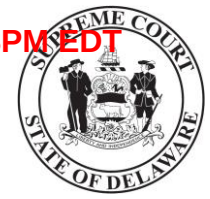
EFiled: May 25 2016 04:38PM EDT
Filing ID 59059770
Case Number 117,2016



IN THE SUPREME COURT OF THE STATE OF DELAWARE

A&R LOGISTICS HOLDINGS, INC.,	)	
	)	
Defendant/Counterclaimant Below, Appellant,	)	
	)	
v.	)	
	)	
FdG LOGISTICS LLC,	)	
	)	No. 117, 2016
Plaintiff/Counterclaim-Defendant Below, Appellee,	)	
	)	Court Below: Court of
and	)	Chancery of the State of
	)	Delaware
FdG ASSOCIATES LP, DAVID S. GELLMAN, JAMES E. BEDEKER, CYNTHIA M. BRANKIN, STEVEN R. BRANTLEY, NORMAN C. BUCK, JOHN P. CISZEK, ROBERT N. DOTSON, PAUL GARBER, MICHAEL J. HOGAN, JEREMY K. LOHRENS, ANDREW J. MANTEY, JEFFREY J. O'CONNOR, BRIAN R. REICHERT, LEEANNE RICE, STEPHEN W. ROBINSON, PAUL D. SWEEDEN, and RICHARD THOMPSON,	)	C.A. No. 9706-CB
	)	
Additional Counterclaim-Defendants Below, Appellees.	)	

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INTRODUCTION

This is a breach of contract case in which the parties agreed that their transaction documents would be governed by Delaware law. The Court of Chancery honored this choice by applying Delaware law, including the presumption under Delaware law, applied by this Court in *Singer v. Magnavox Co.*, that the Delaware Securities Act (the "DSA") does not apply to extraterritorial acts. *Singer*, 308 A.2d 969, 981-82 (Del. 1977), *overruled on other grounds by Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

The presumption against extraterritorial application of laws is a canon of statutory construction that provides certainty and predictability to both state and federal laws. The Supreme Court of the United States recently recognized the importance of this principle when it addressed the territorial limits of Rule 10b-5:

> Rather than guess anew in each case, we apply this presumption [against extraterritorial application] in all cases, preserving a stable background against which Congress can legislate with predictable results.

Morrison v. Nat'l Australian Bank Ltd., 561 U.S. 247, 261-62 (2010). The Supreme Court's application of this principle to Rule 10b-5 is of particular significance because the fraud section of the DSA expressly directs the courts to be guided by the federal courts' interpretation of Rule 10b-5. 6 Del. C. §73-201.

Thus, the Chancery Court did not err in applying the presumption in this case, and its order should be affirmed.

NATURE OF THE PROCEEDINGS

Plaintiff-appellee, FdG Logistics LLC ("FdG"), commenced this civil action to recover more than $2 million in tax refunds (the "Tax Refund") that the defendant-appellant, A&R Logistics Holdings, Inc. ("A&R"), was obligated to "promptly pay" to FdG under Section 9.6(E)(1) of an Agreement and Plan of Merger (the "Merger "Agreement") entered into by A&R, A&R's stock and option holders (the "Securityholders"), A&R Merger Corp., and FdG, as the "Securityholders' Representative." In response, A&R filed counterclaims and amended counterclaims against FdG and the Securityholders and against FdG's affiliates – FdG Associates LP ("Associates") and David S. Gellman ("Gellman," and with FdG and Associates, the "FdG Appellees"). A&R's amended counterclaims purported to state claims for contractual indemnification, violation of the DSA, common-law fraud, and unilateral mistake.

FdG filed a motion for a summary judgment on its claim for the Tax Refund. In response, rather than denying that the Tax Refund was due to FdG under the explicit terms of the Merger Agreement, A&R argued that FdG was barred from bringing an action to recover the Tax Refund because it had violated the DSA.

The FdG Appellees also filed a motion to dismiss A&R's amended counterclaims for violation of the DSA, common-law fraud, and unilateral mistake.

Three other groups of Securityholders also filed motions to dismiss these counterclaims.

As part of its summary judgment motion, FdG requested the entry of a final judgment, under Court of Chancery Rule 54(b), so that it would promptly receive the Tax Refund as provided in the Merger Agreement without having to wait for adjudication of A&R's counterclaims. (Op. dated Feb. 23, 2016 ("Op."), at 38.) A&R opposed FdG's request for entry of a final judgment on its claim, but, contrary to the assertion in its opening brief, A&R did *not* ask the Chancery Court to stay enforcement of the requested final judgment until entry of a subsequent judgment on A&R's counterclaims. (*See* Appellant's Appendix ("A&R's App.") A371-76, A529-36; Appellant's Opening Br. ("A&R's Br.") at 30.)

On February 23, 2016, the Chancery Court issued an Opinion and an Order granting FdG's motion for a summary judgment, granting the motions to dismiss A&R's amended counterclaims for violation of the DSA and for unilateral mistake, and denying the motions to dismiss A&R's amended counterclaim for common-law fraud. (Op. at 1-2, 40; Order dated Feb. 23, 2016 ("Order"), at 1.) The Chancery Court found no just reason to delay either its judgment requiring A&R to pay the Tax Refund to FdG or its dismissal of A&R's DSA and unilateral mistake claims so that "all of the issues potentially relevant to the 2012 Tax Refund claim may be considered together if A&R wishes to seek appellate review." (Op. at 40.)

After entry of the Order, A&R filed an "emergency" motion for a stay of the final judgment "pending A&R's forthcoming Rule 59 motion and appeal," (A&R's App. A552), but it did not ask to stay enforcement of the final judgment pending entry of a judgment on its remaining counterclaims. (*See id.*)[1] On March 16, 2016, the Chancery Court granted A&R's motion for a stay pending appeal, subject to the condition that A&R post a letter of credit in favor of FdG in the amount of $2,525,000. (*See* A&R's App. A555-60.)

[1] A&R never did file a Rule 59 motion. (*See* A&R's App. A1-3 (Docket).)

SUMMARY OF ARGUMENT

Appellant's Statement 1: "**The parties agreed that Delaware law would govern their relationship, and therefore the Delaware Securities Act governs the validity of the securities contract.**" (A&R's Br. at 4.)

