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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MESO SCALE DIAGNOSTICS, LLC and MESO SCALE TECHNOLOGIES, LLC,	)	
Plaintiffs Below, *Appellants,*	)	**No. 200, 2020**
v.	)	Court Below: Court of Chancery C.A. No. 2019-0167-JRS
ROCHE DIAGNOSTICS GMBH, ROCHE DIAGNOSTICS CORP., ROCHE HOLDING LTD., IGEN LS LLC, LILLI ACQUISITION CORP., IGEN INTERNATIONAL, INC., and BIOVERIS, CORP.,	)	
Defendants Below, Appellees.	)	

APPELLEES' ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

NATURE OF PROCEEDINGS

Plaintiffs-appellants Meso Scale Diagnostics, LLC and Meso Scale Technologies, LLC ("Meso") filed a complaint seeking, pursuant to Court of Chancery Rule 60(b), vacation of a final judgment entered nearly five years earlier in *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 2014 WL 2919333 (Del. Ch. June 25, 2014) ("*Meso v. Roche*"). Meso sought this relief on the ground that then-Vice Chancellor Donald F. Parsons, who presided over *Meso v. Roche*, had violated the Due Process Clause of the Fourteenth Amendment and Delaware Judges' Code of Judicial Conduct Rule 2.11 by failing to recuse himself. Meso contended that recusal was required because Andre G. Bouchard, Delaware counsel for defendants in that case, was concurrently representing the members of the Court of Chancery in their official capacities in *Delaware Coalition for Open Government, Inc. v. Strine*, No. 1:11-cv-1015 (D. Del.) ("*Delaware Coalition*"), an unrelated federal lawsuit challenging the constitutionality of a Delaware arbitration statute.

Defendants-appellees Roche Diagnostics GmbH, Roche Diagnostics Corp.; Roche Holding Ltd.; IGEN LS LLC; Lilli Acquisition Corp.; IGEN International, Inc.; and Bioveris Corp. ("Roche") moved to dismiss the complaint for failure to state a claim because (i) neither the Due Process Clause nor Rule 2.11 required Vice Chancellor Parsons to recuse himself under the circumstances alleged, and (ii) Meso

had not pled facts showing that it was entitled to the extraordinary relief it was seeking.

Following briefing and oral argument, Vice Chancellor Slights entered an order granting Roche's motion to dismiss. (Br., Ex. A.[1]) Meso appeals from the order.

[1] "Br. __" refers to Meso's opening brief, and the exhibits attached thereto.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held that recusal violations render a judgment voidable, rather than void, and thus fall categorically outside the scope of Rule 60(b)(4), even in those rare cases where the Due Process Clause requires recusal. Such violations do not implicate a party's right to notice and a hearing, the only "process" whose deprivation makes a judgment void. In any event, the facts alleged do not implicate the Due Process Clause, which requires recusal only in "extreme" cases involving a severe risk of actual bias.

2. Denied. The Court of Chancery correctly held that Meso was not entitled to relief under Rule 60(b)(6) because the delay of nearly five years between entry of the 2014 judgment and Meso's filing its complaint was "patently unreasonable." Meso conspicuously failed to allege that its former attorneys, whose knowledge is imputed to their client, were unaware of Mr. Bouchard's concurrent representation of the members of the Court of Chancery. When asked at oral argument to clarify what Meso's former attorneys knew, Meso's current counsel equivocated. He first asserted the attorney-client privilege and then stated only that, as part of the investigation that formed the basis for its complaint, Meso had "spoke[n] directly with both law firms that represented it," but not that it had communicated with its former attorneys, including its principal Delaware counsel, then-attorney Collins J. Seitz, Jr. Vice Chancellor Slights also properly determined that Meso's asserted

difficulties securing counsel did not justify waiting a full year to file its complaint after it claims it discovered Mr. Bouchard's representation.

3. Denied. The Court of Chancery correctly held that Meso failed to plead extraordinary circumstances warranting relief under Rule 60(b)(6). At oral argument, Meso made clear that it was not claiming that Vice Chancellor Parsons had engaged in any improper conduct other than failing to recuse himself, and it admitted that its interests were not adversely affected by that failure. These concessions confirm that Meso will not suffer any injustice if the 2014 judgment is not vacated. In contrast, the injustice to Roche will be severe if it is forced to re-litigate a case in which it long ago prevailed after five years of litigation, including a five-day trial, Meso's unsuccessful appeal to this Court, and Meso's unsuccessful certiorari petition. Moreover, granting *vacatur* five years after judgment, based on an alleged recusal violation that admittedly had no effect on the merits of the litigation, would do far more to undermine public confidence in the judiciary than any perceived violation of the rules governing judicial conduct.

STATEMENT OF FACTS

I. BACKGROUND

A. *Meso v. Roche*

Between 2010 and 2015, Meso prosecuted a breach-of-contract action against Roche in the Court of Chancery. *See Meso v. Roche*, 2014 WL 2919333, at *1, 12. Vice Chancellor Parsons presided and, following trial, dismissed the sole claim against Roche that survived summary judgment. *Id.* at *12, 29. Meso's appeal was rejected by this Court "for the reasons [in Vice Chancellor Parsons'] exhaustive and well-reasoned opinion," 116 A.3d 1244, 2015 WL 3824809, at *1 (Del. Jun. 18, 2015) (TABLE), and certiorari was denied, 136 S. Ct. 524 (2015) (mem.). Mr. Bouchard represented Roche from 2010 until April 2014, when he withdrew to accept his appointment as Chancellor. (B48–50.)

B. The *Delaware Coalition* Litigation

In October 2011, while *Meso v. Roche* was pending, the Delaware Coalition for Open Government ("Coalition") filed suit in federal court seeking to have a recently enacted statute declared unconstitutional. (A030–34.) The statute, 10 *Del. C.* § 349, authorized the Court of Chancery to conduct confidential arbitrations to resolve certain business disputes. *See Del. Coal. for Open Gov't v. Strine*, 894 F. Supp. 2d 493, 494 (D. Del. 2012). These arbitrations were to be purely state-sponsored functions: The members of the court were to "conduct[ ] the proceedings in the Chancery courthouse with the assistance of Chancery Court staff"; the

designated judicial officer was "not compensated privately by the parties"; and "the Chancery Court judge and staff [were to be] paid their usual salaries for arbitration work." *Id.* at 503.

The Coalition's complaint invoked 42 U.S.C. § 1983 and named as defendants (i) the State, (ii) the Court of Chancery, and (iii) all then-sitting members of the Court of Chancery in their official capacities. (A030–31, ¶¶ 2–8; B61.) *See also Del. Coal.*, 894 F. Supp. 2d at 494 & n.1. The action sought no damages or other personal relief against the judicial defendants; it sought only declaratory and injunctive relief to preclude the statutorily authorized arbitration proceedings. *See Del. Coal.*, 894 F. Supp. 2d at 494 & n.1. (*See also* A030–31, ¶¶ 2–6 (explaining that each judge's "duties includ[e] administering the statute challenged in this action"); A033–34.)

