IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE RURAL METRO CORPORATION SHAREHOLDERS LITIGATION	))	Consolidated C.A. No. 6350-VCL

MEMORANDUM OPINION

Date Submitted: September 26, 2013
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LASTER, Vice Chancellor.

The plaintiffs in this class action assert that the members of the board of directors (the "Board") of Rural/Metro Corporation ("Rural/Metro" or the "Company") breached their fiduciary duties when selling the Company to a private equity firm. The plaintiffs contend that RBC Capital Markets, LLC ("RBC") and Moelis & Company LLC ("Moelis"), who served as financial advisors to the Company, aided and abetted the Board members' breaches of fiduciary duty. The directors and Moelis settled with the plaintiffs. The case proceeded to trial against RBC.

After the close of the evidence and post-trial briefing, but before post-trial argument, the Company filed a suggestion of bankruptcy. The bankruptcy filings included a declaration from Stephen Farber (the "Farber Declaration" or "FD"), who joined the Company after the trial and became its Chief Financial Officer on June 25, 2013, two years after the closing of the challenged transaction. In his declaration, Farber offers opinions about the reasons for the Company's insolvency, including his view that the Company had difficulty integrating acquisitions and could not forecast revenue accurately. By letter dated August 8, RBC asked this court to take judicial notice of the Farber Declaration and to rely on it for the truth of two propositions: first, that the financial projections used during the Rural/Metro sales process were "significantly flawed and wildly optimistic," and second, "that the price received by the Company's shareholders was fair." Dkt. 325 at 3.

The plaintiffs have moved to bar consideration of the Farber Declaration. Their motion is granted.

I. FACTUAL BACKGROUND

Rural/Metro is a Delaware corporation headquartered in Scottsdale, Arizona. Founded in 1948, the Company is a leading national provider of ambulance and private fire protection services that serves more than 400 communities across 22 states. Its ambulance business offers emergency and non-emergency transports under contracts with government organizations, hospitals, nursing homes, and other healthcare entities. Rural/Metro listed on NASDAQ in July 1993.

A. The Company's Business Plan

In May 2010, the Board hired Michael P. DiMino as the Company's new President and CEO and gave him a mandate to grow the Company. To carry out his mandate, DiMino developed new growth strategies. As discussed in the Company's public filings, Rural/Metro planned to:

> *Increase Revenue Through Strategic Growth*. Flexibility in our capital structure allows us to actively pursue acquisitions of ambulance transport businesses and to consolidate business in the fragmented ambulance transport market. We will pursue acquisitions that are accretive to our profitability, leverage our strengths and complement our existing national footprint.
>
> …
>
> *Increase Revenue Through New Market Non-Emergency Contracts*. We believe we can increase revenue by entering new markets where we do not have an emergency transportation presence. We will enter new markets through preferred provider agreements with local and regional hospitals and healthcare systems for non-emergency general transportation services. We believe our name recognition and service excellence in our existing markets will allow us to gain entrance into new markets to provide non-emergency services to larger scale customers.

JX 60 at 13.

The evidence at trial demonstrated that Rural/Metro's growth strategy was reasonable and had a significant likelihood of success. It was not a sure thing, but in an uncertain world, nothing is. During trial, DiMino testified about the risks facing the Company in late 2010 and early 2011, which included potential difficulties integrating acquisitions and changes in the sources of payment for the Company's services. Two other directors testified about these matters. The Company's public filings detailed these risks, as did the materials provided to potential bidders.

Warburg Pincus LLC ("Warburg"), the ultimate acquirer of the Company, conducted extensive due diligence on the Company. Warburg hired high-powered consultants to evaluate Rural/Metro's financial projections and business model. After combing through the contemporaneously available data, Warburg concluded that "[b]ecause Rural/Metro's revenue is predictable, long-term, and recurring, and the reimbursement environment is projected to be stable, we believe the downside to our investment is limited, with minimal risk to base capital." JX 628 at 2-3.

Warburg closed on its acquisition of the Company on June 30, 2011. So great was Warburg's confidence in Rural/Metro's prospects and business model that Warburg took two aggressive steps to enhance its post-closing returns. First, Warburg accelerated the Company's acquisition program, including by causing the Company to embark simultaneously on two large acquisitions totaling approximately $100 million. Second, Warburg increased the Company's leverage. Post-merger, Rural/Metro already was highly leveraged because of the debt financing that Warburg used to fund its acquisition of the Company. Warburg nevertheless elected to finance the $100 million in accelerated

acquisitions by causing the Company to issue notes yielding 13.125% and by increasing the draw on its revolving loan facility from $5 million to $15 million.