FdG Appellees' Answer: The first clause is admitted, the second denied. The FdG Appellees admit that the parties agreed in Section 10.9 of the Merger Agreement that all issues concerning the Merger Agreement are to be governed and construed in accordance with Delaware law. The FdG Appellees deny, however, that the DSA governs the validity of the Merger Agreement because the DSA does not apply to acts that lack a territorial nexus with the State of Delaware.

Contrary to A&R's argument, Delaware's "Choice of law" statute, 6 *Del. C.* § 2708, does not delegate to private parties the power to create a territorial nexus with the State of Delaware merely by choosing to have Delaware law apply to their contract. The requirement of a territorial nexus is a constitutionally-mandated principle, satisfaction of which must be decided by the courts, not private parties.

In addition, by its express terms, the DSA does not apply to merger transactions like the one at issue. Therefore, even if there were a territorial nexus with the State of Delaware in this case, the DSA is still inapplicable.

Appellant's Statement 2: "**In the alternative, the Court of Chancery should not have allowed FdG to collect on its contract claim without ensuring that FdG would be able to satisfy a judgment on the still-pending, and much larger, counterclaims.**" (A&R's Br. at 4.)

FdG Appellees' Answer: Denied. Section 9.6(E)(1) of the Merger Agreement explicitly provides that the Tax Refund is the "property of the Securityholders" and that, as such, A&R must "promptly pay" the Tax Refund to FdG, as the Securityholders' Representative. A&R could have bargained for different terms, but it did not do so, and it provides no legal basis to have the Court rewrite its contract.

FdG Appellees' Additional Statement 1: A&R waived the right to argue that the Chancery Court improperly entered a final judgment under Court of Chancery Rule 54(b). On appeal, A&R says nothing about the standard for entry of a final judgment under Rule 54(b). Nor does it argue that the Chancery Court abused its discretion in entering a final judgment. Therefore, any argument that A&R may have had that the Chancery Court abused its discretion in entering a final judgment under Rule 54(b) has been waived. Sup. Ct. R. 14(b)(vi)(A)(3).

FdG Appellees' Additional Statement 2: A&R waived its right to argue that the Chancery Court should have stayed enforcement of the final judgment until entry of a subsequent judgment on A&R's counterclaims.

A&R did not present this issue to the Chancery Court. Therefore, it may not raise this question on appeal absent a showing that the interests of justice require its consideration. Sup. Ct. R. 8. Yet A&R has provided no explanation for its failure to raise this issue in the trial court, and it has made no argument that the interests of justice require the determination of this newly-presented question, as required under Supreme Court Rule 14(b)(vi)(A)(1).

STATEMENT OF FACTS

This action arises out of a private-equity firm's merger acquisition of a trucking company owned by A&R. (Op. at 1.) The private-equity firm, Mason Wells, is based in Milwaukee, Wisconsin. (*Id*. at 3.) A&R is incorporated in Delaware, but it had its headquarters in Illinois at the time of the merger and is now headquartered in Louisville, Kentucky. (*Id*. at 3, 22.) In fact, A&R does not allege that either it or Mason Wells has ever had operations or employees in Delaware. (*See, e.g.*, A&R's Br. at 7.)

As alleged, the merger was negotiated by Mason Wells, on the one hand, and FdG, on the other. (Op. at 22.) FdG is based in New York City. (*Id*. at 22.) "No negotiations concerning the merger are alleged to have taken place in Delaware, and none of the allegedly underlying fraudulent business practices or violations is alleged to have occurred in Delaware." (*Id*. *Accord* A&R's Br. at 7.)

Under the Merger Agreement, a Mason Wells subsidiary, A&R Merger Corp. ("Merger Corp."), was merged into A&R, and A&R was the surviving corporation. (Op. at 3.) The structure of the transaction as a merger, rather than a stock sale, was not an accident. In fact, Merger Corp.'s counsel specifically requested that the parties structure the transaction as a merger rather than a stock sale: "[W]e wanted to talk to you about the possibility of structuring the transaction as a forward merger, rather than a stock acquisition. After

consideration and some tax analysis, this would be our preferred approach." (Joint Appendix to Appellees' Answering Briefs ("Appellees' Joint App.") B1.)

Under the Merger Agreement, as of the effective date of the merger, all of A&R's issued and outstanding stock was "canceled and extinguished" and converted into the right to receive a "Per Share Common Payment." (A&R's App. A89 (Merger Agmt. §2.5).) Likewise, all of A&R's treasury stock, not issued and outstanding, was "canceled and . . . cease[d] to exist." (*Id*. A90 (Merger Agmt. §2.9).) Merger Corp.'s stock, on the other hand, was converted into and became shares of new A&R common stock. (*Id*. A89 (Merger Agmt. §2.6).) The Merger Agreement and the merger were approved and adopted by the stockholders of A&R and of Merger Corp. (*Id*. A119, A121 (Merger Agmt. §§7.1(D)(5)(B); 7.2(D)(3)(i)(c)).)

The Merger Agreement includes a provision that selects Delaware law as governing all issues concerning the transaction documents. (*Id*. at A142 (Merger Agmt. § 10.9).) Nevertheless, as the Chancery Court found, "the sole connection that A&R can draw to Delaware" is that the merger parties were incorporated in Delaware. (Op. at 22.) Since A&R "failed to allege a sufficient nexus to Delaware to sustain a claim under the Delaware Securities Act," the court dismissed A&R's DSA claim for failure to state a claim for relief and held that the DSA provided no defense to FdG's Tax Refund claim. (*Id*. at 22, 38.)

ARGUMENT

I. THE DELAWARE SECURITIES ACT DOES NOT APPLY TO THE PARTIES' TRANSACTION

QUESTION PRESENTED

Does the Delaware Securities Act apply to the parties' transaction?

The FdG Appellees answer: No.

SCOPE OF REVIEW

The Court reviews issues of statutory construction *de novo*. *State v. Barnes*, 116 A.3d 883, 888 (Del. 2015). The Court reviews findings of fact for abuse of discretion and legal conclusions *de novo*. *Hayward v. King*, 127 A.3d 1171 (table), 2015 WL 6941599, at *2 (Del. Nov. 9, 2015).