The need to sue the members of the Court of Chancery in their official capacities resulted from principles of sovereign immunity rooted in the Eleventh Amendment, which deprives federal courts of jurisdiction to hear actions against States and state agencies—even actions under § 1983 seeking prospective injunctive relief only. *See Del. Coal.*, 894 F. Supp. 2d at 494 n.1; *see also Quern v. Jordan*, 440 U.S. 332, 338–39 (1979). An exception to this rule, first recognized in *Ex Parte Young*, 209 U.S. 123 (1908), arises when an action seeks to enjoin a state official from continuing to enforce an unconstitutional state law. *E.g.*, *Green v. Mansour*, 474 U.S. 64, 68 (1985). In such cases, the federal court indulges the "fiction" that,

for Eleventh Amendment purposes, the suit is one against the individual official rather than the State, even though "[t]he manifest, indeed the avowed and admitted, object of seeking [the requested] relief [is] to *tie the hands* of the *State*." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269–70 (1997) (quoting *Young*, 209 U.S. at 174 (Harlan, J., dissenting)) (second and third alterations and emphasis in original); *accord* 17A Fed. Prac. & Proc. Juris. § 4231 (3d ed.) (discussing the *Young* "fiction").

Thus, any challenge to the constitutionality of 10 *Del. C.* § 349 could proceed in federal court only by naming the members of the Court of Chancery in their official capacities. *See Del. Coal.*, 894 F. Supp. 2d at 494 n.1. Indeed, Eleventh Amendment immunity subsequently led the federal court to dismiss both the State and the Court of Chancery. *Id.*

The federal district court granted the Coalition judgment on the pleadings, invalidating the statute. *Id.* at 494. The Third Circuit affirmed by a 2–1 vote, *Del. Coal. for Open Gov't, Inc. v. Strine*, 733 F.3d 510, 521 (3d Cir. 2013), and the U.S. Supreme Court denied certiorari, *Strine v. Del. Coal. for Open Gov't, Inc.*, 572 U.S. 1029 (2014) (mem.). After dismissal of the State and the Court of Chancery, Mr. Bouchard, who had initially appeared only for those defendants, continued to defend the statute's constitutionality by representing the only remaining defendants, the members of the Court of Chancery in their official capacities, who were also

separately represented by Professor Lawrence Hamermesh. (*See* B123; B126; B209–10.)

C. Meso's Complaint

In February 2019, Meso sued Roche, seeking Rule 60(b) relief from the final judgment entered in *Meso v. Roche*, based on Mr. Bouchard's representation of Vice Chancellor Parsons in *Delaware Coalition*. (A017–28.) Meso asserted that, in light of that representation, both the Due Process Clause and the Code of Judicial Conduct required Vice Chancellor Parsons to recuse himself, and that his failure to do so warranted *vacatur* of the 2014 judgment under Rule 60(b)(4) and (6). (A022–27, ¶¶ 25–52.)

To explain its nearly five-year delay in seeking this relief, Meso alleged that it did not become aware of Mr. Bouchard's representation in the highly publicized *Delaware Coalition* litigation[2] until early 2018, when Meso's CEO was "conducting Internet research." (A020, ¶ 15.) Meso alleged that it then initiated "a careful

[2] *See, e.g.*, Rita K. Farrell, *Judge Rules Against Arbitration by a Delaware Court*, N.Y. Times (Aug. 30, 2012), https://www.nytimes.com/2012/08/31/business/judge-rules-against-delaware-courts-use-of-arbitration.html (B119) ("During arguments on Feb. 9, Andre Bouchard, a lawyer representing Chancery Court and the State of Delaware, argued that arbitration differed from a civil trial because the parties have to agree to arbitration, and the judges' authority is not constitutional but contractual."); Sean O'Sullivan, *US judge uncloaks Chancery Court*, The News Journal (Aug. 31, 2012), https://www.newspapers.com/image/118274417/ (B122) ("At a hearing in February, Chancery Court attorney Andre Bouchard argued that the arbitration program did not violate the Constitution … .").

investigation," through which it "confirmed that no one at Meso was aware of Mr. Bouchard's representation of Vice Chancellor Parsons." (A021, ¶ 17.) Meso further alleged that it spent another year securing counsel to represent it. (A021–22, ¶¶ 18–24.) Ultimately, Meso hired as its Delaware counsel the same lawyer who had represented the plaintiff in *Delaware Coalition*. (Br., Ex. B ("Ex. B") at 19.)

II. PROCEEDINGS IN THE COURT OF CHANCERY

Roche moved to dismiss Meso's complaint under Rule 12(b)(6) for failure to state a claim upon which Rule 60(b) relief can be granted. Following briefing and argument, the Court of Chancery granted the motion and dismissed the complaint with prejudice. (Ex. A.)

Vice Chancellor Slights ruled that Meso was not entitled to relief under Rule 60(b)(4) or (6). He reasoned that Rule 60(b)(4) provides relief only from void judgments, and that judicial recusal violations, even if serious enough to implicate the Due Process Clause, render a judgment voidable, rather than void. (Ex. B at 9–16.) He thus concluded that Meso was not entitled to relief under Rule 60(b)(4), without deciding whether the Due Process Clause required recusal. (*Id.* at 9.)

Vice Chancellor Slights determined that Meso was not entitled to relief under Rule 60(b)(6) either, regardless whether Judicial Conduct Rule 2.11 required recusal. (*Id.*) He cited two independent grounds for this conclusion.

First, he held that, by waiting to seek the extraordinary relief of *vacatur* of the 2014 judgment until February 2019, Meso had violated Rule 60(b)(6)'s requirement that it act within a reasonable time. (*Id.* at 17.) While crediting at this stage the allegation that "no one at Meso was aware of Mr. Bouchard's representation" until 2018, he noted that "[w]hat is conspicuously absent from Meso's pleading is an averment that its attorneys did not know of now-Chancellor Bouchard's

representation." (*Id.*) He also noted that Meso admittedly had waited another year to files its complaint after learning about Mr. Bouchard's representation. (*Id.* at 18–19.) He concluded that this further delay was also unreasonable and that Meso's excuse that it was trying to secure counsel did not justify the full year that it allowed to elapse. (*Id.* at 18–20.)

As a second, independent basis for denying Rule 60(b)(6) relief, Vice Chancellor Slights held that Meso failed to plead "extraordinary circumstances" warranting such relief. (*Id.* at 20.) *See Shipley v. New Castle Cnty.,* 975 A.2d 764, 767 (Del. 2009). Applying the three-factor test set forth in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), he reasoned that Meso failed to identify any indicia of injustice resulting from the alleged recusal violation, while *vacatur* of a fully litigated five-year-old judgment would severely prejudice Roche. (Ex. B at 20–23.)