As Rural/Metro's new owner, Warburg was entitled to take these steps, but they had the ineluctable consequence of altering the Company's risk profile. Warburg sought greater upside at the price of higher borrowing costs and a thinner equity cushion. If Warburg's bet paid off, then Warburg would reap leverage-enhanced profits. But if the Company stumbled, then Warburg would have a slimmer margin of safety, and there would be a greater risk that Rural/Metro would become insolvent.

B. Evidence About Post-Closing Performance

During fact discovery, the plaintiffs inquired into Rural/Metro's post-closing performance. The latest post-closing evidence that the defendants produced was dated September 30, 2012. During expert discovery, the defendants slipped in additional post-closing material under the guise of information that they provided to their expert. The defendants' expert received information from as late as January 2013, which was produced to the plaintiffs in March.

Trial was held on May 6-9, 2013. During trial, RBC elicited testimony from DiMino and two other directors about Rural/Metro's business plan and the risks the Company faced. RBC also questioned DiMino about Rural/Metro's post-closing performance. Both sides introduced documentary evidence on these subjects. The defendants' expert testified about these matters as well.

Post-trial briefing was completed on August 6, 2013. By letter dated August 8, RBC's counsel asked the court to take judicial notice of the Farber Declaration. This was

the first time the court learned that Rural/Metro had filed for bankruptcy protection voluntarily after reaching a deal with its lenders on a pre-packaged restructuring. On August 11, Rural/Metro's counsel filed a suggestion of bankruptcy.

C. The Farber Declaration

At the time of trial, DiMino remained President and CEO of Rural/Metro. Apparently that changed soon after trial, because the Farber Declaration states that in May 2013, Rural/Metro hired Scott A. Bartos as its new President and Chief Executive Officer and Farber as its new Executive Vice President. FD ¶¶ 1, 40. Farber became Chief Financial Officer on June 25, 2013. *Id.* ¶ 1. Farber was not present at Rural/Metro during the sale process, for the creation of the projections used during that process, or for the development of DiMino's business plan.

As the Farber Declaration acknowledges, Farber's averments about Rural/Metro's historical financial performance and practices are based on "knowledge [he] acquired from those who report to [him] (including outside consultants), consultation with other officers and directors, [his] review of relevant documents, and [his] opinion based on experience, knowledge and information concerning the Debtors' operations and financial condition." *Id.* ¶ 5. Farber was not a percipient fact witness for the historical matters litigated at trial, and he does not have personal knowledge of those subjects.

The Farber Declaration states that the Company has had "great difficulty appropriately accounting for revenue." *Id.* ¶ 31. According to the Farber Declaration, these difficulties related, in part, "to changes in the sources of payment for its services." *Id.* ¶ 32.

> [Rural/Metro's] actual cash receipts depend on whether patients are uninsured, hold commercial insurance or have medical expenses covered by Medicare or Medicaid – this is commonly referred to in the industry as the "payor mix." The Company is often not aware of a patient's insured status until after the transport is complete and a bill is issued and processed, but the Company records revenue following each transport. Historically, [Rural/Metro] calculated anticipated revenue based on average receipts from transports in each geographic region . . . . This method is generally dependable in environments where payor mix is stable. However, many factors relating to the [Company's] payor mix, reimbursement levels, reimbursement timing and other elements have changed over time.

Id. Farber states that changes in the payor mix contributed to a divergence between the Company's accounted-for revenue and its actual cash receipts. *Id.* Faber also opines that Rural/Metro did not accurately estimate the results of the two large acquisitions that Warburg caused Rural/Metro to undertake simultaneously. *Id.* ¶ 33.

In his declaration, Farber expresses his views and opinions with a high degree of generality. He does not provide extensive reasoning, documentary support, or data. The Farber Declaration recognizes that "many factors" contributed to the divergences between accounting revenue and actual cash receipts. *Id.* ¶ 32.

