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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BORGWARNER INC. and BORGWARNER MORSE TEC LLC, Appellants, v. FIRST STATE INSURANCE COMPANY, THE NORTH RIVER INSURANCE COMPANY, and OWENS CORNING/FIBREBOARD ASBESTOS PERSONAL INJURY TRUST, Appellees.	No. 413, 2016 Court Below – Superior Court of the State of Delaware, C.A. No. N15M-05-009

APPELLEE'S ANSWERING BRIEF SUBMITTED ON BEHALF OF THE NORTH RIVER INSURANCE COMPANY

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NATURE OF THE PROCEEDINGS

This appeal relates to a subpoena duces tecum[1] issued by Appellants, BorgWarner, Inc. and BorgWarner Morse TEC, LLC (collectively "BorgWarner"), to the Owens Corning/Fibreboard Asbestos Personal Injury Trust ("Trust") seeking to abridge the rights of parties to a confidential settlement as well as the rights of participants in a private arbitration proceeding ("ADR"). Specifically, in connection with Illinois litigation involving a dispute between BorgWarner and its insurers, BorgWarner served a subpoena on the Trust seeking discovery of confidential documents and materials exchanged between The North River Insurance Company ("North River") and its insured, Owens Corning Fiberglas ("OCF") that were adduced during the private ADR proceeding. The ADR proceeding was conducted pursuant to a settlement agreement, i.e. the Wellington Agreement[2], between OCF and North River, among others.

Appellee, North River, intervened and moved to quash the subpoena so as to preserve the confidentiality of those proceedings and materials.[3] BorgWarner

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[1] B001, Subpoena issued by BorgWarner.

[2] A86 and A135, the Wellington Agreement and the associated Confidentiality Agreement.

[3] North River is not a party to the Illinois litigation between BorgWarner and its insurers. BorgWarner is not a signatory to the Wellington Agreement. See B19 and B049, motion to intervene and cross-motion to quash, respectively.

moved to compel production. On March 22, 2016, Commissioner Manning found: (1) the BorgWarner subpoena was "too broad", (2) OCF and North River intended all aspects of the private ADR to be confidential, (3) Delaware public policy favored private ADR proceedings, and (4) "allowing third parties to abrogate bargained for confidentiality agreements, while fishing for evidence to be used in unrelated litigation, would undeniably discourage future parties from engaging in arbitration."[4] On July 14, 2016, the Superior Court denied reconsideration, finding: BorgWarner failed to demonstrate the Commissioner's decision was contrary to law, and that Delaware favors arbitration -- a finding that "undergirds" the Commissioner's decision.[5] On August 12, 2016, BorgWarner filed a notice of appeal from the Superior Court order denying its motion for reconsideration.

[4] See Exhibit A, Appellant's Opening Brief.
[5] See Exhibit B, Appellant's Opening Brief.

SUMMARY OF ARGUMENT

1. **DENIED.** The Superior Court appropriately: (1) denied reconsideration as BorgWarner failed to demonstrate that Commissioner Manning's decision was "contrary to law" as required under Superior Court Civil Rule 132, (2) affirmed that Delaware's public policy favors arbitration and preserving confidentiality asintegral to that policy, and (3) affirmed that "fairness" governs whether disclosure of confidential arbitration materials should be permitted. Commissioner Manning appropriately found that: (1) the subpoena was overbroad, (2) the materials subpoenaed were confidential materials under a confidential settlement agreement and are part of a confidential private ADR proceeding, (3) Delaware public policy favors settlements and private arbitration, and (4) if expected confidentiality was "abrogated" by third-parties fishing for evidence to be used in unrelated litigation, parties would be discouraged from engaging in arbitration.

2. **DENIED.** Superior Court Civil Rule 26(c) is not applicable and the Commissioner and the Superior Court appropriately applied Rule 26(a)(1)(i) (exercising the inherent authority to limit the extent of discovery) and Rule 45 (c)(3)(A) (exercising authority to modify the overbroad subpoena and limit discovery of protected materials).

3. **DENIED.** BorgWarner improvidently treats North River as a party to its litigation, but North River is not a party to the Illinois action. Consequently, BorgWarner's argument that a confidentiality agreement "cannot trump a party's obligation to produce relevant, non-privileged materials" is premised upon a false assumption and should be rejected. This is particularly true because BorgWarner repeatedly acknowledged below that the information sought was confidential information. The entirety of BorgWarner's arguments below sought to create some exception so it might access discovery of confidential materials.

Further, BorgWarner misrepresents the Court's findings with respect to Delaware's public policy favoring arbitration. Neither Commissioner Manning nor Judge Scott applied the Delaware Rapid Arbitration Act to reach their decision. In both instances, the jurists indicated that Delaware had an existing public policy favoring arbitration as a matter of law, but then noted as an observation that had the ADR proceeding occurred under "current Delaware law" there would be no doubt the materials sought would be confidential.

4. **DENIED.** The Commissioner and Superior Court appropriately determined that BorgWarner's construction of the Wellington Agreement and associated Confidentiality Agreement was "tortured". The Superior Court did not classify the Commissioner's recitation of the confidentiality terms as *dicta*, but

expressly ruled that BorgWarner had failed to demonstrate where the Commissioner erred as a matter of law and, having failed as a matter of law to demonstrate the threshold error, the Commissioner's decision was properly affirmed.

5. **DENIED.** BorgWarner's "waiver" argument does not compel production as argued by BorgWarner, and both the Commissioner and the Superior Court ruled that the rationale behind allowing partial disclosure is one of "fairness." North River is not a party to the BorgWarner litigation and has not sought to use a privilege as a weapon. To the contrary, North River intervened to protect the confidentiality of the materials under the Wellington Agreement because the materials are, by the express terms of the settlement agreement, not to be precedential. North River sought to quash the subpoena because the materials represent confidential materials disclosed during a private and confidential ADR proceeding involving compromised positions unique to that ADR proceeding. Further, the private proceeding was limited to disputes between North River and OCF. BorgWarner seeks to invade the sanctity of North River's private and confidential ADR proceeding and abridge the settlement agreement that includes, as a material term, confidentiality. Moreover, it seeks to do so in unrelated litigation to which North River is not a party.