MERITS OF THE ARGUMENT

A. The Delaware Securities Act Does Not Apply to Acts that Have No Territorial Nexus with the State of Delaware Regardless of the Parties' Contractual Choice of Delaware Law

1. *The Parties' Choice of Delaware Law Includes the Presumption under Delaware Law that the DSA Does Not Apply to Extraterritorial Acts*

On appeal, A&R argues that the Chancery Court erred by failing to apply the DSA to the parties' merger transaction since the parties contractually agreed that all issues concerning the Merger Agreement would be governed and construed in accordance with the laws of the State of Delaware. A&R argues that its interpretation of the DSA as covering extraterritorial securities transactions, rather

than Chancellor Bouchard's contrary interpretation, is necessary because "[a]ny other outcome would subvert the predictability and certainty that Delaware's choice-of-law rules and the General Assembly through 6 *Del. C.* § 2708 seek to provide." (A&R's Br. at 10.)

Despite A&R's attempt to make this a case about the freedom of contract and Delaware's choice-of-law statute, the fact is that the Chancery Court *did* apply Delaware law. A&R's discontent is not really with the court's supposed failure to apply Delaware law, but with its application of *all* of Delaware law, including "the jurisdictional limitations inherent in the [DSA]." (Op. at 16.)

The Chancery Court found that, under Delaware law, there is "'a presumption that a law is not intended to apply outside the territorial jurisdiction of the State in which it is enacted.'" (*Id*. at 14-15 (quoting *Singer*, 380 A.2d at 981).) And, applying this presumption, the Chancery Court logically reasoned that, "if one assumes that a generic Delaware choice of law provision encompassed the Delaware Securities Act, it is reasonable to assume that the parties (at least absent expressing a contrary intent) intended to incorporate the Act 'as is,' which would include the jurisdictional limitations inherent in the Act." (*Id*. at 16 (referencing *Eurofins Panlabs, Inc. v. Ricera Biosciences, LLC*, 2014 WL 2457515, at *18 (Del. Ch. May 30, 2014)).) *Accord O'Connor v. Uber Techs., Inc*., 58 F.Supp.3d 989, 1005 (N.D. Cal. 2014) ("[A] contractual choice of law provision that incorporates

California law presumably incorporates *all* of California law – including California's presumption against extraterritorial application of its law." (Emphasis in original.)).

Not surprisingly, during oral argument, A&R's counsel initially acknowledged that the choice of law statute does *not* supersede the presumption that the DSA does not apply to extraterritorial transactions. Specifically, Chancellor Bouchard asked:

> Can people, by virtue of a choice of law statute, spring into being the application of a Delaware statute that never otherwise would have applied to a particular transaction in the first place?

(Appellees' Joint App. B289.) To which, A&R's counsel concisely responded:

> From a choice of law standpoint, the answer is unquestionably yes. From a substantive standpoint, if the substance of the transaction is not such as to invoke application of the Delaware Securities Act . . . [t]hen the answer is no.

(*Id*. at B290.)

A&R's counsel subsequently backtracked when asked by the court:

> So your argument, in essence -- so let's assume before 2708 was enacted, it's just clear as it can be that the Delaware Securities Act would not apply to this kind of transaction, because it doesn't really involve somebody in Delaware buying or selling a security. Again, putting where you're incorporated out of the mix. That's been deemed by itself to be insufficient. But it's not like somebody is physically here buying or selling a security. It's not like somebody is engaging in a solicitation about buying or selling a security within Delaware; right? And it's as plain as driven snow that that statute wouldn't apply prior to the enactment of 2708.

> Now you're saying by virtue of the enactment of 2708 that a statute that wouldn't be applicable before springs into being and has applicability?

(*Id*. at B311.)

Initially, A&R's counsel unequivocally responded: "No." (*Id*. at B312.) But he quickly reversed himself, arguing that the choice-of-law statute conflated what he had previously acknowledged were separate questions of choice-of-law and the substantive coverage of the DSA:

> What I'm telling Your Honor is that we pled our case as we did, with the jurisdictional facts that we did, including, most importantly and dispositively, the choice of law clause, because that's all you need. That's all you need.

(*Id*. at B313.)

On appeal, A&R continues its effort to conflate these two questions, arguing that the choice-of-law statute makes contractual choice-of-law provisions dispositive of the substantive reach of Delaware statutes. (*See* A&R's Br. at 16.) Thus, A&R argues, "[o]nly if the statute in question states that it requires a (non-contractual) connection to Delaware as an element of the statutory offense, and thus goes *beyond* the standard choice-of-law rules, might the contractual choice be ineffective [to supply the jurisdictional nexus to Delaware]." (*Id*. (emphasis in original).)

A&R's argument that, unless the General Assembly affirmatively states that a law only applies to conduct in Delaware, the law applies beyond the State's borders is directly contrary to the presumption against extraterritorial legislation recognized by this Court in *Singer*, 380 A.2d at 981. In *Singer*, this Court, applying the "presumption that a law is not intended to apply outside the territorial jurisdiction of the State in which it is enacted," held that the DSA did "not apply" to a merger transaction whose only connections to the State of Delaware were that Delaware was the merger parties' state of incorporation and the state in which the merger vote was held. *Id*. at 981-82.

Similarly, in *Doe v. Boy Scouts of America*, 2013 WL 6040344, at *3 (Del. Super. Sept. 4, 2013), the superior court explained:

> Generally, a state's legislature does not have the power to regulate conduct occurring outside of its borders. Therefore, the General Assembly does not have the legislative jurisdiction to regulate conduct occurring outside of the State of Delaware.

(Footnotes omitted.) *Accord Klig v. Deloitte LLP*, 36 A.3d 785, 797-98 (Del. Ch. 2011) ("Under our federal system of co-equal state sovereigns, Delaware can readily regulate within its borders, but cannot regulate the wages of an individual working in another state, outside of Delaware's jurisdiction.").[2]

[2] A&R's argument is also contrary to the General Assembly's express acknowledgement of the territorial limits of State government in Section 101 of Title 29 of the Delaware Code, titled, "Territorial limitation," which provides: "The jurisdiction and sovereignty of the State extend to all places *within the boundaries thereof* . . . ." 29 *Del. C.* § 101 (emphasis added). "The General Assembly is presumed to have enacted legislation with knowledge of the existence and effect of

Despite its rhetoric, A&R has presented no authority to suggest that the choice-of-law statute effectively overturned, *sub silencio*, either the presumption against extraterritorial application of Delaware laws, in general, or the *Singer* Court's application of this presumption to the DSA, in particular. Accordingly, there is no basis for A&R's argument that the parties' choice of Delaware law did not include the presumption, recognized in *Singer*, that the DSA does not apply to transactions outside of Delaware.