RBC wishes to rely on the Farber Declaration to establish the truth of the assertions it contains. According to RBC, the statements in the Farber Declaration and "the mere fact that Rural/Metro filed for bankruptcy" some two years after the underlying deal demonstrate that Rural/Metro's projections were overly aggressive and that the value stockholders received in the merger was necessarily fair. Defs.' Opp. Br. 7.

II. LEGAL ANALYSIS

A motion to re-open and supplement the trial record is addressed to the discretion of the trial court. *Fitzgerald v. Cantor*, 2000 WL 128851, at *1 (Del. Ch. Jan. 10, 2000).

"Ultimately, a motion to reopen turns on the interests of fairness and justice." *Carlson v. Hallinan*, 925 A.2d 506, 520 (Del. Ch. 2006), *clarified by* 2006 WL 1510759 (Del. Ch. May 22, 2006). This court has identified factors to guide its exercise of discretion, which include:

> (i) whether the party learned of the evidence since the trial;
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> (ii) whether the party could have discovered the evidence for use at trial through the exercise of reasonable diligence;
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> (iii) whether the evidence is so material and relevant that it will likely change the outcome;
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> (iv) whether the party has sought timely consideration of the new evidence;
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> (v) whether the opposing parties would suffer undue prejudice; and
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> (vi) considerations of judicial economy.

Pope Invs. LLC v. Benda Pharm., Inc., 2010 WL 3075296, at *1 (Del. Ch. July 26, 2010); *Carlson*, 925 A.2d at 519-20.[1] "[T]he admission of late-submitted evidence is not favored." *TR Investors, LLC v. Genger*, 2009 WL 4696062, at *12 n.36 (Del. Ch. Dec. 9, 2009). Consistent with this general principle, the factors in this case weigh decidedly against post-trial consideration of the Farber Declaration.

A. When The Evidence Became Available

The first and second *Pope* factors address when the evidence became available. These factors rest on the premise that a party has its chance to present evidence during

[1] The *Pope* and *Carlson* decisions identify as an additional factor "whether the evidence is material and not merely cumulative." *Pope*, 2010 WL 3075296, at *1; *Carlson*, 925 A.2d at 620. This factor would seem subsumed by consideration of whether the evidence "is so material and relevant that it will likely change the outcome," so it has not been listed separately.

trial, and a party should not get a do-over simply because it later re-thinks its trial strategy. *See Kennedy v. Emerald Coal & Coke Co.*, 42 A.2d 398, 405 (Del. 1944) (citing general rule against re-opening the record to accept "evidence which could have been elicited by a proper examination"). The first *Pope* factor therefore asks whether the party actually learned of the evidence in time to use it at trial. Lest an actual knowledge test reward negligence or incentivize strategic behavior, the second *Pope* factor asks whether a nominally nescient party should have learned about the evidence in time to use it at trial.

Assuming that RBC did not actually learn of the Farber Declaration until Rural/Metro's bankruptcy filing, RBC could have obtained and presented the information in the Farber Declaration during trial. Throughout discovery and pre-trial preparation, RBC closely worked with Rural/Metro and its former directors on a unified defense. RBC and the defendants jointly retained an expert and provided him with information about Rural/Metro's post-closing financial performance. That information included post-closing data that had not been produced during fact discovery. The individual defendants did not settle with the plaintiffs until April 29, 2013, giving RBC ample time to participate fully in building the defense case. Even after the other parties settled, Rural/Metro and its former directors cooperated with RBC, and DiMino and two other members of the Rural/Metro board testified live at trial. In light of this close coordination, RBC could have obtained and presented the information in the Farber Declaration.

RBC's trial strategy confirms this. RBC in fact did present evidence regarding (i) Rural/Metro's revenue estimates for potential acquisitions, (ii) Rural/Metro's reimbursement rates and payor mix, and (iii) Rural/Metro's post-closing financial performance. RBC questioned DiMino about these subjects, including about the Company's expected EBITDA for the fiscal year ended June 30, 2013. RBC elicited testimony about these matters from two other directors who testified at trial. RBC's opposition to the plaintiffs' motion provides citations to the points in the trial record where evidence on these subjects was introduced. *See* Defs.' Opp. Br. 3, 6-7. The first and second *Pope* factors therefore call for not considering the Farber Declaration. *See Carlson*, 925 A.2d at 521 (declining to admit post-trial affidavit where "[m]ost of the facts in [the] affidavit, or a suitable substitute, could have been elicited at trial by a proper examination"); *Fitzgerald*, 2000 WL 128851, at *2 (declining to admit document that did not formally exist at time of hearing where contents "could have been flushed out and put in contention").