STATEMENT OF FACTS

On June 19, 1985, OCF and North River entered into a settlement agreement known as the Wellington Agreement (the "Agreement").[6] The Agreement resolved numerous insurance coverage disputes between Subscribing Producers and Subscribing Insurers with respect to, among others, OCF's asbestos-related claims and liabilities. BorgWarner is not a signatory to the Agreement. BorgWarner's asbestos claims and its insurers' rights and obligations are not governed by the Agreement. BorgWarner has no rights under the Agreement.

The Agreement expressly provides: "All actions taken and statements made by persons or their representatives relating to their participation in the Agreement, including its development and implementation, shall be without prejudice or value as precedents, and shall not be taken as a standard by which other matters may be judged." (emphasis supplied).[7] The Agreement expressly provides that it does not reflect the views of the Subscribing Producers or Subscribing Insurers as to their rights and obligations with regard to matters or persons outside the scope of the Agreement, and that the Subscribing Producers and Subscribing Insurers were resolving disputed claims relating to the application of insurance to asbestos-

[6] See A86.
[7] See A89, I. General Conditions (4).

related claims within the scope of the Agreement.[8] The Signatories expressly negated the relevancy of the Agreement to disputes outside the Agreement, and reserved their rights with respect to persons and disputes outside the scope of the Agreement.

In the Agreement, OCF and North River agreed to resolve all disputes through a private and confidential Alternative Dispute Resolution (ADR) process.[9] Under the ADR rules: "Nothing from the ADR process is admissible in subsequent litigation" and no "precedential effect" was to be given to any decision rendered in the ADR procedure.[10] The Agreement provided for a Facility to "maintain the confidentiality of confidential and proprietary information submitted by Subscribing Producers and Subscribing Insurers."[11] The exchange of information was to facilitate the resolution of insurance disputes between the Signatories. The Signatories to the Agreement agreed and jointly requested that Courts "take notice of [the Agreement's] underlying purpose, and accord all persons subscribing to or otherwise associating themselves with the Agreement and their representatives full privilege and protection with respect to the disclosure

[8] A88, General Conditions, Para 2.
[9] A92, Section VIII, Para. 6.
[10] A89, General Conditions, Para. 4.
[11] A90, Cooperation with Facility. Today the "Facility" is the Center for Public Resources.

of their actions, statements, documents, papers and other materials relating to the Agreement, including its development and implementation."[12]

To further their intentions and make clear that confidentiality was an important and material term of the ADR process, North River and OCF also entered into a "Confidentiality Agreement" to ensure confidential treatment for discovery exchanged between and among them in the ADR proceeding.[13] Recognizing that the ADR procedure required the "exchange of confidential or sensitive business information between and among the Parties and their counsel," the Confidentiality Agreement specifically required that: (1) confidential documents were not to be disclosed to third-parties outside the Agreement and (2) any documents were to be used solely for the ADR proceeding.

In completely unrelated litigation between BorgWarner and its insurers, BorgWarner issued a broad-reaching subpoena to the Trust, designed to expose to BorgWarner and other litigants in its case all of the confidential material exchanged and testimony rendered by North River and OCF in the ADR proceeding.[14] BorgWarner sought transcripts of confidential depositions and ADR trial testimony, exhibits, and other confidential documents relied upon by North

[12] A89, General Conditions, Para. 5.
[13] A135, Confidentiality Agreement.
[14] See B001, Subpoena.

River and OCF witnesses in the ADR. The purported rationale behind this subpoena is to search for evidence of industry practices concerning insurer consent before incurring defense costs in defending asbestos claims, apparently an issue in the Borg Warner Illinois litigation.

North River objected to the subpoena and the production because the materials were "confidential" and protected not only by the Agreement's confidentiality provisions, but by the Confidentiality Agreement. Further, North River intervened because the documents and other materials at issue from the ADR were, by express agreement, not to be precedential, not to be used in other proceedings, and were premised upon compromises reached with regard to the issues raised in the OCF ADR proceeding. Seeking to maintain the bargained for confidentiality that was integral to the settlement and arbitration of the OCF dispute, North River moved to intervene and quash the subpoena.[15]

On March 22, 2016, Commissioner Bradley V. Manning ruled on cross-motions brought by BorgWarner and North River. Commissioner Manning

[15] See B019 and B049. Also, at page 8 of its brief BorgWarner informs the court that "several of BorgWarner's insurers (or their corporate affiliates), including North River …, took positions on the meaning of the defense cost language that contravene the positions they now are taking in the Illinois Action." North River is NOT an insurer of BorgWarner and it is NOT a party to the Illinois action. North River has not taken any position in the Illinois action despite BorgWarner's repeated erroneous representations to this effect.

concluded that: (a) BorgWarner's subpoena was "too broad"; (b) BorgWarner's interpretation of the Wellington Agreement was "tortured, to say the least"; (c) the Wellington Agreement and associated Confidentiality Agreement make it "abundantly clear" the parties intended every part of the arbitration, including all discovery and evidence, to be confidential; (d) Delaware's public policy warranted enforcing the confidentiality provisions of the Wellington Agreement; (e) Delaware's public policy favors "arbitration and the concomitant confidentiality" and it is Delaware's public policy to encourage "voluntary resolution of disputes through mediation and confidentiality as a vital part of the mediation process"; (f) allowing third-parties to abrogate "bargained for confidentiality agreements" while "fishing for evidence to be used in unrelated litigation" would "undeniably discourage future parties from engaging in arbitration," a key aspect of which is confidentiality; (g) Delaware's courts would be "overwhelmed if parties could not resort to arbitration"; and (h) BorgWarner presented "no compelling justification for the Court to compel the Trust to produce the evidence it is searching for." Because North River became embroiled in litigation with its reinsurers, the Commissioner concluded that North River, to some extent, waived the confidentiality protection relating to any information North River may have introduced in a "public proceeding." Based on that finding, Commissioner

Manning "modified" BorgWarner's subpoena to permit discovery of any ADR evidence "that has been publically disclosed, released or used in other previous litigation," but information "that was never previously disclosed by North River shall remain confidential."