2. *The Presumption that a Law Is Not Intended to Apply Outside the Territorial Jurisdiction of the State in Which It Is Enacted Is a Constitutional Principle of Statutory Construction that Is Particularly Applicable to Blue Sky Laws Like the DSA*

On appeal, A&R argues that the Chancery Court should have disregarded the Delaware rule of law, confirmed in *Singer*, that the DSA does not apply to extraterritorial transactions. But, in doing so, A&R ignores that, while blue sky laws like the DSA have withstood constitutional challenges, the "rationale for upholding [these] laws was that they only regulated transactions occurring within the regulating States." *Edgar v. MITE Corp*., 457 U.S. 624, 641 (1982); *see Singer*, 380 A.2d at 981. Otherwise, blue sky laws like the DSA would offend the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. *Edgar*, 457 U.S. at 641.

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prior law," *State v. 0.0673 Acres of Land, More or Less*, 224 A.2d 598, 602 (Del. 1966), and there is nothing in the choice-of-law statute to suggest that the General Assembly intended to repeal Section 101, much less to give private parties the power to contractually extend the laws of this State to extraterritorial transactions.

As this Court has explained, "[a]lthough the Commerce Clause is expressed as an 'affirmative grant of power,' the United States Supreme Court has consistently held that the Commerce Clause also contains a negative implication, known as the Dormant Commerce Clause, which prohibits certain state actions that interfere with interstate commerce." *Lehman Bros. Bank, FSB v. State Bank Comm'r*, 937 A.2d 95, 107 (Del. 2007).[3]

In *Lehman*, this Court applied, as controlling law, the test articulated by the United States Supreme Court to determine the constitutionality of a state tax statute under the Dormant Commerce Clause. *See Lehman*, 937 A.2d at 110 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). The first prong of this test requires the court to determine whether the statute "is applied to an activity having a substantial *nexus* to the [adopting] state." *Id*. at 108 (emphasis added).

Given this constitutional requirement, it is not at all surprising that the Delaware courts have adhered to the traditional "presumption that a law is not intended to apply outside the territorial jurisdiction of the State in which it is

[3] Thus, the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Edgar*, 457 U.S. at 642-43. For example, the Supreme Court has "struck down on Commerce Clause grounds a state law where the 'practical effect of such regulation is to control [conduct] beyond the boundaries of the state. . . .' " *Id*. at 643 (citation omitted; brackets in original).

enacted." *Singer*, 380 A.2d at 981.[4] Nor is it surprising that, in determining whether to apply the DSA to an out-of-state transaction, the Chancery Court, applying *Singer*, confirmed that "the Delaware Securities Act 'only applies where there is a sufficient nexus between Delaware and the transaction at issue.' " (Op. at 15 (citation omitted).)[5]

3. *The Delaware Choice-of-law Statute Did Not Abrogate the Presumption that a State Law Is Not Intended to Apply Outside the Territorial Jurisdiction of the State in Which It Is Enacted*

A&R seems to argue that, in adopting the Delaware choice-of-law statute, the General Assembly impliedly abrogated the Delaware rule of law, applied by the Chancery Court, that " 'a law is not intended to apply outside the territorial jurisdiction of the State in which it is enacted.' " (Op. at 14-15 (quoting *Singer*, 380 A.2d at 981).) There is, however, no evidence of such an intent expressed in the choice-of-law statute.

[4] *Accord Eurofins Panlabs, Inc. v. Ricerca Biosciences, LLC*, 2014 WL 2457515, at *18 (Del. Ch. May 30, 2014) ("Furthermore, our Supreme Court explained that there is 'a presumption that a law[, such as the Delaware Securities Act,] is not intended to apply outside the territorial jurisdiction of the State in which it is enacted.' " (Quoting *Singer*.)); *Vichi v. Koninklijke Philips Elecs. N.V.*, 2009 WL 4345724, at *19 (Del. Ch. Dec. 1, 2009) (same).

[5] In addition to protection against Commerce Clause violations, the presumption against extraterritorial application of state laws protects against violation of the Due Process Clause of the United States Constitution. *Sullivan v. Oracle Corp.*, 254 P.3d 237, 248 n.9 (Cal. 2011). Thus, "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that [application] of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981). "[I]f a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." *Id.* at 310-11.

Under Delaware law, "[t]his Court has a duty to interpret statutes so as to avoid any constitutional conflict." *Monceaux v. State*, 51 A.3d 474, 478 (Del. 2012). Furthermore, "'[t]he common law is not repealed by statute unless the legislative intent to do so is plainly or clearly manifested.'" *A.W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1122 (Del. 2009) (brackets in original; footnote omitted). Thus, if the General Assembly had intended to abrogate the presumption that a Delaware statute is intended to be applied only within Delaware, it was incumbent on the General Assembly to expressly do so.

This issue was recently addressed by the Supreme Court of California in *Sullivan v. Oracle Corp*., 254 P.3d 237 (Cal. 2011). That court's conclusion was similar to that of the Chancery Court's in this case:

> Plaintiffs' claim implicates the so-called presumption against extraterritorial application. However far the Legislature's power may theoretically extend, we presume the Legislature did not intend a statute to be " 'operative, with respect to occurrences outside the state, . . . unless such intention is clearly expressed or reasonably to be inferred "from the language of the act or from its purpose, subject matter or history.' " Neither the language of the [unfair competition law] nor its legislative history provides any basis for concluding the Legislature intended the [unfair competition law] to operate extraterritorially.

Sullivan, 254 P.3d at 248 (footnote and citations omitted; ellipses in original).