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT MESO IS NOT ENTITLED TO RELIEF UNDER RULE 60(b)(4).

A. Question Presented

The first question presented is whether Meso is entitled to relief from the 2014 judgment under Rule 60(b)(4) because Vice Chancellor Parsons did not recuse himself. Vice Chancellor Slights correctly held that recusal violations render a judgment voidable, rather than void. (Ex. B at 16; *see also* B36–37; B308–10.) This Court should affirm dismissal of the Rule 60(b)(4) claim on the same ground or, alternatively, on the ground that this is not one of the rare cases where due process required recusal. (*See* B18–24; B287–302.)

B. Scope of Review

"This Court reviews *de novo* the grant of a motion to dismiss under Court of Chancery Rule 12(b)(6), 'to determine whether the trial judge erred as a matter of law in formulating or applying legal precepts.'" *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010) (citation omitted).

C. Merits

1. Recusal Violations Do Not Warrant Rule 60(b)(4) Relief, Even in Rare Cases Where the Due Process Clause Requires Recusal.

Rule 60(b)(4) allows relief from a judgment if "the judgment is void." Ct. Ch. R. 60(b)(4). "The list of … infirmities" that will render a judgment void is "exceedingly short; otherwise, rule 60(b)(4)'s exception to finality would swallow

the rule." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010) (construing Fed. R. Civ. P. 60(b)(4)).[3] A judgment is void within the meaning of Rule 60(b)(4) only if it "is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *Id.*

Recusal violations do not implicate a party's right to notice and a hearing and thus do not render a judgment void within the meaning of Rule 60(b)(4). *Cf. Lacour v. Tulsa City Cnty. Jail*, 562 F. App'x 664, 665 (10th Cir. 2014) ("The judgment would be considered 'void' only if the due process violation involved a lack of 'notice or the opportunity to be heard.'" (quoting *Espinosa*)); *Sanchez v. MTV Networks*, 525 F. App'x 4, 6 (2d Cir. 2013) ("A procedural due process violation renders a judgment void only where such a violation is fundamental, and 'deprives a party of notice or the opportunity to be heard.'" (quoting *Espinosa*)). Indeed, this Court and others have long held that such violations render a judgment voidable, rather than void. *Copeland v. Manuel*, 1994 WL 665257, at *2 (Del. Nov. 22, 1994); *see also Margoles v. Johns*, 660 F.2d 291, 296 (7th Cir. 1981); *Sexton v. Barry*, 233

[3] "[T]his Court gives the authorities applying the Federal Rules 'great persuasive weight' in the construction of a parallel Delaware Rule." *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 490 (Del. 2000) (citation omitted); *see also Jewell v. Div. of Soc. Servs.*, 401 A.2d 88, 90 (Del. 1979) (looking to federal Rule 60 for guidance when interpreting Superior Court Civil Rule 60).

F.2d 220, 225 (6th Cir. 1956); *Heber v. Heber*, 330 P.3d 926, 930 (Alaska 2014); *Smith v. Clark*, 468 So. 2d 138, 141 (Ala. 1985). A party seeking relief from a judgment based on a failure to recuse must utilize Rule 60(b)(6). *See Liljeberg*, 486 U.S. at 863–64 & n.11 ("clause (6) and clauses (1) through (5) [of Rule 60(b)] are mutually exclusive" and relief for recusal violations based on the appearance of bias is properly sought under clause (6)).

Meso does not cite a single decision holding that a recusal violation voids a judgment within the meaning of Rule 60(b)(4). Instead, it relies principally on *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), and *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016). Both these decisions arose, not on collateral attacks on final, preclusive judgments under Rule 60(b) or comparable rules, but on direct review of the judgments themselves. *Caperton* held that the Due Process Clause requires recusal in rare cases where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." 556 U.S. at 872 (citation omitted). *Williams* held that "an unconstitutional failure to recuse constitutes structural error" not subject to harmless-error review on direct appeal. 136 S. Ct. at 1909. Neither case purported to alter the well-established rule that recusal violations render a judgment voidable, rather than void.

Meso also cites a handful of cases for the proposition that an opportunity to be heard requires an impartial judge, asserting that it "had no 'opportunity to be

heard'" because it was "denied this impartial judge." (Br. at 14–15.) But Meso made clear at argument that it is ***not*** alleging that Vice Chancellor Parsons was actually biased, only that Mr. Bouchard's representation of the Vice Chancellor in *Delaware Coalition* created an appearance of bias:

> With respect to then-Vice Chancellor Parsons' interest in the case, knowledge, fervor for the arbitration statute, that is all irrelevant. ***This is an appearance of impropriety***. We are in no way impugning the motives, intentions, actions other than the failure to observe the rules by Vice Chancellor Parsons.

(B349 (emphasis added).) *Compare Margoles*, 660 F.2d at 298 ("Had the trial judge ***in fact been corrupt***, the plaintiff would have been entitled, on due process grounds, to have the judgment set aside." (Emphasis added)). Meso's hypothetical in which a judge "tak[es] a bribe to rule against a party" (Br. at 15) or is otherwise actually corrupt is irrelevant because that is not what Meso alleged.

Vice Chancellor Slights properly concluded that recusal violations fall categorically outside the scope of Rule 60(b)(4).

2. The Due Process Clause Did Not Require Recusal.

If this Court decides to reach the merits of Meso's due-process claim, it should hold that the Due Process Clause did not require recusal. At argument, Meso conceded that the "only salient facts" (B345) underlying its claims are Vice Chancellor Parsons' presiding over the proceedings in *Meso v. Roche* and Mr. Bouchard's concurrent representation of the members of the Court of Chancery in

Delaware Coalition. These facts are nowhere close to extreme enough to qualify as the rare situation in which recusal is required as a matter of due process.

a. Due Process Requires Recusal Only in Extreme Cases Involving a Severe Risk of Actual Bias.

"Due process guarantees 'an absence of actual bias' on the part of a judge." *Williams*, 136 S. Ct. at 1905 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). "To establish an enforceable and workable framework" for implementing this guarantee, the Supreme Court has articulated "an objective standard that requires recusal when the likelihood of bias on the part of the judge 'is too high to be constitutionally tolerable.'" *Id.* at 1903, 1905 (quoting *Caperton*, 556 U.S. at 872). Only in "rare instances" involving "extreme" facts is the risk of bias severe enough to require recusal as a matter of due process. *Caperton*, 556 U.S. at 887, 890.