On March 30, 2016, BorgWarner filed a Motion for Reconsideration. BorgWarner did not contest the Commissioner's determination that the testimony and documents from the private ADR were "confidential" and, in fact, admitted in its briefing that the documents and testimony sought are "confidential," as evident from BorgWarner's arguments advancing some exception to confidentiality.[16] In each instance, BorgWarner premised its arguments on documents being "confidential." BorgWarner did not challenge the finding that its subpoena was "too broad," or the Court's authority under Rule 26 to modify the overbroad subpoena and limit the request to those documents that North River may have introduced in public litigation. BorgWarner argued only that the Commissioner's decision was "contrary to law." On July 14, 2016, the Superior Court denied the motion for reconsideration, finding that BorgWarner failed to

[16] First, BorgWarner argued there was no demonstrated harm by circumventing confidentiality; next, that *Gotham* permitted discovery of "confidential" documents"; then it cited to a Bankruptcy Court that permitted discovery of confidential documents; and then it advanced other arguments it could conjure to explain why it needed "confidential documents." B323-B330.

show that the Commissioner's order was contrary to law.[17] The Superior Court appropriately determined that BorgWarner failed to meet the standard for review and, more specifically, noted that Rule 132 permitted reconsideration only where the order is based on findings of fact that are clearly erroneous or the order is contrary to law. The only issue raised on reconsideration was the argument that the decision was "contrary to law". The Court concurred with Commissioner Manning's "candid description of BorgWarner's interpretation of certain provisions of the Wellington Agreement as 'tortured,'"[18] and determined that the case law cited by BorgWarner was not binding precedent nor persuasive with respect to the issue presented.

[17] See Exhibit B to Appellant's Opening Brief.
[18] See Exhibit B to Appellant's Opening Brief, Page 9, Footnote 11.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY DENIED APPELLANT'S MOTION FOR RECONSIDERATION

A. Question Presented by BorgWarner

Did the Superior Court err by denying BorgWarner's motion without requiring a showing of good cause for precluding the discovery?

B. Standard of Review

The Supreme Court's review of the scope of discovery allowed by the court below is an abuse of discretion standard. See *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 825 (Del. 1992); *Zirn v. VLI Corp.*, 621 A.2d 773, 780 (Del. 1993) ("Appellate review of a trial court's ruling limiting discovery is based on an abuse of discretion standard"); *Swanson v. Davis*, 69 A.3d 372 (Del. 2013) ("We review a trial court's application of discovery rules for abuse of discretion"). The Supreme Court of Delaware reviews pretrial discovery rulings for abuse of discretion. *Coleman v. PriceWaterhouseCoopers, LLC*, 902 A.2d 1102, 1106 (Del. 2006). "When an act of judicial discretion is under review, the reviewing court may not substitute its own notions of what is right for those of the trial judge, if his [or her] judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness." *Id*. The Supreme Court of Delaware has explained that "[j]udicial discretion is the exercise of judgment directed by conscience and

reason, and when a court has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused." *Id*.

C. Merits of Argument

1. **The Court Appropriately Rejected Application of Rule 26(c) and Applied Rule 26(b)(1)(a)(i) and Rule 45(c)(3)(A)(ii)**

BorgWarner argues that the Superior Court should have required a showing of "good cause" before limiting discovery and, in doing so, relies upon Delaware Superior Court Civil Rule 26(c). However, as the Superior Court expressly ruled, Rule 26(c) relates to protective orders and is inapplicable to any motions at issue in this matter. The Superior Court found that the Commissioner appropriately applied Rule 26(b)(1)(a)(i) and Rule 45(c)(3)(A)(ii).

Rule 26(c) specifically provides:

> "(c) **Protective orders.** -- Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the Court …may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following…" Del. Super. Ct. Civ. R. 26.

Neither BorgWarner's motion to compel, nor North River's motion to quash sought or in any way involved a request for a protective order. Rather, the proceedings below addressed the extent to which materials from a private,

confidential settlement and ADR proceeding were subject to discovery. At issue was the scope of discovery and whether BorgWarner was allowed to intrude into a confidential and private settlement and ADR proceeding as part of its discovery in unrelated litigation it had with its own insurers in Illinois. The issues relate to the scope of discovery and specifically the discoverability of confidential information from a private ADR proceeding. BorgWarner improvidently premises its argument upon a standard applicable to motions for a protective order, as opposed to a motion to quash, which was at issue here. The Superior Court properly determined Rule 26(c) did not apply, and the Commissioner appropriately applied Rule 26(b)(1)(a)(i) and Rule 45(c)(3)(A)(ii).

Rule 26(b) provides:

> "(b) **Discovery scope and limits.** -- Unless otherwise limited by order of the Court in accordance with these rules, the scope of discovery is as follows: (1) In general. -- Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter…." Del. Super. Ct. Civ. R. 26.

Rule 45 expressly relates to subpoenas, such as the one at issue here, and provides:

"(3) (A) On timely motion, the Court shall quash or modify the subpoena if it… (ii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or…" Del. Super. Ct. Civ. R. 45. That is the precise issue here. The subpoena sought material from the ADR proceeding protected by a confidentiality agreement, and a confidential settlement agreement. North River moved to quash the subpoena. The Commissioner and the Superior Court properly applied Rule 26(b)(1)(a)(i), which vests the Court with authority to control the scope of discovery, and Rule 45, which vests the Court with authority to quash or modify a subpoena, as it did here.

Delaware case law recognizes that motions for protective orders and motions to quash, although frequently brought together by the movant, involve separate, distinct and different relief, measured by different standards. BorgWarner's reliance on Del. Super. Ct. Civ. R. 26(c) to argue absence of "good cause" is misplaced because, as the Superior Court correctly found, Rule 26(c) governs protective orders, which does not apply in this situation. *Anaqua, Inc. v. Bullard*, 2015 WL 2208978 (Del. Super. 2015). See also *Lavigne v. Jack Lingo, Inc.*, 2006 Del. Super. LEXIS 729, at *3 (Del. Super. 2006) (Superior Court discussion of the different type of relief available to subpoenaed party, involving a motion to quash under Rule 45(c), and motion for protective order under Rule 26(c)(1) and (4));

Miller v. Jack Lingo, Inc., 2006 WL 2242703 (Del. Super. 2006). As is evident from the cases, these Rules address different circumstances, involving different types of relief, requiring application of different standards. The Superior Court applied the appropriate standard.