Here, the choice-of-law statute says nothing about superseding the rule of law against extraterritorial application of state laws, in general, or the DSA, in particular. This is hardly surprising since the General Assembly "has an unlimited power to enact any laws that it may consider necessary, *except where the National or State Constitutions have placed limitations upon it*." *State ex rel. James v. Schorr*, 65 A.2d 810, 812 (Del. 1948) (emphasis added). And it is clear that the presumption against extraterritorial application is a rule of statutory construction intended to preserve the constitutional validity of laws under the Commerce Clause. *See Edgar*, 457 U.S. at 641; *Lehman*, 937 A.2d at 107; *Singer*, 380 A.2d at 981.

The Supreme Court of Connecticut recently confirmed this very point:

> [T]he primary reason for the presumption against the extraterritorial application of statutes is that states have limited *authority* to regulate conduct beyond their territorial jurisdiction. Thus, this rule of statutory construction is akin to other rules of construction intended to preserve the validity of a statute.

Abel v. Planning & Zoning Comm'n, 998 A.2d 1149, 1157 (Conn. 2010) (emphasis in original).

In its opening brief, A&R briefly quotes the United States Court of Appeals for the Third Circuit in *A.S. Goldmen & Co. v. New Jersey Bureau of Securities*, 163 F.3d 780 (3d Cir. 1999). (A&R's Br. at 22.) But, notably, A&R does not quote the portion of the opinion in which the Third Circuit explains that the

constitutionality of a state regulation of interstate commerce requires a transactional nexus with the state:

> [T]he constitutionality of state regulations of interstate commerce depends largely on the territorial scope of the transaction that the state law seeks to regulate. If the transaction to be regulated occurs "wholly outside" the boundaries of the state, the regulation is unconstitutional. If the transaction occurs "within" the boundaries of the state, it is constitutional so long as the regulation furthers legitimate in-state interests.

A.S. Goldmen, 163 F.3d at 786 (citation omitted).

A&R does not contest this constitutional requirement of a transactional nexus. Instead, it asserts that the General Assembly, in adopting the Delaware choice-of-law statute, has delegated to *private parties*, both in and out of Delaware, the power to contractually stipulate to the existence of a constitutional nexus merely by choosing to apply Delaware law to their transaction.

A&R argues that the General Assembly's synopsis of the choice-of-law statute supports its assertion because the synopsis says that the choice-of-law statute is intended " 'to supersede all Delaware common law limitations on the enforceability of Delaware *choice of law* provisions.' " (A&R's Br. at 11 (quoting 1993 Del. Laws Ch. 127 (H.B. No. 291), Synopsis) (emphasis added).) But A&R conspicuously cuts off the second part of the sentence it quotes, which demonstrates the General Assembly's much narrower intent, *viz*., only to supersede the choice-of-law provisions in the Restatement (Second) of Conflict of Laws,

rather than fundamental rules of statutory construction intended to preserve constitutionality:

> The Bill is intended to supersede all Delaware common law limitation on the enforceability of Delaware choice of law provisions (including any restrictions contained in the Restatement (Second) Conflict of Laws), as well as limitations on contractual consent to jurisdiction or service of process.

69 Del. Laws, c. 127 (1993), Synopsis.

Indeed, the presumption against extraterritorial application of statutes is not a choice-of-law rule found in the Restatement (Second) of Conflict of Laws.[6] It is a canon of statutory construction intended to preserve the constitutional validity of state laws. *See, e.g., Abel*, 998 A.2d at 1157.[7]

In short, there is nothing in the choice-of-law-statute or in the General Assembly's synopsis to suggest that the choice-of-law statute delegated to private parties the power to contractually extend the laws of this State beyond its borders absent an actual territorial nexus. Accordingly, the Court should reject A&R's suggestion that the General Assembly silently abrogated the constitutional presumption that Delaware laws are not intend to apply to acts outside of

[6] To the contrary, the Restatement provides that, "[t]he range of application of a statute, questions of [personal] jurisdiction aside, involves a problem of statutory construction and is beyond the scope of the Restatement of this Subject." Restatement (Second) of Conflict of Laws § 9, cmt. b.

[7] A similar presumption is found in the Restatement (Third) of the Foreign Relations Law of the United States § 402, which provides in Section 402(1)(a), that "a state has jurisdiction to prescribe laws with respect to conduct that, wholly or in substantial part, takes place within its territory."

Delaware. *See Monceaux v. State*, 51 A.3d 474, 477 (Del. 2012) ("This Court has a duty to read statutes 'so as to avoid constitutional questionability and patent absurdity.'")

4. *The Fraud Section of the DSA Does Not Apply to Extraterritorial Acts*

In an effort to overcome the presumption that the DSA does not apply to extraterritorial acts, A&R refers to two registration provisions in the DSA that prohibit the offer or sale of unregistered, nonexempt stock "in this State" and the transaction of business "in this State" by an unregistered "broker-dealer or agent." (A&R's Br. at 19-20 (citing 6 *Del. C.* §§73-202, 73-301(a)).) Based on these two registration provisions, A&R concludes that the General Assembly intentionally "left the[] [false-statement prohibitions in the DSA] subject to the *traditional choice-of-law tests* that this Court referenced in *Singer*." (*Id*. at 20 (emphasis added).)

There are two glaring flaws in this argument. First, contrary to A&R's assertion, *Singer* did not refer to "traditional *choice-of-law* tests"; rather, it referred to traditional *jurisdictional* tests and, in particular, to the presumption against the application of a law "outside the territorial jurisdiction of the State in which it is enacted." *Singer*, 380 A.2d at 981.

Second, A&R's argument ignores that the fraud section of the DSA expressly provides that, "[i]n interpreting this section, courts will be guided by the

interpretations given by federal courts to similar language set forth in § 17(a) of the Securities Act of 1933 and Rule 10b-5 promulgated under the Securities Exchange Act of 1934." 6 *Del. C.* §73-201. Thus, it is of particular significance that the Supreme Court of the United States has held that the presumption against extraterritorial application applies to Rule 10b-5:

> It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' " . . . Thus, "unless there is the affirmative intention of the Congress clearly expressed" to give a statute extraterritorial effect, "we must presume it is primarily concerned with domestic conditions." . . . When a statute gives no clear indication of an extraterritorial application, it has none.
>
> . . . .
>
> . . . Rather than guess anew in each case, we apply this presumption in all cases, preserving a stable background against which Congress can legislate with predicable results.
>
> . . . [I]f § 10(b) is not extraterritorial, neither is Rule 10b–5.
>
> . . . .
>
> In short there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not.