In *Caperton*, the Supreme Court confronted the rare case of extreme facts that required recusal as a matter of due process. There, a justice of the West Virginia Supreme Court of Appeals twice cast the deciding vote in favor of a party who, while his case was pending before it, made $3 million in contributions to the justice's re-election campaign. *Id.* at 872–75, 886. Those contributions "eclipsed the total amount spent" by all the justice's other supporters combined and "exceeded by 300% the amount spent" by his own campaign committee. *Id.* at 884. On these facts, the Supreme Court held that "there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a

particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.*

Caperton identified a limited number of other factual scenarios that are sufficiently extreme in their likelihood of bias to deprive a party of due process without requiring proof of actual bias. The first is when "a judge ha[s] a financial interest in the outcome of a case." *Id.* at 877–78 (discussing *Tumey v. Ohio*, 273 U.S. 510 (1927) (judge received compensation derived from fines assessed in cases over which he presided)). The second is when a judge "participat[es] in an earlier proceeding" in the case in the effective capacity of a prosecutor. *Id.* at 880–81 (discussing *Murchison* (judge could not preside over defendant's trial for contempt when he had acted as a "one-man grand jury" in bringing the contempt charges)). The third is when a judge "becomes embroiled in a running, bitter controversy" with a litigant. *Id.* at 881 (discussing *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (judge "vilified" by defendant could not preside over defendant's criminal contempt proceedings)).

Williams presented the second *Caperton* scenario. There, the Philadelphia district attorney had approved the trial prosecutor's request to seek the death penalty in a murder case. 136 S. Ct. at 1903. Years later, after a post-conviction court stayed the defendant's execution and ordered a new sentencing hearing based on *Brady*

violations in the original trial, the former district attorney (by then chief justice of the Pennsylvania Supreme Court) joined in a decision reinstating the death penalty. *Id.* Relying principally on *Murchison*, the Supreme Court reversed because "the due process guarantee that 'no man can be a judge in his own case' would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical decision." *Id.* at 1906.

b. The Facts of this Case Are Far from Extreme.

Meso admits that the conflicts in *Caperton* and *Williams* were more extreme than anything alleged here. (B367.) More broadly, Meso's claim presents none of the other factual scenarios that *Caperton* identified as extreme enough to presume a violation of due process. Vice Chancellor Parsons could not have had even an indirect financial interest in the outcome of *Delaware Coalition*, since "judge[s] and staff [were] paid their usual salaries for arbitration work" under the challenged statute, *Del. Coal.*, 894 F. Supp. 2d at 503. *See Caperton*, 556 U.S. at 877–79 (discussing *Tumey*). He likewise is not alleged to have participated in any earlier proceeding that was at issue in either case or to have been embroiled in any sort of personal conflict with any of the parties to either case. *See id.* at 880–81 (discussing *Murchison* and *Mayberry*).

Meso does not seriously argue otherwise. Instead, it asks the Court to recognize a new scenario requiring mandatory due-process recusal whenever "the

attorney representing a party is also representing the trial judge in another matter" (Br. at 19). When faced with similar requests to extend *Caperton* and *Williams*, federal appellate courts have consistently refused. *See Johnson v. Morales*, 946 F.3d 911, 918 n.3 (6th Cir. 2020) (recognizing that the Supreme Court "has declined to find an unconstitutional risk of bias in all but a few narrow circumstances"); *United States v. Williams*, 949 F.3d 1056, 1061–62 (7th Cir. 2020) (discussing the "limited set of circumstances" in which the Due Process Clause requires recusal and rejecting due-process claim that "d[id] not fit into these buckets"); *United States v. Richardson*, 796 F. App'x 795, 799–800 (4th Cir. 2019) (rejecting due-process claim that did not involve any of the "extraordinary situation[s]" in which the Supreme Court has held that "the Constitution requires recusal"). This Court should do the same.

And the reasons that Meso offers for extending *Caperton* and *Williams* are wholly unpersuasive. First, Meso argues that "a reasonable observer would conclude that there is a serious potential for bias" in this case because a judge in Vice Chancellor Parsons' position "may feel a 'debt of gratitude'" to the attorney representing him, may have "a favorable view of that attorney's character and legal skills," and may "engage in ongoing, private conversations about the status of the judge's case." (Br. at 19–20.) But *Caperton* makes clear that not every interest requires recusal as a matter of due process, only those that "pose[] such a risk of

actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." 556 U.S. at 884 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). *Caperton* also holds that context matters when dealing with questions of judicial recusal. *E.g.*, *id.* at 879 (Due Process Clause does not require recusal of a judge who has only a "remote and insubstantial" financial interest (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825–26 (1986))).

Here, Mr. Bouchard represented all the members of the Court of Chancery in their official capacities only, in a case where they had no financial stake and where none of their individual actions was challenged. In this context, Vice Chancellor Parsons would have had no occasion to feel a "debt of gratitude" as in *Caperton*, since Mr. Bouchard engaged in no efforts—let alone "extraordinary efforts"—to further the Vice Chancellor's personal interests. It is simply unsustainable that Mr. Bouchard's representation could be viewed as giving rise to a sense of gratitude powerful enough to override judicial objectivity. *Cf. Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 916 (2004) (memorandum of Scalia, J.) ("But while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer." (Original emphasis)).[4]

[4] At oral argument, Meso recognized that the risk of actual bias in this situation is

The second reason Meso offers for extending *Caperton* and *Williams* to the facts of this case—that some state ethics rules require recusal under these circumstances (Br. at 21–23)—is equally unavailing.[5] The U.S. Supreme Court has made clear that failure to comply with federal or state rules governing judicial conduct does not violate due process. As *Caperton* explains, "The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today." 556 U.S. at 889–90 (quoting *Lavoie*, 475 U.S. at 828). While the requirements of ethics rules and due process may sometimes overlap, the mere fact that a rule requires recusal says nothing about whether the Constitution does. *See, e.g.*, *Richardson*, 796 F. App'x at 798–99 ("[A] statutory violation 'does not automatically mean the defendant was denied constitutional due process.'" (quoting *Davis v. Jones*, 506 F.3d 1325, 1336 (11th Cir. 2007))).

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minimal: When asked whether recusal was required in each of the other 25 cases in which Mr. Bouchard's former firm appeared in the Court of Chancery during this time, Meso's counsel said that he was "quite confident" that the parties in "many of th[o]se cases" would have waived their rights if made aware of the representation. (B349–50.) This concession is squarely at odds with Meso's argument that "a reasonable observer would conclude that there is a serious potential for bias" (Br. 18–19) under the circumstances alleged.

[5] As discussed below, *see infra* at 34–39, the Code of Judicial Conduct did not require Vice Chancellor Parsons to disclose or to recuse himself.

In arguing otherwise, Meso wrongly cites *Caperton* for the proposition that "a court considering a due process claim must 'take into account the judicial reforms the States have implemented to eliminate even the appearance of partiality.'" (Br. at 21.) *Caperton* "t[ook] into account" state ethics rules to point out that they "provide more protection than due process requires," meaning that "most disputes over disqualification will be resolved without resort to the Constitution" and that "[a]pplication of the constitutional standard implicated in [*Caperton*] will thus be confined to rare instances." 556 U.S. at 888, 890. It provides no support for Meso's argument that its cherry-picked rules and guidance are "evidence" (Br. at 16) of a due-process violation.