2. The Court Appropriately Applied Rule 132(a)(3)

The Superior Court applied the correct standard of review for a motion for reconsideration, requiring BorgWarner to comply with Delaware Superior Court Civil Rule 132(a)(3) that provides:

> (3) (iv) A judge may reconsider any hearing or pretrial matter under subparagraph (3) only where it has been shown on the record that the Commissioner's order is based upon findings of fact that are clearly erroneous, or is contrary to law, or is an abuse of discretion (emphasis supplied).[19]

The Superior Court appropriately determined that BorgWarner failed to demonstrate that the Commissioner's findings were contrary to law. *Doe v. Slater*, 2014 WL 6669228 (Del. Super. 2014). A decision is "contrary to law" "if it violates a statute, legal regulation or settled common law principle." *Brandywine Innkeepers, LLC v. Bd. of Assessment Review of New Castle County*, 2005 WL 1952879 (Del. Super. 2005). Commissioner Manning's decision was not contrary

[19] BorgWarner did not challenge Commissioner Manning's decision as being "clearly erroneous" or an "abuse of discretion" but instead, relied solely on the assertion that it was "contrary to law." B316-317.

to law and, in fact, expressly followed Delaware Superior Court Civil Rules 26 and 45. The Commissioner properly determined that: (1) BorgWarner's subpoena was "too broad"[20], (2) the Wellington Agreement clearly and unambiguously rendered the documents "confidential"[21], (3) Delaware law and public policy favored both settlement and private arbitration, and (4) public policy dictated that confidentiality be preserved in order to promote alternative dispute resolution.[22]

3. BorgWarner's Reliance On *In Re Armstrong World Industries, Inc.* Is Misplaced

BorgWarner cites to motion practice in *In re Armstrong World Industries*, C.A. No. 00-4471 (RJN) (Bankr. D. Del.) a bankruptcy proceeding. BorgWarner's reliance on this case is misplaced. First, in the *In re Armstrong World Industries* decision the court specifically warns: "However, this decision shall not serve as precedent and may not be cited as such for disclosure of any additional documents of any kind or nature, including without limitation, the reference to documents in the Briefs as well as the arbitrator's decision (emphasis added)." *In re Armstrong*

[20] Appellant's Exhibit A, page 5.
[21] Appellant's Exhibit A, page 6.
[22] BorgWarner did not challenge the determination that the subpoena was over-broad, nor did it challenge the Court's exercise of discretion to modify the subpoena, nor could it. BorgWarner also did not challenge the Commissioner's determination that the materials were confidential and, in fact, each of BorgWarner's arguments is premised upon the documents being "confidential". B323-B330.

World Industries, C.A. No. 00-4471 (RJN) (Bankr. D. Del. Sept. 8, 2003) (Order).[23] It is inappropriate for BorgWarner to even cite this decision given the Court's express instruction that it shall not be precedential and is not to be cited. Regardless, BorgWarner admits this decision is not binding precedent and further, does not support an argument that the Superior Court acted contrary to law.

Moreover, *In re Armstrong World Industries* is distinguishable. The party opposing production in *In re Armstrong World Industries* (i.e. Liberty Mutual) was an insurer for Armstrong and the claims were against the Liberty Mutual policy(ies). Liberty Mutual was seeking to use confidential material against its adversary (i.e. Armstrong) while, at the same time, seeking to prevent its adversary from gaining discovery into other confidential material. In those circumstances, courts alter the privilege to level the playing field. There is no such need in this case. The Armstrong World court specifically stated: "…the documents that are sought by way of this motion to compel go to the heart of the administration of this case and are directed at one of what may be the principal assets that thousands, hundreds of thousands of asbestos claimants may be looking to as a part of the asbestos trust that is set up in the Plan."

[23] A345-A346.

The circumstances in *Armstrong World Industries* and this situation could not be more distinct. North River is not a party to the Illinois action, nor does it have an interest in the Illinois action. No claims are made against North River policies. North River has been impelled into this proceeding by BorgWarner's subpoena and fishing expedition seeking confidential ADR materials and testimony of parties to a private arbitration governed by the Wellington Agreement, which have no relationship to BorgWarner. In *Armstrong*, the coverage available under the Liberty Mutual policies was directly at issue. Here, North River's policies are not involved at all. The Superior Court recognized the difference and declined to follow it.

II. THE COMMISSIONER'S DECISION ON CONFIDENTIALITY PROPERLY APPLIED DELAWARE'S LAW FAVORING SETTLEMENT, ALTERNATIVE DISPUTE RESOLUTION AND ENFORCEMENT OF CONTRACTS

A. Question Presented by BorgWarner

Did the Superior Court err by denying BorgWarner discovery of relevant, non-privileged information based on (1) confidentiality agreements to which BorgWarner was not a party, and (2) the Delaware Rapid Arbitration Act?

B. Standard of Review

The Supreme Court's review of the scope of discovery allowed by the court below is an abuse of discretion standard. See *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 825 (Del. 1992). See also *Zirn v. VLI Corp.*, 621 A.2d 773, 780 (Del. 1993) ("Appellate review of a trial court's ruling limiting discovery is based on an abuse of discretion standard"); *Swanson v. Davis*, 69 A.3d 372 (Del. 2013) ("We review a trial court's application of discovery rules for abuse of discretion"); *Coleman v. PriceWaterhouseCoopers, LLC*, 902 A.2d 1102, 1106 (Del. 2006).

While BorgWarner asserts application of a statute is a question of law that is reviewable *de novo*, neither the Commissioner nor the Superior Court applied a statute in reaching their respective decisions and thus, the effort to obtain *de novo* review based upon review of a statute is misplaced.

C. Merits of Argument

BorgWarner argues that the Superior Court erred by disregarding its argument that it cannot be bound by a contract to which it is not a party. BorgWarner distorts the Court's ruling. The Superior Court made no determination that BorgWarner was bound by any contract, nor did it treat BorgWarner as if it were bound by the Wellington Agreement. Rather, the Court recognized that the Wellington Agreement was a settlement agreement, and that the settlement agreement provided for a private ADR proceeding and that the parties intended to be confidential. The Agreement provides for a confidential exchange of information to facilitate settlement of a dispute, and the confidential ADR to resolve their dispute. The Court recognized the ADR proceedings were conducted with confidentiality in place, and, that Delaware had a long history of favoring settlements, arbitration and enforcement of contracts. Each of these determinations is well established and supported by Delaware law, which the Court properly applied.