B. The Significance Of The Evidence

The third *Pope* factor evaluates whether the evidence is so material and relevant that it will likely change the outcome of the trial. The Farber Declaration does not meet this standard.

Farber was not a percipient witness, so he could not offer any first-hand knowledge about the matters at issue at trial. Assuming for the sake of argument that the Farber Declaration were admissible, it is entitled to less weight than contemporaneous documents and DiMino's testimony.

Rather than factual testimony, what the Farber Declaration most closely resembles is an expert report. The expert whom RBC and the individual defendants retained addressed Rural/Metro's post-closing performance. Additional expert testimony on these matters would be cumulative.

Perhaps most significantly, the Farber Declaration discusses an entity whose operative reality differed materially from Rural/Metro's at the time of the sale. The Farber Declaration notes that Warburg financed its $738 million acquisition of Rural/Metro with $525 million in debt financing. Warburg then chose to double down on Rural/Metro's business plan by accelerating the pace of acquisitions and pursuing two large acquisitions simultaneously. Warburg also chose to fund the acquisitions with more debt. Although this conduct demonstrates Warburg's confidence in the business plan and its expectation that the plan could be executed successfully, it meant that Rural/Metro under Warburg was a riskier entity than Rural/Metro was at the time of the merger. The Farber Declaration focuses on the post-merger, more highly leveraged, and more aggressively managed Rural/Metro Mark II. The performance and fate of that entity has at best tangential relevance to the pre-merger, less highly leveraged, and less aggressively managed Rural/Metro Mark I.

The third *Pope* factor therefore favors giving no consideration to the Farber Declaration. *See Pope*, 2010 WL 3075296, at *2 (excluding Form 10-K filed after close of trial where contents were largely cumulative of evidence presented at trial).

C. Timeliness

The fourth *Pope* factor asks whether the party has sought timely consideration of the new evidence. This factor presumes that the party did not possess the information at the time of trial and could not have reasonably obtained the evidence for purposes of trial. If both are true, then a party could appropriately present newly discovered evidence after trial, so long as it does not delay unreasonably in doing so. In this case, RBC could have introduced the information that appears in the Farber Declaration at trial, either through fact witnesses or via an additional expert, so the request to consider the substance of the Farber Declaration is untimely. The fourth *Pope* factor favors giving no consideration to the Farber Declaration.

D. Undue Prejudice

The fifth *Pope* factor calls for considering prejudice to the other parties in the case, namely the plaintiffs. It would be unduly prejudicial to the plaintiffs for the court to consider the Farber Declaration at this point, after trial, without affording the plaintiffs the opportunity to conduct discovery, and without re-opening the record to hold a new mini-hearing at which Farber would testify live and be subject to cross examination.

Farber is a new witness making new claims based on new evidence. Farber has never been deposed, and Rural/Metro has not been required to provide discovery relating to the Farber Declaration. Unlike the witnesses who testified live at trial, the court has not had the chance to hear Farber testify, evaluate his demeanor, and judge his credibility.

This reality poses serious problems for the plaintiffs. They have not been able to understand Farber's affiliations or explore his motivations or incentives for testifying. As

just one example, Rural/Metro's website identified Farber as an Executive in Residence with Warburg from 2011 through 2012. Perhaps discovery would establish that this affiliation provides no cause for concern. Or perhaps discovery would reveal connections that would undercut Farber's credibility.

The plaintiffs also have not been able to obtain discovery into the Farber Declaration. That document is a lawyer-scrivened affidavit, and this court has been appropriately skeptical of such "non-adversarial proffers." *In re W. Nat. Corp. S'holders Litig.*, 2000 WL 710192, at *19 (Del. Ch. May 22, 2000). The Farber Declaration does not provide extensive data or documentary support for Farber's assertions. The conclusions and opinions in the Farber Declaration might be accurate and complete, or they may have been presented strategically and be subject to fair debate. *See Carlson*, 925 A.2d at 521 (explaining that discovery would be necessary to counter a post-trial affidavit because the defendants "have an obvious incentive to cherry pick information favorable to them"). In this case, discovery would be especially critical because the Farber Declaration discusses the fate of the post-closing, highly leveraged version of Rural/Metro that Warburg caused to double down on DiMino's acquisition strategy. The plaintiffs would be entitled to explore the degree to which inferences could be drawn about the Company as it was operated at the time of the merger.