By Meso's admission, the "only salient facts" in this case are Vice Chancellor Parsons' presiding over *Meso v. Roche* while Mr. Bouchard represented the members of the Court of Chancery in *Delaware Coalition*. If this Court decides to reach the merits of Meso's due-process claim, it should hold that these facts are plainly insufficient to create an unconstitutional risk of actual bias.

II. THE COURT OF CHANCERY CORRECTLY HELD THAT MESO IS NOT ENTITLED TO RELIEF UNDER RULE 60(b)(6).

A. Question Presented

The second question presented is whether Meso is entitled to relief under Rule 60(b)(6) because Vice Chancellor Parsons did not recuse himself. Vice Chancellor Slights correctly held that Meso is not entitled to relief for two reasons: first, because the delay of nearly five years between entry of the 2014 judgment and when Meso filed its complaint was "patently unreasonable" (Ex. B at 20; *see also* B37–41; B310–13); and second, because Meso failed to plead extraordinary circumstances warranting relief (Ex. B at 20–23; *see also* B41–46; B313–16). Either of these reasons is sufficient to affirm dismissal of Meso's Rule 60(b)(6) claim. The Court may also affirm on the ground, not reached by Vice Chancellor Slights, that Rule 2.11 of the Code of Judicial Conduct did not require recusal. (*See* B24–36; B302–07.)

B. Scope of Review

"This Court reviews *de novo* the dismissal of a complaint pursuant to Rule 12(b)(6)." *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 167–68 (Del. 2006). While the Court must accept as true all the complaint's well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff, it is not required to credit "conclusory allegations without supporting factual allegations" or "every strained interpretation of the allegations proposed by the plaintiff." *Id.* at 168

(citations and quotation marks omitted).

C. Merits

1. Meso's Five-Year Delay in Filing Its Rule 60(b)(6) Claim Was Unreasonable.

"Although there is no set time limit in which a party must file a Rule 60(b) motion, the movant must exercise diligence and act without unreasonable delay." *Shipley*, 975 A.2d at 770 (interpreting identical Superior Court Civil Rule 60(b)). This requirement stems from the importance of "reasonable finality in litigation": Parties are "entitled to rely upon … the judgment[s]" entered in their favor. *Nashold v. Giles & Ransome, Inc.*, 245 A.2d 175, 176 (Del. 1968); *see also Schremp v. Marvel*, 405 A.2d 119, 121 (Del. 1979). To determine whether a movant acted "without unreasonable delay," a court considers all the circumstances, taking into account "the inflexible time one has" for seeking other forms of relief from a judgment. *Schremp*, 405 A.2d at 120–21 (citing time "for appealing an adverse judgment (thirty days), … moving for a new trial (ten days), … or reargument in this Court (fifteen days)"). A court may deny relief under Rule 60(b) without reaching the merits of the claim if it determines that the challenge was not timely. *Id.* at 120.

Vice Chancellor Slights correctly held that Meso is not entitled to relief from the judgment because Meso allowed ***nearly five years*** to pass between its entry on June 25, 2014 and this action's filing in February 2019. (Ex. B at 17–20.) A delay of this magnitude is unreasonable by any measure. *See, e.g.*, *Schremp*, 405 A.2d at

121 (two-month delay unreasonable); *Shipley*, 975 A.2d at 771–72 (motion untimely at 128 days); *Nashold*, 245 A.2d at 176 (two-year delay unreasonable); *see also Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1411 (5th Cir. 1994) (delay of "nearly a year" unreasonable under Fed. R. Civ. P. 60(b)(6)); *Chaverri v. Dole Food Co., Inc.*, 220 A.3d 913, 922 (Del. Super. Ct. 2019) (seven-month delay unreasonable); *Opher v. Opher*, 531 A.2d 1228, 1234 (Del. Fam. Ct. 1987) (11-month delay "egregious" under identical Family Court Civil Rule 60(b)).

Meso's attempts to excuse its delay are unavailing. It first argues that it was unaware until 2018 that Mr. Bouchard had represented the members of the Court of Chancery in *Delaware Coalition*. (Br. at 29.) However, the sparse and carefully worded allegations in Meso's complaint do not support this argument. Specifically, Meso alleges that its CEO first learned of Mr. Bouchard's representation in early 2018 while "conducting Internet research," and that its Chief Legal Officer subsequently confirmed through "a careful investigation" that "no one ***at Meso*** was aware of Mr. Bouchard's representation." (A020–21, ¶¶ 15–17 (emphasis added).)

Absent is any allegation that the attorneys who represented Meso were likewise unaware of the representation. As Meso acknowledges (Br. at 30), it is black-letter law that an attorney's knowledge is imputed to the client. *See Nolan v. E. Co.*, 241 A.2d 885, 891 (Del. Ch. 1968), *aff'd sub nom. Nolan v. Hershey*, 249 A.2d 45 (Del. 1969); *see also Armstrong v. Ashley*, 204 U.S. 272, 283 (1907). Thus,

Meso's burden of demonstrating that it timely filed its Rule 60(b) motion required it to allege that not only everyone "at Meso" but also Meso's then-attorneys were unaware of Mr. Bouchard's representation. *See Nat'l Auto Brokers Corp. v. Gen. Motors Corp.*, 572 F.2d 953, 958–59 (2d Cir. 1978) (facts supporting recusal argument "had been known to plaintiffs' counsel for months prior to trial"). Meso's failure to do so dooms its claim.

Meso now argues that Vice Chancellor Slights should have inferred that its attorneys were unaware of that representation from the allegation that "no one at Meso" knew about it. (Br. at 30.) Setting aside the obvious fact that Meso's former outside counsel, including its Delaware counsel, are not "at Meso" by any definition of that phrase, Meso had a number of opportunities to address this issue directly, before its complaint was dismissed, but consistently failed to do so. Roche first raised the issue in the June 2019 brief supporting its motion to dismiss. (B40.) Rather than confirm that none of its former attorneys were aware of Mr. Bouchard's representation, Meso's brief in opposition offered a carefully worded evasion, stating that it "is well aware that it must have a good-faith basis for all of its allegations—including that it carefully investigated the extent (if any) of its knowledge of the conflict." (B265.)

At argument in May 2020, nearly a year after Roche had put Meso on notice of the issue, Vice Chancellor Slights asked if Meso had conferred with its former

attorneys regarding their knowledge of Mr. Bouchard's representation. (B351–53.) After initially and unpersuasively attempting to avoid the question by invoking the attorney-client privilege (*id.*), Meso's counsel again refused to provide a direct answer as to its individual attorneys, instead stating that Meso "spoke directly with both law firms that represented it and made the allegations of no actual knowledge based on its principals and its agents based on that investigation" (B354–55). Speaking "directly" with its former "law firms" is plainly not the same as speaking with its former principal Delaware counsel, who has not been affiliated with his former firm since he left practice in 2015. While Meso is entitled to have the allegations of its complaint accepted as true, and to have all reasonable inferences drawn in its favor, it is not entitled to inferences drawn from facts that it has neither pled nor been willing to represent to the Court.