1. Delaware Favors Settlements, ADR And Enforcement Of Contracts With Attendant Confidentiality

"[Delaware] law favors the voluntary settlement of contested issues." *BVF Partners L.P. v. New Orleans Emples. Ret. Sys. (In re Celera Corp. S'holder Litig.)*, 59 A.3d 418, 433 (Del. 2012); *Polk v. Good*, 507 A.2d 531 (Del. 1986);

Rome v. Archer, 197 A.2d 49, 53 (Del. 1964). Delaware courts favor settlements because settlements promote the interest of judicial economy. *In re Vitalink Communications Corp. Shareholders Litig.*, 1991 WL 238816 (Del. Ch. Nov. 8, 1991). Also, Delaware courts have long had an express policy "favoring arbitration." See e.g. *Del. Transit Corp. v. Amalgamated Transit Union Local 842*, 34 A. 3d. 1064, 1068 (Del. 2011); *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A. 2d 286, 292 (Del. 1998) (Arbitrations foster Delaware policy "favoring alternate dispute resolution mechanisms" and such mechanisms are "an important goal of Delaware legislation, court rules and jurisprudence.").

BorgWarner would have this Court believe Delaware's public policy favoring settlements and arbitration is of recent vintage, which is not the case. Moreover, that the cited decisions post-date the Wellington Agreement is of no moment, since the protection they afford existed then, and applies now, at a time when BorgWarner seeks to breach the confidentiality of a private ADR despite decisional law identifying Delaware's long standing policy favoring both confidential settlements and arbitrations.

Delaware also upholds the freedom of contract and enforces, as a matter of fundamental public policy, voluntary agreements of sophisticated parties. See *In re Del Monte Foods Co. Shareholders Litigation*, 25 A.3d. 813, 840 (Del. Ch.

2011)(citing *NACCO Indus. Inc. v. Applica Inc.*, 997 A. 2d 1, 35 (Del. Ch. 2009)). Delaware recognizes that "contractual expectations" of sophisticated business should be respected (*Id*. at 841, citing *Abry v. P'rs V, L.P. v. F & W Acq., LLC*, 891 A. 2d 1032, 1061 (Del. Ch. 2006)) and that parties bargain for provisions in agreements because those provisions "mean something." It is therefore "critical to our law that those bargained-for rights be enforced." *Id*. at 841 (citing *NACCO* , 997 A. 2d at 19 (Del. Ch. 2009)).

The decision below recognizes and upholds Delaware's public policy favoring alternative dispute resolution and voluntary resolution of disputes. The decision recognizes that to promote settlements, arbitration and other alternative dispute resolution, Delaware must uphold the "concomitant confidentiality" that is contracted for and without which the incentive to engage in private alternative dispute resolution and settlements would be impaired. The Superior Court's decision recognized that failing to enforce the policies of confidentiality that move parties to ADR and settlements would result in an overburdened court system. Commissioner Manning expressly stated: "Allowing third parties to abrogate bargained for confidentiality agreements, while fishing for evidence to be used in

unrelated litigation, would undeniably discourage future parties from engaging in arbitration.[24]

The notion that the Superior Court bound BorgWarner to the Wellington Agreement is meritless. The Superior Court's decision upheld Delaware's public policies favoring settlements, ADR proceedings and the enforcement of contracts. The Superior Court recognized the intention of the parties to a private contract, in this case a settlement agreement, must be upheld to protect and preserve each of those public interests. And, both the Commissioner and the Superior Court recognized Delaware's long standing public policy favoring settlements and arbitration, both of which are the subject matter of the Wellington Agreement.

In sum, the Superior Court applied Delaware law favoring ADR proceedings and settlements to the express terms of the Wellington Agreement, and held the materials and testimony sought by BorgWarner were confidential. Having made that determination, the Superior Court assessed whether the materials should be subject to discovery by a third party interloper, namely BorgWarner, and ultimately determined they were protected from discovery under the circumstances presented. BorgWarner's effort to use generalized statements of contract law in

[24] See Exhibit A, Appellant's Opening Brief at page 7.

order to argue that the Superior Court bound it to a contract to which it was not a party is simply unsupported by the facts and law, and should be rejected.

Other than string citing to a few Delaware cases that refused to compel arbitration against a non-signatory to the arbitration agreement, BorgWarner fails to cite any controlling Delaware law to support its argument that the Superior Court's decision is contrary to Delaware law. Instead, it resorts to *Gotham Holdings LP v. Health Grades, Inc.*, 850 F. 3d 664 (7th Cir. 2009), which is inapplicable, and which the Superior Court properly identified as a Seventh Circuit decision that was not binding on it.

2. Borg Warner's Reliance on *Gotham Holdings* Is Misplaced

Gotham Holdings LP v. Health Grades, Inc., 850 F. 3d 664 (7th Cir. 2009), is not Delaware decisional law. As a threshold matter, BorgWarner's contention that the Superior Court acted contrary to Delaware law cannot be supported by resort to law of a different jurisdiction, since the Court is not and was not constrained to follow *Gotham*. Further, *Gotham* is distinguishable because it is premised on the absence of any national policy favoring arbitration. In *Gotham*, Health Grades had argued that access to the information subpoenaed would undermine a national policy favoring arbitration, but the court found no such "national policy" to exist. *Id*. at 666. In contrast, Delaware has a long-standing

policy favoring alternative dispute resolution and arbitration. The Superior Court recognized that Delaware has a public interest and public policy favoring arbitration and upheld that public policy.

