Plaintiffs nominated a slate of candidates to fill these two seats, initiating a proxy contest. On May 15, 2012, the Individual Defendants amended Vermillion's bylaws to reduce the size of the Board from seven to six members, leaving only one Class III seat up for election at the June 2012 annual stockholder meeting, instead of the original two. The Plaintiffs allege that the Individual Defendants breached their fiduciary duties by eliminating the Board seat. The Plaintiffs further requested declaratory and injunctive relief that

[1] Vermillion and the Individual Defendants are referred to collectively as the "Defendants."

would require Vermillion to allow its shareholders to elect two directors at the upcoming annual stockholder meeting.

The regular processing of this action was derailed because the Defendants learned that the signatures of one of the Plaintiffs had been improperly notarized. The Defendants moved to dismiss this action because Bessenyei was out of the United States when a Pennsylvania notary public notarized documents with jurats reciting that Bessenyei had "personally appeared before [her]" in Pennsylvania.

The Court now addresses the Defendants' Motion to Dismiss pursuant to Court of Chancery Rule 41(b).

II. BACKGROUND

At issue is the legitimacy of three verifications executed by Bessenyei for use in this litigation, as required by Court of Chancery Rule 3(aa): the first, dated May 25, 2012, filed with Plaintiffs' initial complaint (the "May 25 verification"); the second, dated June 1, 2012, filed with Plaintiffs' Amended Verified Complaint (the "June 1 verification"); and the third, dated June 26, 2012, filed with Plaintiffs' Responses to Defendants' First Set of Interrogatories (the "June 26 verification").

Court of Chancery Rule 3(aa) requires that all complaints and related pleadings be accompanied by a notarized verification from a qualified individual for each named plaintiff, one which attests to the correctness and truthfulness of

the filing.[2] All three challenged verifications purport to contain representations by Bessenyei that they are "SWORN TO" by Bessenyei and "subscribed before" Jennifer L. Bennett ("Bennett"), a Pennsylvania notary public who works in Philadelphia. When each of the three documents was signed, Bessenyei was not only not in Pennsylvania, but he also was not in the United States.

III. CONTENTIONS

The Defendants allege that although each of the three May 25, June 1, and June 26 verifications was purportedly signed by Bessenyei, they were improperly notarized by Bennett and therefore are invalid as verifications. They claim that Goggin, a Pennsylvania attorney, caused Bennett, a legal assistant in his Pennsylvania law office, to notarize these verifications even though Bennett did not personally witness Bessenyei sign the documents before her.

The Defendants argue that because Bessenyei was not present in Pennsylvania before Bennett when these notarizations took place, the notarizations are invalid and in violation of Pennsylvania law. In turn, the Defendants claim that, if these notarizations are invalid, their use as verifications for the purposes of Delaware law and Court of Chancery Rule 3(aa) is also therefore invalid. The Defendants further allege that Plaintiffs' Delaware counsel had apparent knowledge that the verifications were invalid, and yet still caused the May 25 and

[2] Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 4.01, at 4-2 (2011) ("Wolfe & Pittenger").

June 1 verifications to be filed improperly with the Court, and the June 26 verification to be improperly transmitted to the Defendants.

IV. APPLICABLE LAW

A. *Rule 41(b) Motion to Dismiss for Failure to Comply with Court of Chancery Rules*

Court of Chancery Rule 41(b) provides that "a defendant may move for dismissal of an action or of any claim against the defendant . . . for failure of the plaintiff to . . . comply with the [Court of Chancery] Rules or any order of court." Rule 41(b) further states that a dismissal under these circumstances "operates as an adjudication upon the merits."

The parties agree that the *Parfi* standard governs the application of Rule 41(b).[3] In *Parfi*, this Court held that "the harsh sanction of dismissal" under Rule 41(b) is proper "when a party knowingly misleads a court of equity in order to secure an unfair tactical advantage."[4] Further, dismissal is proper when "the tradition of civility and candor that has characterized litigation in this court" is threatened because "the integrity of the litigation process is fundamentally undermined if parties are not candid with the court."[5] This Court has "inherent

[3] *Parfi Holdings AB v. Mirror Image Internet, Inc.*, 954 A.2d 911 (Del. Ch. 2008).
[4] *Id.* at 932-33.
[5] *Id.*

authority to police the litigation process, to ensure that acts that undermine the integrity of that process are sanctioned."[6]