In any event, the fact that Meso allowed yet another year to elapse after it claims to have learned about Mr. Bouchard's representation in early 2018 is unreasonable by itself. *Compare Schremp*, 405 A.2d at 121 (two-month delay following discovery of basis for motion unreasonable); *see also Travelers*, 38 F.3d at 1410 (delay of less than three months unreasonable); *Chaverri*, 220 A.3d at 922 (seven-month delay unreasonable). Meso attributes this further delay to difficulties in "find[ing] a law firm willing to undertake this [case]" and to its new counsel's need "to conduct its own investigation of these issues in order to determine that Meso

had grounds to set aside the judgment." (A021–22, ¶¶ 18–24.)[6] Although such difficulties might excuse a much shorter delay, Vice Chancellor Slights rightly held that they cannot justify waiting a full year, "particularly when [Meso] knew that the judgment it would seek to vacate was already three years old" (Ex. B at 19). *Compare Bouret-Echevarria v. Caribbean Aviation Maint. Corp.*, 784 F.3d 37, 44 (1st Cir. 2015) (delay of less than four months due to difficulties securing admission *pro hac vice*, retaining local counsel, researching grounds for motion, and communicating with key witness was reasonable), *with Chaverri*, 220 A.3d at 922 (seven-month delay due to counsel's workload and complex nature of case was unreasonable).

Given the interest that both litigants and the judicial system have in the finality of judgments, it is difficult to imagine any circumstances that could excuse a delay of even one year, let alone nearly five years, in seeking relief from a judgment. Certainly, Meso's equivocation about what its former attorneys knew and its vague assertions regarding difficulties retaining new counsel are not sufficient. Its request for Rule 60(b)(6) relief was properly denied on this basis alone.

[6] Citing a Georgia attorney's memoir, Meso argues that such difficulties are to be expected when one "sue[s] a sitting judge before whom you will later have to appear." (Br. at 31.) But the only person who Meso alleges has committed "serious ethics violations" (*id.*) is Vice Chancellor Parsons, who left the bench in 2015, years before Meso filed its complaint.

2. Meso Has Not Pled Extraordinary Circumstances Warranting Relief under Rule 60(b)(6).

Because Rule 60(b)(6) provides "an extraordinary remedy," it "requires a showing of 'extraordinary circumstances.'" *Shipley*, 975 A.2d at 767 (quoting *Jewell*, 401 A.2d at 90, and citing *Klapprott v. United States*, 335 U.S. 601, 615 (1949) (movant must allege an "extraordinary situation" to qualify for Rule 60(b)(6) relief)). Establishing a recusal violation is not enough. *See Liljeberg*, 486 U.S. at 864 (Rule 60(b)(6) relief is "neither categorically available nor categorically unavailable" for all judicial recusal violations).[7] In deciding whether to grant Rule 60(b)(6) relief based on a recusal violation, a court must further consider "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Id.* Each of these considerations weighs against granting the extraordinary remedy of *vacatur* here.

a. Risk of Injustice to the Parties

Allowing the judgment in *Meso v. Roche* to stand would not cause prejudice to Meso, while granting *vacatur* would cause severe prejudice to Roche. Two factors inform the determination of whether a party will suffer injustice if denied relief under

[7] *Liljeberg* was decided under Fed. R. Civ. P. 60(b)(6), based on a failure to recuse under 28 U.S.C. § 455(a), which is materially identical to Code of Judicial Conduct Rule 2.11, except for its use of "shall," rather than Rule 2.11's "should."

Rule 60(b)(6): (1) "whether the party seeking *vacatur* has pointed to particular circumstances that may indicate a risk of injustice to that party," and (2) "the seriousness of the [recusal violation] that is involved." *United States v. Cerceda*, 172 F.3d 806, 813 (11th Cir. 1999).

Here, Meso has not identified any particular indicia of injustice resulting from Vice Chancellor Parsons' failure to recuse himself.[8] To the contrary, Meso conceded at oral argument that Vice Chancellor Parsons engaged in no improper conduct other than failing to recuse himself. (*See* B349.) Indeed, Meso went a step further, effectively acknowledging that Meso received a fair trial in *Meso v. Roche* by admitting that "what is at issue here is not the interest of individual litigants." (B349.) *Compare Liljeberg*, 486 U.S. at 868 & n.16 (concluding that "there [wa]s a

[8] Meso wrongly claims that it "needed to show only that 'the judge's impartiality might reasonably be questioned'" (Br. at 33) to obtain relief under Rule 60(b)(6). That "clearly is not sufficient" because it "follows by definition from a court's finding [a recusal violation]." *Cerceda*, 172 F.3d at 813; *see also Liljeberg*, 486 U.S. at 864 (holding that *vacatur* is not "categorically available" for all recusal violations). This Court's decision in *Stevenson v. State*, 782 A.2d 249 (Del. 2001), did not involve a motion for relief under Rule 60(b)(6); it came on appeal from denial of post-conviction relief based on an alleged recusal violation in a capital-murder case. Moreover, while the Court noted that the "inquiry into the effect of participation by a judge under the appearance of partiality prong is not limited to a search for discrete rulings demonstrating prejudice," *id.* at 258, it went on to identify particular indicia of bias. Specifically, it looked closely at the trial judge's sentencing findings, noting that they "carr[ied] a tone of personal affront" that was "troubling, particularly when viewed in light of the trial judge's personal request for assignment [to the case] even before the defendants were indicted." *Id.* at 259.

greater risk of unfairness in upholding the judgment" based on "a careful study" of the issues raised by the dissenting judge in the court of appeals decision that affirmed the judgment).

In contrast, Roche will suffer severe injustice if the 2014 judgment is vacated. As many courts have held, "the remedy of providing [a] new trial[ ] … poses a significant risk of injustice to [the prevailing party]" in terms of the "significant amounts of time and money" required to retry the case, *Cerceda*, 172 F.3d at 814, and the unfairness in requiring the prevailing party "to start over" with burdensome litigation, *Travelers*, 38 F.3d at 1412 (calling this a "travesty of justice—to say the least"). Here, Roche prevailed over Meso after five years of litigation, including a five-day trial, Meso's unsuccessful appeal to this Court, and its unsuccessful certiorari petition. While Meso breezily dismisses the costs of starting over years later by noting that Roche is "a conglomerate worth billions of dollars" (Br. at 32), a party's interest in "bringing litigation to an end" and being able to rely on "the finality of judgments," *MCA, Inc. v. Matsushita Elec. Indus. Co., Ltd.*, 785 A.2d 625, 635 (Del. 2001), is not related to the party's size or revenue. Meso also ignores that contested facts underlying the 2014 judgment relate to events in 2003, meaning important evidence is no longer available. *Cf. Cerceda*, 172 F.3d at 815 (vacating six-year-old judgment would cause severe hardship for government where key witness may no longer be able to testify). The injustice that Roche will suffer if the

2014 judgment is vacated is severe by any measure but especially when weighed against the non-existent risk of injustice to Meso if it is allowed to stand.

b. Risk of Injustice in Other Cases

While Meso has not shown that denying *vacatur* would cause injustice in any other cases, vacating the 2014 judgment would create a serious risk of injustice in each of the other cases in which Mr. Bouchard's firm appeared in the Court of Chancery while he and others in the firm were representing members of that court. Meso largely ignores this factor, suggesting only in passing that "[s]etting aside the judgment would likely 'prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered.'" (Br. at 28.)