3. A Proper Reading Of *Gotham* Requires Affirmance Of Commissioner Manning's Order And The Superior Court's Denial Of Reconsideration

In *Gotham*, the court noted that Health Grades' confidentiality agreement expressly permitted disclosure in response to a subpoena. *Id*. at 665. The Wellington Agreement contains no such provision. To the contrary, the Agreement has express statements concerning the parties' privacy interests and asks all courts to honor and protect those interests. The Agreement states "[n]othing from the ADR process is admissible in subsequent litigation."[25] It also states it does not reflect the views of insurers on matters outside of Wellington[26] and requests "all Courts" to "accord all persons subscribing to *** the Agreement *** full privilege and protection with respect to the disclosure of their actions, statements, documents, papers and other materials relating to the Agreement, including its development and implementation." [27] *Gotham* recognizes that courts

[25] A89, General Conditions, para. 2.
[26] A88, para. 2.
[27] A89, para. 5.

should ensure the enforceability of private ADR agreements "according to their terms." *Id*. at 666. The Superior Court decision is consistent with *Gotham*.

4. Confidentiality Agreements Are Enforceable and BorgWarner Has No Right of Access To Private ADR Proceedings

BorgWarner would have this Court empower it to subpoena any corporate entity's private arbitration materials nationwide, absent any relationship to BorgWarner or its dispute, in a quest to establish an "industry custom or practice." There is no legal support sanctioning such tactics. In *Del. Coalition for Open Gov't, Inc. v. Strine*, 733 F. 3d 510 (3rd Cir. 2013), the court recognized Wellington-type arbitrations are distinctly private and do not involve any right of public access. 733 F. 3d at 517. *See also Mosaid Techs., Inc. v. LSI Corp.*, 878 F. Supp. 2d 503 (Del. 2012) ("There are other forums - such as arbitration - available if parties wish to protect all types of information from public view."); *Mine Safety Appliances Co. v. North River Ins. Co.*, 73 F. Supp. 3d 544, 587 (W.D. Pa 2014) ("To the extent parties desire to have their dispute resolved in private by a body that is bound to secrecy, they are free to employ the forum that readily offers such benefits: arbitration.") BorgWarner cannot abrogate these principles by issuing a subpoena that intrudes into a private ADR proceeding.

5. The Rulings Of "Other Courts" Relied Upon By BorgWarner Demonstrate The Superior Court's Decision Is Proper And Consistent With Delaware Law

First, case decisions from other jurisdictions do not establish Delaware law and should not be used to argue the Superior Court acted "contrary to law." Arguing that the Superior Court failed to follow decisions from other jurisdictions cannot sustain BorgWarner's appeal of the denial of reconsideration. BorgWarner failed to demonstrate that the Superior Court acted contrary to law, for the reasons expressed by the Superior Court with respect to BorgWarner's challenge to the Commissioner's decision.

BorgWarner cites to *National Union Fire Insurance Co. of Pittsburgh PA v. Porter Hayden Co.*, 2012 WL 628493, at *1 (D. Md. Feb. 24, 2012) and *Federal-Mogul Products, Inc. v. AIG Casualty Co.*, C. A. No. MRS-L-2535-06 (N.J. Super. July 20, 2011)(Master's Report)[28] and criticizes the Superior Court for distinguishing these cases because they sought the "disclosure of confidential claimant information in the context of asbestos bankruptcy trusts…" In these decisions, claimants had submitted claims to a variety of trusts and the defendant trusts sought discovery of other claim information the claimants had submitted. The first obvious distinction is that the claimants are parties in the action. Consistent with the law of Delaware and other jurisdictions, a party may not use a

[28] A374-A443.

confidentiality privilege as both a sword and a shield. However, that is not the circumstance here.

In the *Gruwell v. Allstate Ins. Co.* decision, 2010 WL 3528900 (Del. Super. Sept. 9, 2010), the Superior Court appropriately distinguished *Porter Hayden* and *Federal-Mogul*, consistent with Delaware law. In *Gruwell*, the party claiming confidentiality was a party to the litigation seeking to gain some advantage over its adversary by resisting discovery of a confidential document. Allstate contended it was inappropriate to disclose the terms of the settlement entered between Gruwell and Allstate because the parties agreed to keep the terms confidential. *Gruwell* involved a witness who had a financial interest in the case through a settlement agreement sought to be kept confidential. The discovery sought would demonstrate that financial interest in the outcome of the litigation. The court found that the interest in disclosure outweighed the interest in preserving confidentiality.

Here, North River is not a party to the BorgWarner litigation and it has taken no position in BorgWarner's litigation with its insurers. North River has not sought to gain some advantage to the detriment of BorgWarner. North River intervened in this proceeding only because BorgWarner sought to intrude into North River's and OCF's confidential settlement and ADR proceedings to gain access to their private documents and testimony. None of the decisions cited by

BorgWarner permits such access. The Superior Court appropriately distinguished them in deference to Delaware decisional law.

While BorgWarner cites to *Council of Unit Owners of Sea Colony East v. Carl M. Freeman Assocs.*, 1990 WL 128185 (Del. Super. 1990), there the court expressly stated that: "All provisions as to the scope of discovery in Rule 26(b) are subject to the initial qualification that the Court may limit discovery in accordance with the rules." Thus, the Superior Court appropriately applied Rule 26(b), contrary to BorgWarner's argument. While section c of Civil Rule 26 is not applicable, the court in *Sea Colony* also noted that pursuant to Section c of Rule 26, the court "may make any order which justice requires to protect a party from annoyance, embarrassment, oppression or undue burden or expense, including …(4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters. The public policy favoring and encouraging settlement agreements would be undermined by needless revelations of the terms of particular agreements." Id at *3. The Superior Court appropriately exercised its discretion to limit discovery under Civil Rule 26(b), and also appropriately recognized that Delaware public policy would be undermined if it did not do so.

In *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1990 Del. Super. LEXIS 494 (Del. Super. 1990), the court held that relevance, particularly when it is marginal,

is not conclusive and must be weighed against burden and expense and take into account features of need and, absent an overriding consideration, insurers should be unimpeded in their effort to obtain internal financial security and should not be fearful that the reinsurance process will be used against them in coverage litigation. Here, BorgWarner seeks to use material from a reinsurance dispute to the detriment of North River. See also *E.I. DuPont Nemours & Co. v. Admiral Ins. Co.*, 1994 WL 555542 (Del. Super. 1994)(Discovery of other policyholder information would force courts to conduct "mini-trials" on the issue of 'other policyholder' coverage); *Clark Equip. Co. v. Liberty Mutual Ins. Co.*, 1995 WL 867344 (Del. Super. 1995)(Denying discovery on reserve and reinsurance issues because the "many variables make the possibility of relevance too remote and the manner in which other policyholders are handled would create extended "mini-trials" and thus, rationale limits must be set on the extent of discovery in complex litigation.")