Morrison v. Nat'l Australian Bank Ltd., 561 U.S. 247, 255, 261-62, 265 (2010) (citations and footnote omitted).[8] Thus, both *Singer* and the United States Supreme

[8] In *Singer*, this Court relied on *Hilton v. Guyot*, 159 U.S. 113, 163 (1895), for the presumption that a law is not intended to apply outside the territorial jurisdiction of the State in which it is enacted. 380 A.2d at 981. *Hilton* stands for the proposition that "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived." 159 U.S. at 163.

Court's interpretation of Rule 10b-5 establish that the presumption against extraterritorial application applies with full force to the DSA's fraud section. [9]

Inexplicably, A&R argues that, "if some constitutional principle prohibited applying the Delaware Securities Act here, it also would prohibit applying Delaware common law." (A&R's Br. at 23.) But this argument misses, or tries to obscure, the fact that Chancellor Bouchard *did* apply both the statutory and common law of Delaware, including the canon of statutory construction, confirmed by this Court in *Singer*, and supported by the United States Supreme Court's interpretation of Rule 10b-5 in *Morrison*, that the DSA, like Rule10b-5, does not apply to extraterritorial transactions.

In short, A&R cannot pick and choose to apply some principles of Delaware law and ignore others. A&R is correct in saying that the parties agreed to be governed by Delaware law; but it is not correct in suggesting that, by doing so, the parties also agreed to ignore the Delaware-law presumption against extraterritorial application of the DSA.

[9] In its opening brief, A&R cites *Gravquick A/S v. Trimble Navigation International Limited*, 323 F.3d 1219 (9th Cir. 2003), (A&R's Br. at 19), but it fails to note that, in *Gravquick*, (i) one of the parties to the contract had its principal place of business in California, and (ii) the court found that the California statute "applies only to contracts that have sufficient connections with California to support a California choice of law." *Gravquick*, 323 F.3d at 1224.

5. *The Parties' Acts Do Not Have a Sufficient Nexus with Delaware to Support Application of the DSA*

As discussed above, the Chancery Court correctly determined that the DSA only applies to acts that have a substantial nexus with the State of Delaware. It also correctly found that the alleged fraud of which A&R complains does not have a sufficient nexus with the State to support application of the DSA.

The Merger Agreement was not negotiated in Delaware. (*See* A&R's Br. at 6-7.) The merger parties were Delaware corporations, but neither corporation was headquartered in Delaware, (*id*. at 6), and neither one is alleged to have had any operational presence in the State. (*See id*. at 6-7. *See also* A&R's App. A163-64 (Am. Counterclaims ¶¶8-9).) A&R notes that "the transaction's geographical contacts were dispersed across the country," (A&R's Br. at 6), but, conspicuously, it does not identify any transactional contacts in Delaware. (*Id*. at 6-7.)

Likewise, while A&R complains of "conduct that was widely dispersed geographically," (*id*. at 7), it does not identify any act of fraud that occurred in Delaware. (*Id*.) This is not surprising since there is no allegation in the Amended Counterclaims that any of the persons accused of fraud were located in Delaware, (*see* A&R's App. A164-69 (Am. Counterclaims ¶¶12-29)), or that the alleged fraud occurred in Delaware. (*See, e.g., id*. A183-84, A212, A263, A271 (Am. Counterclaims ¶¶78, 205, 426, 428, 459). *Accord* A&R's Br. at 6-7.)

The only identified connection that the Merger Agreement, the merger transaction, and the complained-of acts had to the State of Delaware is that the corporate parties were chartered here and they filed their merger documents here. (A&R's Br. at 6-7.) This, however, is not sufficient to establish a basis for the application of the DSA under *Singer*. As this Court held in *Singer*,

> We are not persuaded that because the corporate merger vote was held in Delaware this is a sufficient connection with the alleged fraud to permit plaintiffs to invoke the Act. That is simply too fragile a basis on which to establish subject matter jurisdiction over an alleged fraud in Pennsylvania or over a contract made in New York. And plaintiffs' arguments based on registration of the merger documents in Delaware, see 8 Del.C. s 103, and the statutory situs of the Magnavox stock in this State, 8 Del.C. s 169, are equally tenuous and we reject them for the same reason.

380 A.2d at 982. Thus, the Chancery Court properly found that "A&R has failed to allege a sufficient nexus to Delaware to sustain a claim under the Delaware Securities Act." (Op. at 22.)

B. THE DSA'S MERGER EXEMPTION IS APPLICABLE TO, AND EXEMPTS FROM THE ACT, THE MERGER OF MERGER CORP. INTO A&R

The DSA has an express merger exemption that exempts from its coverage "any act incident to a vote by stockholders . . . on a merger, consolidation, reclassification of securities, dissolution, or sale of corporate assets in consideration of the issuance of securities of the same or another corporation." 6

Del. C. §73-103(a)(17)(d).[10] A&R acknowledges this exemption, but argues that the exemption does not apply because the phrase "in consideration of the issuance of securities of the same or another corporation" modifies *each* of the preceding acts, such that the exemption applies to a merger only if it is "in consideration of the issuance of securities of the same or another corporation." (*See* A&R's Br. at 26.) This argument is wrong, both because it reads into the statute a comma that does not exist, and because the merger was, in any event, a merger in consideration of the issuance of securities of A&R to Merger Corp.'s stockholders.

Under the "last antecedent rule," a modifier phrase generally applies only to the noun or phrase that it immediately follows. *See Rag Am. Coal Co. v. AEI Res., Inc.*, 1999 WL 1261376, at *4 (Del. Ch. Dec. 7, 1999).[11] Here, the statutory exemption has commas separating "a merger, consolidation, reclassification of securities, dissolution, or sale of corporate assets," but there is no comma separating the last phrase, "sale of corporate assets," from the phrase, "in

[10] The DSA merger exemption is found in the definition of the terms "sale" or "sell" and "offer" or "offer to sell." 6 *Del. C.* § 73-103(a)(17).