B. *The Verification Requirement under Delaware Law*

All complaints and comparable pleadings filed in this Court must be accompanied by a notarized verification for each named plaintiff, attesting to the correctness and truthfulness of the filing.[7] Rule 3(aa) provides that "all complaints, counterclaims, cross-claims and third party complaints, and any amendments thereto, shall be verified by each of the parties filing such pleading."[8] When verification of a pleading is required under the Rules, the pleading must be "under oath or affirmation by the party filing such pleading that the matter contained therein insofar as it concerns the party's act and deed is true, and so far as relates to the act and deed of any other person, is believed by the party to be true."[9]

The purpose of Rule 3(aa) is at least twofold: first, the matter set forth in any pleading must be verified by someone attesting to its correctness and truthfulness; and second, such a person must sign the pleading and have her signature notarized in order to confirm the authenticity of the signature. Signatures on Delaware pleadings notarized outside of Delaware are sufficient to satisfy the verification requirements of Rule 3(aa), as long as they are valid notarizations under the law of

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[6] *Id.*
[7] Wolfe & Pittenger, § 4.01, at 4-2.
[8] Ct. Ch. R. 3(aa).
[9] *Id.*

the foreign jurisdiction in which they are signed.[10] Because the verifications at issue purport to have been notarized before a Philadelphia notary public, Pennsylvania law governs their validity.

C. *The Validity of the Notarizations under Pennsylvania Law*

The section of Pennsylvania's notary public law governing personal appearances before a notary requires that a notary "have satisfactory evidence that the person appearing before the notary is the person described in and who is executing the instrument."[11] The statute plainly requires that the actual person "appear[] before the notary" in order for a notarization to be valid. Pennsylvania courts have consistently held, that under Pennsylvania's notary law, the signatory must appear personally before the notary who is notarizing a signed document.

In *Bokey's Estate,* the Supreme Court of Pennsylvania held that the personal appearance of a signer is fundamental to the purpose of notarization: "[t]he essence of the notarial certificate is that the document has been executed, and that the notary knows that he is confronted by the signer, and that the signer is asserting the fact of his execution."[12] In *Frey*, the Superior Court of Pennsylvania held that "[w]hen a notary public does certify a document, he attests that the document has been executed or is about to be executed, that the notary knows that he is

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[10] *Kortum v. Webasto Sunroofs, Inc.*, 769 A.2d 113 (Del. Ch. 2000) (finding a notarization under German law to satisfy the "under oath" requirements of 8 *Del. C.* § 220).
[11] 57 *Pa. Cons. Stat.* § 158.1(a).
[12] *In re Bokey's Estate*, 194 A.2d 194, 198 (Pa. 1963).

confronted by the signer, and that the signer is asserting the fact of his execution."[13]

Pennsylvania courts have also concluded that it is unlawful in Pennsylvania to notarize documents that are not signed in the notary's presence. In *Downing,* the Pennsylvania Commonwealth Court found invalid a notarization performed by a notary public who "affixed her notary seal to a document which, although signed by [the appellant], had not been signed in her presence."[14] The *Downing* court further stated that "while it is all too common a practice for notaries public to affix their seals to documents not signed in their presence, such a practice, however, is clearly unlawful, and should not be condoned, for the evils of such an unlawful practice are readily apparent. . . ."[15]

To underscore the importance that Pennsylvania law attaches to the validity of notarizations, Pennsylvania courts regard a failure "to sign the affidavit before the notary" as "a defect that cannot be characterized as merely 'technical,'" and considers dismissal of an improperly-notarized complaint as an appropriate remedy.[16]

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[13] *Commw. v. Frey*, 392 A.2d 798, 799 (Pa. Super. 1978).
[14] *Commw. Bureau of Commissions v. Downing*, 357 A.2d 703, 703 (Pa. Commw. 1976).
[15] *Id.* at 704.
[16] *Bolus v. Saunders*, 833 A.2d 266, 270 (Pa. Commw. 2003).