Borg Warner should not be allowed to use North River's reinsurance litigation, which Delaware obviously protects, to North River's detriment. The Superior Court recognized this in balancing competing interest and enforcing Delaware's public policies. And, of course, BorgWarner's reliance on out-of-state decisions is not controlling, as the cases are not controlling law.

6. Positions Taken By Other Insurers Do Not Impact North River's Confidentiality Rights

BorgWarner argues that because other insurers have asserted arguments seeking discovery of "private confidential agreements," North River should be deprived of its bargained-for confidentiality under the Agreement. Once again BorgWarner resorts to out of state law, and a generic principle concerning the same concept addressed in *Gotham*, which the Superior Court decided did not apply in light of Delaware's public policy favoring settlements, arbitration and enforcing written confidential agreements**.**

7. The Superior Court Did Not Apply the Delaware Rapid Arbitration Act.

BorgWarner argues that the Superior Court relied upon the Delaware Rapid Arbitration Act ("DRAA"), 10 *Del. C.* §5801 *et seq.*, a pro-arbitration policy enacted 25 years after the Wellington Agreement. This argument is meritless. BorgWarner erroneously asserts the Superior Court reached its decision based on the DRAA, when no such holding was made. Neither the Commissioner nor the Superior Court based its decision on the DRAA.

Commissioner Manning, after citing common law expressing Delaware's policy favoring arbitration, noted that the DRAA was "further evidence" of Delaware's preference for arbitration, but his decision is premised on the common

law cases cited The Superior Court made it clear that it recognized the DRAA post-dated the Wellington Agreement by 25 years, and that the absence of such a statute at the time of the Wellington Agreement was reason to give deference to the Wellington terms when considering whether or not to enforce Delaware's policy favoring arbitration. Neither the Commissioner nor the Superior Court based their decision on the DRAA. This argument should be rejected.

III. THE MATERIALS SUBPOENAED ARE CONFIDENTIAL

A. Question Presented by BorgWarner

Did the Superior Court err by denying BorgWarner's discovery without examining the Commissioner's holding that the Wellington Agreement's plain terms and a separate confidentiality agreement precluded it?

B. Standard of Review

The Superior Court's interpretation of the Wellington Agreement, a contract, is de novo. See *Salamone v. Gorman*, 106 A.3d 354 (Del. 2014). However, the decision below is not one that construes the terms of the Wellington Agreement. The decision below concerns the discoverability of documents from a private arbitration conducted pursuant to the Wellington Agreement. As set forth previously, this is subject to an abuse of discretion standard. The Supreme Court's review of the scope of discovery allowed by the Superior Court is an abuse of discretion standard. See *e.g. Citadel Holding Corp. v. Roven*, 603 A.2d 818, 825 (Del. 1992); *Zirn v. VLI Corp.*, 621 A.2d 773, 780 (Del. 1993) ("Appellate review of a trial court's ruling limiting discovery is based on an abuse of discretion standard"); *Swanson v. Davis*, 69 A.3d 372 (Del. 2013) ("We review a trial court's application of discovery rules for abuse of discretion").

C. Merits of Argument

1. The Testimonial And Other ADR Documents Sought Are Confidential

The Superior Court applied basic rules of contract law noting that when "read as a whole" the Agreement and associated Confidentiality Agreement "make it abundantly clear that the parties intended every part of the arbitration--from evidence to result--to be confidential." Applying these basic rules of contract and Delaware's long-standing policy favoring arbitration, settlements and enforcement of contracts between sophisticated parties, the Superior Court appropriately determined that the ADR documents were confidential and not subject to discovery.

BorgWarner did not challenge this finding in this appeal[29], nor could it based upon the express terms of the Agreement and the Commissioner's reasoned decision. Instead, BorgWarner argues that: (1) *Gotham* "Permitted Discovery of Confidential Arbitration documents", (2) a "Delaware Bankruptcy Court Permitted Discovery of Confidential Arbitration Documents", (3) "Numerous Other Courts Have Permitted Discovery of Materials Subject to Confidentiality Agreements". In each instance, BorgWarner acknowledged the materials sought were confidential. The Superior Court properly determined that the testimonial transcripts and other

[29] B311, BorgWarner Motion for Reconsideration.

ADR documents sought were well within the confidentiality provisions of the Wellington Agreement, and the decision is consistent with applicable law.

On appeal, BorgWarner seemingly challenges the Commissioner's and Superior Court's fact findings with regard to the interpretation of the confidentiality provisions. Even if such findings were made, the Supreme Court "will not overturn a trial court's factual findings unless they are clearly erroneous and the record does not support them." *Pellicone v. New Castle Cty.*, 88 A.3d 670, 673 (Del. 2014). BorgWarner fails to demonstrate that the Superior Court's enforcement of the Wellington Agreement was clearly erroneous.

The Wellington Agreement was a negotiated agreement between sophisticated parties, entered into after a negotiated settlement had been reached resolving a wide array of disputed insurance issues and, the manner in which thousands of asbestos claims pending against OCF would be addressed. In order to facilitate settlement and ensure that no party would be prejudiced as a result of their participation in the settlement and private ADR proceedings, the Agreement unequivocally urged all Courts to accord all persons subscribing to or associating themselves with the Agreement full privilege and protection with respect to the disclosure of their actions, statements, documents, papers and other materials relating to the Agreement, including its development and implementation. All

signatories recognized that such protections were material terms of the Agreement, necessary to facilitate the settlement of their disputes, as clearly stated in the Agreement, and as further agreed-to by OCF and North River in a separate Confidentiality Agreement. This allowed for an unencumbered exchange of information that could only be accomplished if adequate protections were in place, and if those protections remained in place to ensure strict confidentiality as intended.