But providing such guidance does not require the extreme remedy of *vacatur*. If this Court were to hold that the Code of Judicial Conduct required Vice Chancellor Parsons to recuse himself, that ruling alone would "serve as a caution to other judges" facing similar recusal issues. *In re Cont'l Airlines Corp.*, 901 F.2d 1259, 1263 (5th Cir. 1990); *see also CEATS, Inc. v. Cont'l Airlines, Inc.*, 755 F.3d 1356, 1366 (Fed. Cir. 2014) ("We find it unlikely that mediators will simply ignore their disclosure obligations if we deny relief here. To the contrary, our decision serves to reinforce the broad disclosure rules for mediators by holding that [the mediator] had a duty to disclose in this case."); *In re Sch. Asbestos Litig.*, 977 F.2d 764, 785 n.27

(3d Cir. 1992) ("[T]he educative function of this case will largely be served by the ruling on disqualification regardless of whether or not past rulings are vacated."). This is particularly true since Meso concedes that Vice Chancellor Parsons did not act improperly other than by failing to recuse himself. *See CEATS*, 755 F.3d at 1367 (no risk of injustice in other cases where, "[b]eyond his failure to disclose" a conflict, there was "no evidence that [the mediator] acted inappropriately or ineffectively").

Mr. Bouchard's former firm participated in at least 25 different cases in the Court of Chancery while he and others in the firm were representing the members of the Court of Chancery in *Delaware Coalition*. (B211–20.) Although Meso contends that there are "a host of other factors" that may distinguish those cases from this one (Br. at 28), it asserted at oral argument that Mr. Bouchard's concurrent representation is "the only salient fact[]" underlying its claims (B345). If Meso's theory is correct, all of the other cases in which Mr. Bouchard's firm participated—and any other in which an attorney for one of the parties was representing the judge in his official capacity in an unrelated matter—are automatically subject to re-litigation. Under these circumstances, the risk of injustice in other cases if relief is granted is extreme. *Compare Polaroid Corp. v. Eastman Kodak Co.*, 867 F.2d 1415, 1420 (Fed. Cir. 1989) ("little or no risk of injustice in other cases" where decision "rest[ed] on the specific facts of this case"); *Sch. Asbestos Litig.*, 977 F.2d at 785

n.27 (minimal risk of injustice in other cases where "[t]he circumstances in the present case are largely fact-bound and unlikely to arise in future cases").

c. Risk of Undermining the Public's Confidence

Given the amount of time that has passed and Meso's concession that, other than failing to recuse himself, Vice Chancellor Parsons did not engage in any improper conduct, granting *vacatur* would be far more damaging to the public's confidence than allowing the 2014 judgment to stand. *See, e.g.*, *Cerceda*, 172 F.3d at 816 (where movants "failed to establish any significant possibility that they suffered any harm" as a result of recusal violation, "the public would lose confidence in the judicial process if the judgments were vacated, because the parties and the courts would be forced to re-litigate the case even though the proceedings leading to those judgments seemed completely fair"). Meso's suggestion (Br. at 28) that the reputation of Delaware's courts depends on vacating a five-year-old judgment in a case not alleged to have been unfairly or incorrectly decided is absurd. *See Parker v. Connors Steel Co.*, 855 F.2d 1510, 1527 (11th Cir. 1988) ("Judicial decisions based on such technical arguments not relevant to the merits contribute to the public's distrust in our system of justice.")

With all three *Liljeberg* factors weighing against *vacatur*, Meso certainly has not pled extraordinary circumstances warranting relief under Rule 60(b)(6). This

failure provides another independent basis for affirming dismissal of the Rule 60(b)(6) claim.

3. The Code of Judicial Conduct Did Not Require Recusal.

If the Court concludes either that Meso's Rule 60(b)(6) claim is untimely or that Meso has failed to plead extraordinary circumstances warranting relief, it need not decide whether Vice Chancellor Parsons violated Code of Judicial Conduct Rule 2.11. In any event, he did not violate the rule, which did not require recusal where Mr. Bouchard represented the members of the Court of Chancery only in their official capacities, in a case in which they were nominal defendants only and the State was the real party in interest. And even if Rule 2.11 otherwise required recusal, the rule of necessity would have excused that obligation because all of the other members of the court would have been subject to disqualification on the same grounds as Vice Chancellor Parsons.

a. Rule 2.11 Did Not Require Recusal.

Rule 2.11 requires recusal "in a proceeding in which the judge's impartiality might reasonably be questioned," which includes "instances where … [t]he judge has a personal bias or prejudice concerning a party." Del. Code of Jud. Conduct, Rule 2.11(A)(1). To determine whether such circumstances exist, a judge must employ both a subjective and an objective test, either of which may independently trigger a need for recusal. *Los v. Los*, 595 A.2d 381, 384–85 (Del. 1991).

Subjectively, the judge must "be satisfied that he can proceed to hear the cause free of bias or prejudice concerning that party." *Id.* Objectively, the judge must determine whether "there is the appearance of bias sufficient to cause doubt as to the judge's impartiality." *Id.* at 385. This objective test asks whether "a reasonable person, fully informed of the facts underlying the grounds on which recusal was sought, would [ ] harbor significant doubts about the trial judge's impartiality in th[e] case." *Hearne v. State*, 176 A.3d 715, 2017 WL 6336910, at *3 (Del. 2017); *see also Gattis v. State*, 955 A.2d 1276, 1285 (Del. 2008).

As already noted, Meso has disavowed any claim that Vice Chancellor Parsons was subjectively biased, so only the objective test is at issue. Applying that test, a reasonable person who is fully informed of the facts would not harbor a significant concern about Vice Chancellor Parsons' impartiality. The members of the Court of Chancery, including Vice Chancellor Parsons, were Mr. Bouchard's clients in *Delaware Coalition* only in the most formal sense, in that the Eleventh Amendment required them to be named as defendants to maintain the legal fiction that the Coalition's challenge to the constitutionality of Delaware's arbitration statute was not an action against the State. Consistent with Vice Chancellor Parsons' purely nominal role, Meso fails to plead any facts (as opposed to speculation) suggesting that the Vice Chancellor was personally involved in either the federal court litigation or the enactment of the challenged arbitration statute, despite

admittedly (B344–45) having full access to both the federal docket and the legislative record.