Consequently, before the factual assertions in the Farber Declaration could be evaluated properly, the plaintiffs would need to receive document discovery relating to the Farber Declaration so that they could evaluate its assertions in context. The plaintiffs then would be entitled to depose Farber to test his assertions. After the plaintiffs had

conducted written and oral discovery, the court would be forced to hold a mini-hearing to hear Farber testify live. Because Farber's testimony is largely in the nature of expert opinion, the plaintiffs could seek to introduce competing expert testimony, and the court likely would permit it. Supplemental briefing then would be required to give the parties a chance to marshal their evidence and present their arguments.

For the court to consider the Farber Declaration without taking these steps would be unduly prejudicial to the plaintiffs. Absent these procedures, the court might unwittingly rely on the Farber Declaration's currently unchallenged written account, when with the benefits of discovery the plaintiffs might well be able to call into question his views and opinions. To consider the Farber Declaration on the cold and currently one-sided record would give a potentially unwarranted degree of deference to one side's witness, over the other side's objection, on highly contestable issues. *See Pope*, 2010 WL 3075296, at *2 ("Benda may be unduly prejudiced if the 2009 10-K is introduced without giving Benda an opportunity to respond to the new information . . . ."). It also would carry a powerful risk of hindsight bias.

But while permitting the plaintiffs to conduct discovery might ameliorate these forms of prejudice, it would inflict prejudice in another, equally real form by forcing the plaintiffs to re-open the discovery process and retry aspects of the case. *See Fitzgerald*, 2000 WL 128851, at *2 (noting that it would be "unfairly prejudicial" for the plaintiff to be "forced to galvanize yet another major effort to gather evidence"). The two forms of prejudice are reciprocal. To the extent the court allows the plaintiffs to pursue broader discovery to counteract the former types of prejudice, the greater burden exacerbates the

latter type of prejudice. The fifth *Pope* factor counsels against considering the Farber Declaration.

E. Judicial Economy

The final *Pope* factor examines considerations of judicial economy. As discussed in the preceding section, before the Farber Declaration could be considered fairly by the court, the plaintiffs would have to be allowed to obtain document discovery and take Farber's deposition, then the court would have to hold a mini-hearing so Farber could testify live and the court could evaluate his credibility. The resulting burdens on the court weigh strongly against considering the Farber Declaration. *See Carlson*, 925 A.2d at 521-22 (noting that a supplemental mini-trial regarding an affidavit submitted after the close of the evidence "would waste judicial resources"); *Fitzgerald*, 2000 WL 128851, at *2 (refusing to re-open the record to accept post-trial evidence in light of "the burden placed on the parties and the Court that would result from the need to conduct, over five months after trial, a 'mini-trial' to reconcile disputed evidence").

F. Judicial Notice

In an effort to sidestep the test for re-opening the record, RBC contends that the Farber Declaration is subject to judicial notice. According to RBC, the court need not re-open the record, just take "judicial notice of a federal Bankruptcy Court filing." Defs.' Opp. Br. 2. RBC observes that Delaware Rule of Evidence 201(f) empowers a court to take judicial notice of appropriate materials "at any stage of the proceeding," and that Rule 202(d)(1)(B) empowers a court to take judicial notice of "records of the court in which the action is pending and of any other court of this State or federal court sitting in

or for this State." RBC combines the two concepts into a high-speed evidentiary bypass. The information in the Farber Declaration, however, is not the type of material that is appropriate for judicial notice.

1. Delaware Rule of Evidence 201

Delaware Rule of Evidence 201 "governs only judicial notice of adjudicative facts." D.R.E. 201(a). "Adjudicative facts are simply the facts of the particular case." Fed. R. Evid. 201 advisory committee's note. Under Rule 201(b), "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." D.R.E. 201(b). RBC correctly notes that judicial notice of adjudicative facts "may be taken at any stage of the proceeding." D.R.E. 201(f).

Applying Rule 201, Delaware courts have taken judicial notice of publicly available documents that "are required by law to be filed, and are actually filed, with federal or state officials."[2] But the fact that a document may be suitable for judicial notice for certain purposes does not mean that its contents can be used for any conceivable purpose. *In re Santa Fe Pacific Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del.