D. *The Delaware Uniform Unsworn Foreign Declarations Act*

The Delaware Uniform Unsworn Foreign Declarations Act (the "Declarations Act")[17] provides an alternate avenue for plaintiffs physically located outside the boundaries of the United States to verify their complaints and pleadings under Court of Chancery Rule 3(aa). Under the Declarations Act, if a Delaware law "requires or permits use of a sworn declaration, an unsworn declaration meeting the requirements [of the Declarations Act] has the same effect as a sworn declaration."[18] The Declarations Act defines a "sworn declaration" as a declaration in a signed record given under oath," including any "sworn statement, verification, certificate, and affidavit."[19] The Declarations Act applies to verifications required by Court of Chancery Rule 3(aa) because the "law" of Delaware requiring the use of a sworn declaration includes "a rule of court."[20]

Thus, in lieu of notarization, the Declarations Act allows an "unsworn declaration" by a plaintiff physically located beyond the boundaries of the United States to satisfy the requirements of Court of Chancery Rule 3(aa). To support its application, the declarant must be outside the United States[21] and an unsworn declaration must contain substantially the following language: "I declare under

[17] 10 *Del. C.* ch. 53A.
[18] *Id.* § 5354(a).
[19] *Id.* § 5352(6).
[20] *Id.* § 5352(2).
[21] *Id.* § 5353.

penalty of perjury under the law of Delaware that the foregoing is true and correct, and that I am physically located outside the geographic boundaries of the United States."[22]

V. ANALYSIS

A. *The Notarizations and Rule 41(b)*

Bessenyei's signature was notarized in Pennsylvania even though he was not in the United States.[23] Under Pennsylvania law, Bessenyei's failure to appear before Bennett at the time the notarizations took place renders the notarizations invalid. Bessenyei's verifications are therefore also invalid for the purposes of Court of Chancery Rule 3(aa).

Defendants' effort to obtain dismissal of this action turns on whether the collective conduct of Bessenyei, Bennett, Goggin, and Plaintiff's Delaware counsel relating to the invalid notarizations rises to the level of a deliberate violation of the Rules of this Court that would warrant an involuntary dismissal with prejudice under *Parfi*. The Court will address the actions of each of these actors in turn.

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[22] *Id.* § 5356. Bessenyei's papers did not include words to this effect; indeed, those papers provided the opposite—that he was appearing personally in Pennsylvania. Thus, Bessenyei did not rely on the Declarations Act.

[23] The record does not provide an explanation for why he did not use the Declarations Act or why that statute would not have met his needs.

1. Bessenyei's conduct

Bessenyei's signature appears on each of the three documents at issue. Bessenyei was not present before Bennett and not in Philadelphia at the time Bennett notarized the May 25, June 1, and June 26 verifications. Bessenyei, perhaps, could have used other options, but, instead, he chose to have Bennett notarize the verifications in Philadelphia without his presence, rendering them invalid under both Pennsylvania and Delaware law.

As a non-lawyer and as a Hungarian national residing in Switzerland, it is understandable if Bessenyei did not have an appreciation for the notary laws of Pennsylvania, or that he did not know that under Pennsylvania law he was required to appear personally before the notary public in order for notarizations to be valid. It appears, however, that Bessenyei consulted Goggin before the first verification on May 25, and asked Goggin, a Pennsylvania attorney, whether it was possible for Goggin to notarize the verification because Bessenyei "was down in the islands and didn't know where he could get anything notarized."[24]

2. Bennett's conduct

Bennett is the notary responsible for performing the improper notarizations, and her seal appears on each of the three verifications at issue. The record suggests, however, that Bennett was not acting solely in an independent capacity as

[24] Goggin Dep. at 13.

notary when she notarized the verifications. Bennett is a legal assistant employed by Goggin in his law office. Bennett was asked by Goggin to notarize each of the verifications.[25] Bennett then notarized the documents upon being so instructed, even though Bennett obviously was aware in each instance that Bessenyei was not present before her.

The steps that Bennett took to determine whether she could perform the notarizations without Bessenyei's presence were not reasonable. Bennett did not review the booklet available on the Pennsylvania Department of State's website entitled "Notaries Public in Pennsylvania: a Position of Public Trust," a booklet available for download.[26] She did not use the telephone number of the Pennsylvania governmental agency that oversees notaries, the Bureau of Commissions, Elections and Legislation, Division of Legislation and Notaries, at the Pennsylvania Department of State.[27] She did not consult the website of the National Notary Association.[28]

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[25] Bennett Dep. at 21.

[26] http://www.dos.state.pa.us/portal/server.pt/community/general_information_and_equipment/12642 (last visited Aug. 7, 2012).