[11] As then-Vice Chancellor Strine explained:

> Had the parties wanted the clause "relating to or arising under . . ." to modify both "any and all payments" and "other Loss," they could have done so either by omitting the comma altogether or by inserting a comma between "Loss" and "relating" in order to make "other Loss" an appositive phrase. "[O]rdinarily, qualifying words or phrases, where no contrary intention appears, usually relate to the last antecedent."

Rag Am. Coal Co., 1999 WL 1261376, at *4 (footnotes omitted).

consideration of the issuance of securities of the same or another corporation." 6 *Del. C.* §73-103(a)(17)(d). Therefore, following the last antecedent rule, the phrase, "in consideration of the issuance of securities of the same or another corporation," is properly read as modifying only the antecedent phrase, "sale of corporate assets."[12]

Even if the Court reads the merger exemption as requiring a merger "in consideration of the issuance of securities," this element was clearly present in the transaction consummated under the Merger Agreement. While A&R chooses to focus only on one side of the transaction – the cancellation of the Securityholders' stock– it is undisputed that, on the other side of the transaction – the merger of Merger Corp. into A&R – Merger Corp.'s stockholders received valuable consideration when their stock was converted into newly-issued A&R stock. (*See* A&R's App. A88, A89, A119, A121 (Merger Agreement §§ 2.1, 2.6, 7.1(D)(5)(B), 7.2(D)(3)(i)(c).) Therefore, the DSA is, by its own terms, inapplicable to the parties' transaction.

[12] A&R argued in the Chancery Court that this reading is nonsensical because there cannot be a sale of assets in consideration of the issuance of the seller's own securities. (*See* A&R's App. A521.) A&R is wrong. For example, a corporate real estate developer that finds itself with contaminated property may sell the property to a remediation expert, who is only willing to take the property if it receives consideration in the form of stock from the selling corporation. In other words, the seller is literally paying the buyer to take the property off its hands. *See, e.g., Environmental Aspects of Real Estate and Commercial Transactions, From Brownfields to Green Buildings* 519 (James B. Witkin, ed., 3d ed. ABA 2004) ("If the real estate values are less than the anticipated remediation expenses, the 'selling prices' are negative, requiring the sellers to pay the purchasers to take title to the properties.").

A&R argues that the DSA exemption should be read narrowly. (A&R's Br. at 27.) But A&R fails to explain how a narrow reading of the exemption would change the fact that Merger Corp.'s stockholders received valuable consideration in the form of newly-issued A&R stock. In any event, A&R's argument is contrary to the common understanding of the DSA exemptions: "[T]he exemptive provisions of the [DSA] and the regulations adopted thereunder are broad. . . . The reason for these very broad exemptive provisions is the belief that the federal requirements that are applicable to such securities are sufficient to protect the Delaware investor." 1 R. Franklin Balotti and Jesse A. Finkelstein, *Balotti and Finkelstein's Delaware Law of Corporations and Business Organizations* § 17.7[B] (2015).

A&R also refers to the Uniform Securities Act. (A&R's Br. at 27.) But it ignores what the drafters of the Uniform Securities Act recognized – that the merger exemption exists because transactions that require a shareholder vote and provide appraisal rights for dissenting shareholders do not have the same potential for abuse as a direct offering of securities for cash. *See, e.g.*, 14 Fletcher Cyc. Corps. § 6798 (rev. vol. 2012) (The Uniform Securities Act's merger exemption "recognizes that the potential for abuse in such transactions is much less than in a direct offering of securities for cash, since shareholders must approve the transaction and often have appraisal rights if they choose to dissent.") (citing Uniform Securities Act (1985) § 402(17) (Official Comment)). And, of course,

here, there were both a shareholder vote and appraisal rights in connection with the merger of Merger Corp. into A&R. (*See* A&R's App. A90, A119, A121 (Merger Agreement §§ 2.11, 7.1(D)(5)(B), 7.2(D)(3)(i)(c)).)

In sum, A&R does not dispute that the Act's merger-exemption statute excludes from the definition of "sale" mergers where the stock of one corporation is issued in exchange for the stock of another. Nor can it dispute that nothing in the exemption statute excludes from the exemption a transaction that has *both* a corporation's cancellation of its old stock *and* its issuance of new stock as incidents of a stockholder-approved merger, as was the case here.

Finally, A&R argues that the DSA merger exemption "never exempts sales of securities that . . . were negotiated by the majority shareholder." (A&R's Br. at 28.) There is, however, nothing in the DSA to support this argument, which is based on a defunct doctrine that arose under the now-rescinded Securities and Exchange Commission ("SEC") Rule 133, which, in turn, exempted certain transactions, including mergers, from federal registration requirements. *See* 17 C.F.R. § 230.133, rescinded eff. Jan. 1, 1973, at 37 Fed. Reg. 23636 (Nov. 7, 1972). In essence, the doctrine was created by the SEC as an exception to the SEC Rule 133 exemption from registration where merger transactions were negotiated by the controlling shareholders of an issuer. *See In re Great Sweet Grass Oils Ltd*., 37 S.E.C. 683, 691 (1957), *aff'd per curiam*, 256 F.2d 893 (D.C. Cir. 1958).

A&R's reference to the negotiated transaction doctrine is puzzling in two respects. First, the negotiated transaction doctrine was only in force until SEC Rule 133 was rescinded, which occurred more than seven months *before* the DSA was approved by the Delaware Legislature. *See* 17 C.F.R. § 230.133, rescinded eff. Jan. 1, 1973; 59 Del. Laws, c. 208, §§ 1, 4 (DSA, approved July 13, 1973; eff. July 1, 1973).[13]

A&R's reliance on the negotiated transaction doctrine is also puzzling because the doctrine's limitation on Rule 133 exemptions only applied in the absence of a statutory exemption: "if an exemption from registration is available it must be found in the statute and cannot be based on Rule 133." *In re Great Sweet Grass Oils Ltd*., 37 S.E.C. at 691. And, of course, the Delaware statute *does* include an express exemption for merger transactions like the one in which Merger Corp. merged into A&R, but it does *not* include a negotiated-transaction limitation.