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[2] *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 584 (Del. Ch. 2007); *accord Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320 n.28 (Del. 2004) (holding that the court may take judicial notice of public documents such as SEC filings that required by law to be filed); *see also, e.g.*, *In re Wheelabrator Techs., Inc. S'holders Litig.*, 1992 WL 212595, at *11-12 (Del. Ch. Sept. 1, 1992) (taking judicial notice of publicly filed certificate of incorporation).

1995). In *Santa Fe*, the plaintiffs alleged that the proxy statement omitted material information concerning a potential merger. *Id.* at 65. In dismissing the disclosure claim, the Court of Chancery considered the entire proxy statement, not just the portions cited in the plaintiffs' complaint. *Id.* at 69. The Delaware Supreme Court agreed that the court properly considered the proxy statement for this purpose "because the operative facts relating to such a claim perforce depend upon the language of the [proxy statement.]" *Id.* For purpose of Delaware Rule of Evidence 201(b), the contents of the proxy statement were "capable of accurate and ready determination" and, for purposes of determining what information had been disclosed publicly, the proxy statement was a source "whose accuracy cannot reasonably be questioned." D.R.E. 201(b). The Delaware Supreme Court made clear, however, judicial notice of the same disclosures could not be used "to establish the truth of the statements therein." *Santa Fe*, 669 A.2d at 69-70. For that purpose, the same proxy statement was not a source "whose accuracy cannot reasonably be questioned," and the truth of the matters described in the proxy statement was not "capable of accurate and ready determination." D.R.E. 201(b).

Like the proxy statement in *Santa Fe*, this court could take judicial notice of the Farber Declaration to establish when it was filed or to identify the statements that Farber made. But the court cannot take judicial notice of the Farber Declaration to establish the truth of its contents. Without discovery and a hearing, there is no ready means of assessing the accuracy of Farber's assertions about Rural/Metro's accounting system, the changes over time in its payor mix, the reliability of its financial projections, or why Warburg negotiated a pre-packaged bankruptcy with Rural/Metro's lenders over two

years after the underlying transaction closed. Those propositions are not generally known within the territorial jurisdiction of this court and are not capable of accurate and ready determination by resort to sources "whose accuracy cannot reasonably be questioned." With due respect to Farber, his declaration is not such a source, and its contents are subject to reasonable dispute. Much of the trial testimony and the contemporaneous documents undercut the assertions in his declaration, and Farber admits that his statements include views and opinions. For reasons already discussed, it is highly likely that if permitted to conduct discovery, the plaintiffs would be able to contest numerous aspects of the Farber Declaration. This court cannot take judicial notice of the Farber Declaration under Delaware Rule of Evidence 201 for the purpose of accepting the statements in the Farber Declaration as adjudicative facts.

2. Delaware Rule of Evidence 202

After citing Rule 201(f), which recognizes that judicial notice of adjudicative facts can be taken at any time, RBC turns to Delaware Rule of Evidence 202, which governs the different issue of judicial notice of law. Rule 202(a) states:

> Every court in this State shall take judicial notice of the Constitution of the United States, and case law relating thereto, and the Constitution, common law, case law and statutes of this State. Judicial notice may also be taken of the common law, case law and statutes of the United States, and every state, territory and jurisdiction of the United States.

D.R.E. 202(a) (internal numbering omitted). Under Rule 202(b), "[t]he court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid in obtaining such information." D.R.E. 202(b). Contrary to RBC's

position, Rule 202 does not authorize this court to consider the contents of the Farber Declaration for their truth.

Delaware Rule of Evidence 202 lacks counterparts in the Federal Rules of Evidence and the Uniform Rules of Evidence. *See* D.R.E. 202 cmt. The Special Advisory Committee that the Delaware Supreme Court appointed to develop the Delaware Rules of Evidence intended for Rule 202 to "expand and make easier the introduction of evidence of the Constitution, statutes, common law and case law of this State, of the United States and of other states, countries and jurisdictions" and "to encourage the admissibility of evidence of law rather than to discourage it." *Id.*

To further the goal of ensuring that the court can take judicial notice of applicable law, Delaware Rule of Evidence 202 contains a section (d), entitled "Private acts, regulations, ordinances, court records." D.R.E. 202(d). This section states:

> Judicial notice may be taken, without request by a party, of (A) the private acts and resolutions of the Congress of the United States and of the General Assembly of this State, and of every other state, territory and jurisdiction of the United States, and duly enacted ordinances and duly published regulations and determinations of governmental subdivisions or agencies of the United States, of this State and of every other state, territory and jurisdiction of the United States; (B) *records of the court in which the action is pending and of any other court of this State or federal court sitting in or for this State*.