[27] The phone number is available through a "Contact Us" link of the Department of State's notaries webpage. http://www.dos.state.pa.us/portal/server.pt/community/contact_us/12634 (last visited Aug. 7, 2012).

[28] http://www.nationalnotary.org/about/index.html (last visited Aug. 7, 2012). Bennett is a member of that organization (Bennett Dep. at 59), which functions as an "educator and promulgator of ethical best practices for U.S. Notaries." http://www.nationalnotary.org/resources_for_ notaries/ index.html (last visited Aug. 7, 2012).

Although Bennett claims that she researched the question using Google before agreeing to notarize the documents without Bessenyei's presence, neither Bennett nor the Plaintiffs have provided the sources upon which Bennett relied. At her deposition, she failed to recall whether her Google search was targeted specifically at Pennsylvania notary rules or what website she found on Google.[29] When directly asked whether she searched specifically for whether it was appropriate under Pennsylvania rules to notarize the documents without Bessenyei's presence, Bennett stated that she could not remember.[30]

The Plaintiffs also claim that Bennett relied upon a "credible witness" exception in Pennsylvania notary law, and that she consulted a colleague to make sure that her understanding of the "credible witness" rule was correct. Unfortunately, under Pennsylvania's notary public law, having a "credible witness" does not excuse the signatory from having to appear personally before the notary.[31] Pennsylvania's notary public law requires "satisfactory evidence that the person appearing before the notary is the person described in and who is executing the instrument."[32] According to the statute, this "satisfactory evidence" must consist of either a government issued identification card "or the oath or affirmation

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[29] Bennett Dep. at 21.
[30] Bennett Dep. at 21-22.
[31] *See., e.g., Answers to Self-Test Questions*, Notary Booklet at 74 ("A notary public is always required to have the individual who is executing an affidavit personally appear before them even where the notary public is personally familiar with the signature of the individual.")
[32] 57 *Pa. Cons. Stat.* § 158.1(a).

of a credible witness who is personally known to the notary and who personally knows the individual."[33] Even with a credible witness attesting to the identity of the witness, however, the person is still required to appear before the notary in order for the notarization to be valid.

Although Bennett acted contrary to her responsibilities as a Pennsylvania notary public in notarizing the three documents at issue without Bessenyei's presence, and although Bennett ought to have taken steps beyond a simple Google search to determine whether she could do so, any disciplinary action is a matter for the Pennsylvania authorities.[34] For present purposes, it is worth emphasizing that Bennett is employed by Goggin, a Pennsylvania attorney, and she has testified that she notarized the documents because Goggin directed her to do so.[35]

3. Goggin's Conduct

Goggin, one of the Plaintiffs in this action and a practicing attorney in Philadelphia, claims that, although he had previously only seen notarizations performed when the signer was actually in the presence of the notary, he approached Bennett about notarizing Bessenyei's signature and relied on her determination that notarizing the document of someone outside her presence was permitted. As a Pennsylvania attorney, Goggin ought to have known better.

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[33] *Id.*

[34] Pennsylvania Department of State, Disciplinary Actions, *available at* http://www.portal.state.pa.us/portal/server.pt/community/x_disciplinary_actions/_12528 (last visited Aug. 7, 2012).

[35] Bennett Dep. at 22.

Lawyers in Pennsylvania, like lawyers in Delaware, are directly responsible for the actions of those whom they supervise. According to the Rules of Professional Conduct for attorneys in both Pennsylvania and Delaware, "a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."[36] Delaware and Pennsylvania law both further provide that a lawyer who orders or ratifies misconduct by another is responsible for such misconduct.[37]

Regardless of whether Goggin's requests that Bennett notarize the documents without Bessenyei's presence constituted "orders," Goggin had knowledge of her conduct and subsequently ratified her conduct by seeking to benefit from the improperly notarized documents in this litigation. After each time that Goggin asked Bennett to notarize a verification without Bessenyei's presence, Goggin took the document and transmitted it to Delaware counsel.

A newsletter issued by the Disciplinary Board of the Supreme Court of Pennsylvania, the November 2010 Attorney E-newsletter, states that, in Pennsylvania, "[a]n attorney who directs or encourages an employee-notary to notarize documents not signed in the notary's presence commits serious

[36] Del. Lawyers' Rules of Prof'l Conduct R. 5.3(b); Pa. Rules of Prof'l Conduct R. 5.3(b).
[37] Del. Lawyers' Rules of Prof'l Conduct R. 5.3(c); Pa. Rules of Prof'l Conduct R. 5.3(c).

misconduct and could face discipline."[38] The publication is instructive, further, in its analysis of the relevant sections of the Pennsylvania Rules of Professional Conduct, which bind Goggin as a Pennsylvania attorney. Whether he read this publication is not known.