The Superior Court recognized that to allow any discovery into or disclosure of documents, statements or testimony that exist only because the parties entered a settlement that provided for the private and confidential arbitration of disputes, would render the Agreement ineffective. Delaware enforces as a matter of fundamental public policy the voluntary agreements of sophisticated parties. See *In re Del Monte Foods Co. Shareholders Litigation*, 25 A.3d 813, 840 (Del. Ch. 2011)(citing *NACCO Indus. Inc. v. Applica Inc.*, 997 A.2d 1, 35 (Del. Ch. 2009)). Delaware also recognizes that "contractual expectations" of sophisticated business entities should be respected. *Id.* at 841 (citing *Abry v. P'rs V, L.P. v. F & W Acq., LLC*, 891 A.2d 1032, 1061 (Del. Ch. 2006)). Delaware courts recognize that parties bargain for provisions in agreements because those provisions "mean something," and that it is "critical to [its] law that those bargained-for rights be

enforced." *Id.* at 841 (citing *NACCO Indus. Inc. v. Applica Inc.*, 997 A.2d 1, 19 (Del. Ch. 2009)).

IV. THE COURT HAS DISCRETION TO LIMIT DISCOVERY AND THE SUPERIOR COURT APPLIED A "FAIRNESS" STANDARD WHEN IMPOSING A PARTIAL WAIVER

A. Question Presented by BorgWarner

Did the Superior Court err by denying enforcement of BorgWarner's subpoena, despite the fact that North River had waived protection over many of the documents sought through disclosure in *North River Insurance Co. v. CIGNA Reinsurance*?

B. Standard of Review

The Supreme Court "will not overturn a trial court's factual findings unless they are clearly erroneous and the record does not support them." *Pellicone v. New Castle Cty.*, 88 A.3d 670, 673 (Del. 2014). The Supreme Court's review of the scope of discovery allowed by the trial judge is an abuse of discretion standard. See *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 825 (Del. 1992). See also *Zirn v. VLI Corp.*, 621 A.2d 773, 780 (Del. 1993) ("Appellate review of a trial court's ruling limiting discovery is based on an abuse of discretion standard"); *Swanson v. Davis*, 69 A.3d 372 (Del. 2013) ("We review a trial court's application of discovery

rules for abuse of discretion"); *Coleman v. PriceWaterhouseCoopers, LLC*, 902 A.2d 1102, 1106 (Del. 2006).

C. Merits of Argument

At the outset it should be noted that BorgWarner indicated it has undertaken to secure any publicly-filed documents that may have been part of the appellate record in the *North River Ins. Co. v. CIGNA Reinsurance* matter. At this juncture, North River has yet to determine which, if any, materials were not filed under seal. In any event, the Commissioner and Superior Court have discretion to limit discovery given North River's and OCF's right to confidentiality.

1. Rule 26 Affords The Commissioner Discretion to Limit Discovery

Discovery is subject to the exercise of the trial court's sound discretion. *Dann v. Chrysler Corp.*, 166 A.2d 431 (Del. Ch. 1960). All provisions as to the scope of discovery in Rule 26(b) are subject to the initial qualification that the Court may limit discovery in accordance with the rules. The Commissioner performed a balancing test and exercised his lawful discretion, affording BorgWarner discovery of material it determined would allow BorgWarner to proceed, but protected North River's confidentiality expectation and Delaware's

long standing public policies favoring settlement and ADR. The Superior Court applied the rule of partial disclosure and fairness.[30]

In *Citadel Holding Corp v. Roven*, 603 A.2d 818 (1992), the court wrote that "once a party voluntarily discloses a privileged document, that party is deemed to have waived privilege as to all documents involving the same subject matter, whether or not actually disclosed."[31] However, as the Superior Court recognized, North River is not a party seeking a litigation advantage by an assertion of privilege. Further, the *Citadel* court stated: "However, such a waiver does not open to discovery all communications between attorney and client. (citation omitted) The so called 'rule of partial disclosure' limits the waiver to the subject matter of the disclosed communications. The exact extent of the disclosure is guided by the purpose behind the rule: fairness and discouraging the attorney-client privilege as a litigation weapon." *Id*. at 825 (emphasis supplied).

BorgWarner appears to have abandoned the *Citadel* decision and now relies on *Zirn v. VLI Corp*., 621 A.2d 773 (Del. 1993). *Zirn*, like *Citadel*, recognized that the purpose of the rule of partial disclosure is one of fairness to discourage the use of the privilege as a litigation weapon in the interest of fairness. The Court stated that: "A party should not be permitted to assert the privilege to prevent an inquiry

[30] See Exhibit B to Appellant's Opening Brief, page 14.
[31] BorgWarner Brief at page 24.

by an opposing party where the professional advice, itself, is tendered as a defense or explanation for disputed conduct." *Zirn v. VLI Corp.*, 621 A.2d at 781-82 (emphasis supplied). North River is not a litigant seeking to use privileged information as a sword in litigation in which it was involved as a party, while preventing further disclosure to the detriment of its adversary. North River is not a party to the BorgWarner litigation. North River did not raise or seek to use any privileged information to its benefit, in any respect, with respect to BorgWarner or the Illinois litigation.

In *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254 (Del. 1995), another case relied upon by BorgWarner, the court held that partial disclosure of facts protected by privilege is "not enough" to waive the privilege, but it is required that the partial disclosure place the party seeking discovery at a distinct disadvantage. Id. at 260. And it stated: "…waiver rests on a rationale of fairness…" and noted that a party cannot take a position in litigation and then erect the privilege in order to shield itself from discovery by an adverse party who challenges that position." *Id*. See also *TCV, VI, LP v. TradingScreen Inc.*, 2015 WL 1598045 (Del. Ch. Feb. 26, 2015)(Partial waiver is not per se impermissible because the fairness standard is fluid and responsive to different contexts); *Espinoza v. Hewlett-Packard Co.*, 2011 WL 941464 (Del. Ch. 2011)(allowing

disclosure of documents that entered the public sphere pursuant to balancing test). North River, having no interest in the Illinois litigation and having no relationship with BorgWarner as an insurer, did not gain any advantage over BorgWarner.

Contrary to BorgWarner's assertion, the decision limiting the discovery and permitting a partial disclosure is entirely consistent with Delaware decisional law, including the rule of "partial disclosure". There being no showing that the Court below abused its discretion, and its findings being supported by the record, it is respectfully submitted that this Court should affirm the decision of the Superior Court.

CONCLUSION

For all of the above reasons, BorgWarner's appeal should be denied and the Superior Court's decision should be affirmed.

Respectfully Submitted,

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