D.R.E. 202(d) (emphasis added).

Taking this reference out of context, RBC suggests that the ability to take judicial notice of "records of the court in which the action is pending and of any other court of this State or federal court sitting in or for this State" licenses a Delaware court to rely on any material that appears on the docket of any other court in the State to establish

adjudicative facts. To my mind, the placement of this language within Rule 202, rather than Rule 201, suggests a different rationale, namely the drafters' recognition that as part of the process of taking judicial notice of law, a court may need to consider filings and other docketed items that led up to the order, ruling, or decision. Particularly if a court has entered a relatively brief order without extensive explanation, it may be necessary to refer to these docketed materials to determine the nature and scope of the court's ruling.[3]

Consistent with this reading, other courts have not regarded judicial notice as a license to credit the contents of filings in other courts. Despite lacking a counterpart to Delaware Rule of Evidence 202, federal courts have interpreted Federal Rule of Evidence 201(b)(2) to authorize taking judicial notice of the contents of court records in other jurisdictions. *See, e.g.*, *Green v. Warden*, 699 F.2d 364, 369 (7th Cir.), *cert. denied*, 461 U.S. 960 (1983). Like the Delaware Supreme Court in *Sante Fe*, the federal courts have recognized that court records might be judicially noticed for certain purposes but not others. For example, the United States District Court for the District of Delaware has opined that it could take judicial notice of the timing of a proof of claim in bankruptcy for purposes of recognizing that it was filed post-appeal, but could not take judicial notice of "the contents of the filing" for purposes of determining whether the claim was core or

[3] There may well be other uses that might be permissible given particular circumstances. One that readily springs to mind would be to confront a party making assertions before this court with contrary or conflicting assertions made in proceedings before a sister court. This opinion need not and does not seek to identify all the potentially permissible uses of Rule 202(d). It holds only that Rule 202(d) does not authorize what RBC hopes to do here, which is to rely on an affidavit of a non-party, filed in a different case for a different purpose, to establish the truth of its contents for purposes of a post-trial adjudication where the trial was held months earlier.

non-core to the underlying bankruptcy proceeding. *In re Northwestern Corp.*, 319 B.R. 68, 74 n.1 (D. Del. 2005). The same court took judicial notice of contents of court records from another jurisdiction for purposes of considering defenses of judicial estoppel and mootness and took judicial notice of SEC filings to assess whether certain disclosures were made, but declined to take judicial notice of Schedule 13D filings for purposes of determining whether a group existed or to take judicial notice of letters sent by the parties where they were offered for the truth of their contents. *Southmark Prime Plus, L.P. v. Falzone*, 776 F. Supp. 888, 892–93, 899, 900, 902 (D. Del. 1991). In reviewing a case where a district court declined to take judicial notice of the contents of an affidavit, the United States Court of Appeals for the Third Circuit commented that "the doctrine of judicial notice only permits the court to take notice of the fact of the submission of the affidavit." *Ernst v. Child & Youth Servs.*, 108 F.3d 486, 499 (3d Cir. 1997). The Third Circuit decision explains that before the district court could consider the contents of the affidavit, it would have to re-open the record and, if admissible, admit the contents of the affidavit into evidence. *Id.*

Consistent with these decisions, this court could take judicial notice of the Farber Declaration for certain limited purposes, such as to understand the nature and grounds for rulings made by the bankruptcy court. Rule 202 does not permit this court to take judicial notice of the Farber Declaration for the truth of its contents. Before the Farber Declaration could be considered as evidence, this court would have to re-open the record, which brings the analysis full circle to where this decision started.

III. CONCLUSION

Plaintiffs' motion to exclude the Farber Declaration is granted. The *Pope* factors counsel against re-opening the record, and RBC cannot use judicial notice as a procedural shortcut. Consequently, the record for purposes of post-trial decision will not include the Farber Declaration.