Rule 8.4 of the Pennsylvania Rules of Professional Conduct provides that it is professional misconduct for a lawyer to: "(a) violate or attempt to violate the Rules of Professional Conduct, do so, or do so through the acts of another . . . ; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice . . . ."[39] Further, a "lawyer who files or uses a document knowing it was improperly notarized may 'offer evidence that the lawyer knows to be false,' in violation of Rule 3.3(a)(3)" of the Pennsylvania Rules of Professional Conduct.[40] These provisions of the Pennsylvania Rules of Professional Conduct are substantially similar to the corresponding rules of the Delaware Lawyers' Rules of Professional Conduct.

Goggin's conduct in this litigation would seem to violate each of these ethical rules. On three separate occasions, Goggin caused his legal assistant to

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[38] Attorney E-Newsletter, The Disciplinary Board of the Supreme Court of Pennsylvania, p. 2 (Nov. 2010), http://www.padisciplinaryboard.org/newsletters/2010/november.php#story2 (last visited Nov. 15, 2012).
[39] Pa. Rules of Prof'l Conduct R. 8.4.
[40] Pa. Rules of Prof'l Conduct R. 3.3(a)(3).

notarize verifications improperly, in violation of Pennsylvania law and in violation of Goggin's own professional ethical responsibilities. On each occasion after Bennett affixed her notary seal to the verifications, Goggin, with full knowledge that the jurat on the documents incorrectly stated that it had been "SWORN TO and subscribed before" the notary by Bessenyei, transmitted the documents to Delaware counsel to be used in this litigation.

Goggin acts individually as one of the Plaintiffs in this action and is not the Delaware counsel who filed the improperly notarized documents with the Court.[41] Although Goggin's conduct may have violated a slew of ethical rules under Pennsylvania law, any disciplinary action he may face is up to the Disciplinary Board of the Supreme Court of Pennsylvania.

4. Delaware counsel's conduct

As officers of this Court, Plaintiffs' Delaware lawyers are ultimately responsible for the documents they file with the Court and serve on the Defendants. Their role with respect to each of the documents at issue must be reviewed.

The May 25 verification

On May 25, 2012, Plaintiffs' counsel transmitted draft verifications for the initial complaint to Goggin and Bessenyei at 10:11 a.m., with instructions to "fill in the state and country information, sign them and have them notarized and then

[41] Goggin also has not been admitted *pro hac vice* under Court of Chancery Rule 170(b).

email me a signed copy."[42] In a response to Plaintiffs' counsel and Goggin, Bessenyei recognized that there was a "[n]otarization problem."[43] At 10:38 a.m., Bessenyei wrote to Plaintiffs' counsel, copying Goggin: "problem likely solved, working on it."[44] Plaintiffs' counsel responded immediately, "Great – thanks."[45] At 11:09 a.m., Bessenyei wrote to Plaintiffs' counsel, copying Goggin, "[n]otarization problem solved, you get it in an hour or so."[46] Despite the specter of a notarization problem, Plaintiffs' counsel were not curious enough to inquire as to what the notarization problem was or how it had been solved.[47] Plaintiffs' counsel then filed the initial complaint bearing the improper verification in the late afternoon.

The June 1 verification

It appears that the June 1 verification was actually signed on May 31.[48] Defendants' counsel state that they called Plaintiffs' counsel on May 31 to discuss discovery issues,[49] and that, during that call, Plaintiffs' counsel represented that Bessenyei was on that day, traveling in the Caribbean. Although Plaintiffs'

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[42] Defs.' Opening Br. in Supp. of Mot. to Dismiss ("Opening Br.") Ex. 9.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] Mot. To Dismiss Hr'g Tr. 38-39 (Aug. 22, 2012) ("Tr.").
[48] Opening Br., Ex. 6.
[49] *Id.* Ex. 5; Tr. at 37.

counsel disputes the specifics of the May 31 phone call,[50] their Delaware counsel were aware of Bessenyei's frequent traveling. Plaintiffs' Delaware counsel should therefore have taken better care to ensure that Bessenyei's notarizations were properly executed, given Bessenyei's frequent travel.