In sum, the merger of Merger Corp. into A&R fits squarely within the DSA's express merger exemption. Therefore, even if the parties' contractual choice of Delaware law could trump the need for a territorial nexus, the transaction is still exempt from the DSA under that Act's express merger exemption.

[13] *See also Bowers v. Columbia Gen. Corp*., 336 F. Supp. 609, 622 n. 18 (D. Del. 1971) (recognizing that "a substantial argument can be, and has been, made that this '[negotiated transaction] exception' is no longer viable"); C. Schneider, *Acquisitions Under the Federal Securities Act – A Program for Reform*, 116 U. Pa. L. Rev. 1323, 1325 n. 5 (1968) (same).

II. A&R WAIVED ITS RIGHT TO ARGUE THAT THE CHANCERY COURT SHOULD HAVE STAYED ENFORCEMENT OF THE FINAL JUDGMENT ON FDG'S CLAIM UNTIL THE ENTRY OF A SUBSEQUENT JUDGMENT ON ITS AMENDED COUNTERCLAIMS BECAUSE A&R NEVER REQUESTED SUCH A STAY

QUESTION PRESENTED

Should the Chancery Court have stayed enforcement of the final judgment on FdG's Tax Refund claim until entry of a subsequent judgment on A&R's amended counterclaims, where (i) before entry of the Order, A&R never moved for a stay of enforcement, (ii) after entry of the Order, A&R only requested a stay pending a "forthcoming" Rule 59 motion (that was never filed) and a subsequent appeal of the Order, and (iii) the court granted A&R's motion for a stay pending appeal?

The FdG Appellees Answer: No.

SCOPE OF REVIEW

"[T]his Court reviews the . . . refusal to stay execution on a judgment, or its setting of the terms and conditions for such a stay, for abuse of discretion." *Owens Corning Fiberglas Corp. v. Carter*, 630 A.2d 647, 649 (Del. 1993).

MERITS OF THE ARGUMENT

A&R's stay argument is a *post hoc* fabrication. A&R did not ask the Chancery Court to *stay* enforcement of FdG's judgment until entry of a subsequent judgment on its amended counterclaims; it argued only that the court should not

enter a final judgment under Rule 54(b) because it had counterclaims pending. (*See* A&R's App. A371-76, A529-36 (cited in A&R's Br. at 30).)

Furthermore, it simply is untrue that "[t]he Court of Chancery also stated that *a stay of the partial judgment is barred* by the contractual provision that 'A&R "shall promptly pay" pre-closing tax refunds to [FdG]." (A&R's Br. at 33 (citing Op. at 39) (emphasis added; bracket in original).) Rather, the Chancery Court, *without making any comment about a stay*, referenced the Merger Agreement's "promptly-pay" provision in response to A&R's argument that the court should not grant FdG's motion for a summary judgment based on "'principles of offset–and of commonsense, rather than citing any binding authority mandating the result it seeks." (Op. at 39 (footnote omitted).)

After entry of the Order granting FdG's motion for a summary judgment and directing the entry of a final judgment, A&R *did* move for a stay under Court of Chancery Rule 62 and Supreme Court Rule 32. (*See* A&R's App. A539.) But A&R sought only "a stay pending A&R's forthcoming Rule 59 motion [that it never filed] and appeal." (*Id*. at A552.) It did *not* request a stay of enforcement pending adjudication of its remaining counterclaims. (*See id*. at A539-52.)

Having failed to raise in the trial court the issue of a stay pending adjudication of its amended counterclaims, A&R may not raise this question on appeal absent a showing that the interests of justice require its consideration. Sup.

Ct. R. 8; *see Nance v. State*, 903 A.2d 283, 285 (Del. 2006) ("To preserve an issue for appeal, however, it must be raised in the trial court."). Yet A&R has provided no explanation for its failure to raise this issue in the trial court, and it has made no argument that the interests of justice require the determination of this newly-presented question, as required under Supreme Court Rule 14(b)(vi)(A)(1).

Curiously, A&R does *not* present on this appeal the question of whether the Chancery Court properly directed entry of a final judgment, under Court of Chancery Rule 54(b), on FdG's claim for the Tax Refund and on the dismissal with prejudice of A&R's securities fraud and unilateral mistake counterclaims. Had A&R preserved *this* issue for appeal, the Chancery Court's decision would be reviewed for an abuse of discretion. *See Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8, (1980) ("It is left to the sound judicial discretion of the district court to determine the 'appropriate time' when each final decision in a multiple claims action is ready for appeal."); *Berckeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 202 (3d Cir. 2006) ("we apply an abuse of discretion standard of review to the District Court's determination that there is no just cause for delay").[14]

[14] "Court of Chancery Rule 54(b) is patterned after and almost identical to its counterpart in the Federal Rules of Civil Procedure." *Giordano v. Marta*, 723 A.2d 833, 835 (Del. 1998). "Because Chancery Court Rule 54(b) and Federal Rule of Civil Procedure 54(b) are substantially identical, cases decided under the Federal Rule afford helpful guidance in cases arising under the counterpart Chancery Court Rule." *In re Tristar Pictures, Inc., Litig.*, Civ. A. No. 9477, 1989 WL 112740, at *1 n. 1 (Del. Ch. Sept. 26, 1989) (citations omitted).

A&R did argue against entry of a final judgment under Rule 54(b) in the trial court. (A&R's App. A371-76, A529-36.) But, on appeal, A&R says nothing about the standard for entry of a final judgment under Rule 54(b). Nor does it argue that the Chancery Court abused its discretion in entering a final judgment under Rule 54(b). Therefore, any argument that A&R may have had that the Chancery Court abused its discretion in entering a final judgment under Rule 54(b) has been waived. Sup. Ct. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal.").[15]

CONCLUSION

The Chancery Court's Order should be affirmed.

Respectfully submitted,

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May 25, 2016

[15] To the extent that this Court were to consider whether the Chancery Court abused its discretion, the FdG Appellees rely on the Chancery Court's reasoning in its Opinion, (Op. at 38-40), to demonstrate that the court did not abuse its discretion.

CERTIFICATE OF SERVICE

I hereby certify that, on the 25th day of May, 2016, the foregoing FdG Appellees' Answering Brief was served via File & Serve*Xpress*, on the following counsel of record:

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