One of Plaintiffs' counsel reports that the first three times he spoke with Bessenyei were by telephone and Bessenyei was "in three different countries."[51] While Plaintiffs' counsel admit knowledge that "Mr. Bessenyei was traveling frequently and that there was discussion with Mr. Bessenyei when Mr. Bessenyei was in different locations,[52] Plaintiffs' counsel claim that the issue of where Bessenyei was when he signed the verifications was not something that they considered or looked at until the pending motion.[53] There was no answer to the question of whether anyone at their firm was aware of the notarization problem at the time of the filings.[54]

The June 26 verification

Evidently, the date on the June 26 verification, like the June 1 verification, was not correct. Bessenyei e-mailed a verification page with a signature to Goggin five days before June 26, on June 21 at 5:40 p.m. The subject line of the e-mail

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[50] Tr. at 39.
[51] Tr. at 15.
[52] Tr. at 15.
[53] Tr. at 15-16.
[54] Tr. at 16.

was "Notarization" and the message read: "Pls, thanks!"[55] The verification page, carrying Bennett's notarization dated June 26, was subsequently transmitted to Defendants' counsel by Plaintiffs' Delaware counsel. Bennett first saw this document on June 26, and Bessenyei was not present when she notarized it.[56]

* * *

Plaintiffs' counsel should have conducted further inquiries given the initial "notarization problem" on May 25. Plaintiffs' counsel should also have paid more attention to the notarizations, given Bessenyei's frequent travel. Plaintiffs' counsel could have suggested, for instance, that Bessenyei use the services of a local notary where he happened to be present, or that Bessenyei avail himself of the Declarations Act. With the benefit of hindsight, there are steps that Delaware counsel, perhaps, should have or could have taken. The lack of record knowledge precludes the imposition of the sanction of dismissal on their account.

The notarizations of Goggin's signature are not objectionable. The focus must be on the improper notarization of Bessenyei's signature. Bessenyei may not have known that the notarizations of his signature were inappropriate; Goggin, who may be considered ultimately responsible for the improper notarizations is acting only as a party in this action—not as a lawyer of record; Plaintiffs'

[55] Opening Br., Ex. 13.
[56] Bennett Dep. at 37.

Delaware counsel, who perhaps should have been more vigilant, did not realize—or so the record suggests—that the notarizations were improper.

This Court's rules, in an effort to assure truthfulness, require verification of complaints, answers, and comparable pleadings. Failing to comply with this requirement is not some mere technicality; it undercuts the integrity of the judicial process. The problems with Bessenyei's notarizations occurred on three separate occasions. The Court (and opposing counsel) were misled. Whether Goggin and Bennett knew, in fact and in law, that their conduct was improper does not really matter because, as set forth above, the requirement that the person whose signature is to be notarized personally appeared before the notary is both clear and readily accessible to anyone who undertakes any sort of effort to find out.

Conduct of this nature warrants dismissal. The more difficult question is: what to dismiss? The obvious dismissal would be of Bessenyei because, after all, his signatures were the ones improperly notarized. But, of those involved with the Plaintiffs and the notarizations, Bessenyei probably knew (or should have known) the least about American notary procedures. Goggin, a lawyer, directed someone in his office to go forward with the notarization process, but he does not act, at least formally, in this matter as a lawyer and, as noted, the notarizations of his signatures are without challenge.

Critical documents carrying Bessenyei's signatures were not properly notarized as required by the Rules. The failure was not incidental or technical. Bessenyei seems to have been aware of a "problem," but his co-Plaintiff, Goggin, and someone on his staff, Bennett, working as Goggin's employee, were acting for Bessenyei as well, and Bessenyei is fairly charged with the consequences of their acts. For these reasons, Bessenyei will be dismissed as a Plaintiff.

Goggin may not have been acting as a lawyer in this matter, but Bennett's acts as notary occurred at his offices while Bennett toiled under his supervision. Perhaps he did not know that it is not proper to notarize a signature without the person before the notary, but he should have known. His conduct goes to the very concerns that resulted in the adoption of Rule 3(aa) and its notarization requirements. The documents report that Bessenyei signed before the notary. Bennett and Goggin knew that not to be true, but Goggin did nothing to preserve the integrity of the process that he commenced in this Court. No sanction short of dismissal is appropriate under these circumstances.

B. *Request for Attorneys Fees and Costs*

The Defendants argue for an award of attorneys' fees and expenses incurred in bringing their Motion to Dismiss pursuant to Court of Chancery Rule 41(b), as well as their Motion for Discovery Regarding Plaintiffs' Verifications. Typically, litigants must pay their own attorneys' fees and expenses under the American

Rule.[57] Only rarely do Delaware courts deviate from this standard.[58] Nevertheless, bad faith is a well-established equitable exception to the American Rule and may be found, for example, "where parties have . . . falsified records."[59] Generally, a party acting merely under an incorrect perception of its legal rights does not engage in bad-faith conduct;[60] rather, the party's conduct must demonstrate "an abuse of the judicial process and clearly evidence [ ] bad faith."[61]

The Plaintiffs achieved short-term tactical benefits by avoiding compliance with the notary laws. With some thought and some patience, the entire problem addressed in this memorandum opinion could have been circumvented. Dishonesty in the course of litigation is a tempting marker of bad faith.[62] Yet, here, there is no question that Bessenyei, in fact, signed the documents. The ethical failure arose in the context of not complying with a rule designed to assure that the

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[57] *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1043-44 (Del. 1996).
[58] *See Weinberger v. UOP, Inc.*, 517 A.2d 653, 654 (Del. Ch. 1986) (noting that "Delaware courts have been very cautious in granting exceptions" to the American Rule).
[59] *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 546 (Del. 1998) (citations omitted).
[60] *Mother African Union First Colored Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church*, 1992 WL 83518, at *10 (Del. Ch. Apr. 22, 1992).
[61] *In re SS & C Techs., Inc. S'holders Litig.*, 948 A.2d 1140, 1151 (Del. Ch. 2008); *see also Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 506 (Del. 2005) ("The purpose of this so-called bad faith exception is to deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the judicial process.") (internal quotations omitted); *Montgomery Cellular Holding Co., Inc. v. Dobler*, 880 A.2d 206, 227 (Del. 2005) ("The bad faith exception is applied in 'extraordinary circumstances' as a tool to deter abusive litigation and to protect the integrity of the judicial process.").
[62] There is no reason to conclude that there was any dishonesty during the course of these proceedings other than that associated with the notarizations.

party did sign his pleading and did stand behind its accuracy. The troubling conduct is adequately addressed by dismissal. Dismissal also fully serves the purpose of protecting the integrity of the judicial process in future proceedings. In sum, the reasons behind the fee-shifting doctrine do not lead to the conclusion that the circumstances of this case justify that infrequently granted relief.[63]

VI. CONCLUSION

For the foregoing reasons, this action must be dismissed, but the Defendants' motion for reimbursement of attorneys' fees and expenses is denied.

An implementing order will be entered.

[63] The Defendants, while not being reimbursed their attorneys' fees and expenses, are also spared the additional costs that would have resulted from continued litigation over the merits of Plaintiffs' claims.

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Case No. 7572-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GYÖRGY B. BESSENYEI and ROBERT S. GOGGIN, III,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 7572-VCN**
VERMILLION, INC., BRUCE A. HUEBNER, WILLIAM C. WALLEN, PH.D, JAMES S. BURNS, PETER S. RODDY, CARL SEVERINGHAUS, JOHN F. HAMILTON and GAIL S. PAGE,	:	
Defendants.	:	

ORDER

AND NOW, this 16th day of November, 2012, for the reasons set forth in the Court's Memorandum Opinion of even date,

IT IS HEREBY ORDERED that the above-entitled action be, and the same hereby is, dismissed.

IT IS FURTHER ORDERED that Defendants' application for an award of attorneys' fees and expenses be, and the same hereby is, denied.

/s/ John W. Noble
Vice Chancellor

CERTIFICATE OF SERVICE

I, Matt Neiderman, Esq., do hereby certify that on this 14th day of February 2013, I caused to be served copies of the forgoing document on the following individual(s) in the manner indicated:

LexisNexis File and Serve

James L. Holzman, Esq.
J. Clayton Athey, Esq.
Nicole M. Faries, Esq.
Prickett, Jones & Elliott, P.A.
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/s/ Matt Neiderman
Matt Neiderman(Del. I.D. No. 4018)