This Court has held that far more significant conflicts did ***not*** require recusal under the objective prong of Rule 2.11(A)(1). For example, in *Los*, the Court held that a judge need not recuse himself even after a litigant filed a federal suit naming the judge as a defendant and challenging "the discharge of [the judge's] official duties in implementing court rules or State law." 595 A.2d at 383, 385. In *Jones v. State*, 940 A.2d 1 (Del. 2007), the Court held that a judge "discuss[ing] the case in a public setting where she could be overheard and misconstrued" was not enough, standing alone, to create "an appearance of bias sufficient to cause doubt as to the trial judge's impartiality." *Id.* at 18–20. And in *Gattis*, the Court explained that "animosity expressed toward counsel at sidebar" is "objectively insufficient to cause doubt as to the trial judge's partiality." 995 A.2d at 1284 (construing *Jones*, 940 A.2d at 19). The facts in *Los*, *Jones*, and *Gattis* did not give rise to an appearance of bias sufficient to call the judge's impartiality into question; nor do the facts here.

Authorities outside of Delaware confirm this conclusion. In a case very close on its facts to the allegations here, the Kentucky Supreme Court concluded that "a judge is not required to recuse himself merely because an attorney appearing before the judge in an adversarial proceeding represented the judge at another time in his official capacity." *Alred v. Commonwealth, Jud. Conduct Comm'n*, 395 S.W.3d

417, 432 (Ky. 2012). That representation, the court reasoned, "would not cause a reasonable person with knowledge of all the relevant facts to doubt [the judge's] partiality." *Id.* The United States Judicial Conference adopted the same position with respect to U.S. Department of Justice attorneys representing federal judges in official-capacity suits. *See* U.S. Jud. Conf. Comm. on Codes of Conduct, *Disqualification Issues Relating to Judge Being Sued in Official Capacity, Including Representation by Department of Justice*, Advisory Op. No. 102, 2009 WL 8484596, at *1 (June 2009). Though recusal may be required in unique cases involving issues of personal liability or fact-intensive claims, it is typically "unnecessary" because "a judge often will have little personal contact with the [ ] attorney providing [official-capacity] representation." *Id.* at *1–2.

In dismissing as irrelevant the nature of Mr. Bouchard's representation, Meso simply ignores these authorities, wrongly asserting that "[b]ar associations and ethics committees uniformly require a judge to recuse," based on the mere fact of representation. (Br. at 21.) Most of the authorities that Meso cites address only personal-capacity representation and are thus plainly inapposite. *See Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980); *Berry v. Berry*, 765 So. 2d 855, 856 (Fla. App. 2000); *Beebe Med. Ctr., Inc. v. InSight Health Servs. Corp.*, 751 A.2d 426, 435 (Del. Ch. 1999); *accord Smith v. Sikorsky Aircraft*, 420 F. Supp. 661, 662 (C.D. Cal. 1976) (personal and official capacities in past).

The authorities that do address official-capacity representation are either distinguishable or unpersuasive. Many of the state ethics opinions address official-capacity cases in which the judge was intimately connected with the proceedings. *E.g.*, Ala. Jud. Inquiry Comm'n Op. 88-337 (suit against justice serving as "the chief administrative officer of the court system," who "direct[ed] the attorney's actions in the unrelated matter"); Nev. Ethics Op. 99-007 (noting that "to defend the judges, the designated attorneys general will undoubtedly be required to meet with the judges to review the [case] … and plan defense strategy"); N.Y. Ethics Op. 98-14 (case in which judge's prior decisions were challenged). These opinions, as well as ABA Informal Opinion 1477 (1981) and the cases that follow it, *see In re Disqualification of Badger*, 546 N.E.2d 929, 929 (Ohio 1989), do not address the type of official-capacity representation at issue here, where the judge is a purely nominal defendant and the State is the real party in interest. *Cf.* Ky. Judicial Ethics Op. JE-102 Revised, 2003 WL 26088459, at *1 (March 2003) (requiring neither recusal nor notice when lawyer from Attorney General's office represents judge sued in his official capacity in case "where the Commonwealth is the real party in interest" because "most parties and their attorneys" would not "consider the information relevant"); *In re Disqualification of Reinbold*, 94 N.E.3d 570, 571 (Ohio 2017) (citing *Badger* but recognizing that "disqualification may not be necessary if the judge is merely a nominal party in the case represented by the prosecuting attorney

or attorney general or if the judge is not personally or substantively involved in that litigation").

The remaining state ethics opinions that Meso cites make blanket statements regarding all official-capacity cases, with little or no analysis. *See* Ala. Jud. Inquiry Comm'n Op. 96-616; Ariz. Ethics Op. 02-05; Mich. Bar Standing Comm. on Ethics Op. JI-39; Utah Ethics Op. 99-9. None of these authorities persuasively rebuts the common-sense conclusion that no appearance of impropriety exists where an attorney represents a judge who is a nominal defendant in a case in which the State is the real party in interest.

Applying Rule 2.11(A)(1)'s objective test of bias, no reasonable person fully informed of the nature of Mr. Bouchard's representation of the members of the Court of Chancery in *Delaware Coalition* would harbor any doubts about Vice Chancellor Parsons' impartiality in *Meso v. Roche*, let alone significant ones. The rule thus did not require Vice Chancellor Parsons to recuse himself.

b. The Rule of Necessity Would Excuse an Otherwise-Required Recusal.

Had Rule 2.11 required Vice Chancellor Parsons to recuse himself, the rule of necessity would have excused that obligation. "The rule, simply stated, means that a judge is not disqualified … because of his personal interest in the matter at issue if there is no other judge available to hear and decide the case." *Nellius v. Stiftel*, 402 A.2d 359, 360 (Del. 1978). This Court has applied the rule of necessity to excuse

recusal where "the named defendants include[d] several of the Justices of th[e] Court," *Application of Martin to Del. Bar*, 1990 WL 173833, at *1 (Del. Sept. 19, 1990), and where "all of the members of the Court [had] health care insurance provided by [one of the litigants]," *Crosse v BCBSD, Inc.*, 836 A.2d 492, 493 n.1 Del. 2003).

The rule's application here is straightforward. If Vice Chancellor Parsons were required to recuse himself from *Meso v. Roche* because Mr. Bouchard was representing the members of the Court of Chancery in *Delaware Coalition*, the chancellor and each of the other vice chancellors would likewise have had to recuse themselves, leaving no member of the court "available to hear and decide the case." *Nellius*, 402 A.2d at 360. Under these circumstances, the rule of necessity would have excused any recusal obligation that Vice Chancellor Parsons had.

Contrary to what Meso argues, the rule is not rendered "irrelevant" (Br. at 33) by the fact that the Chief Justice has constitutional authority to designate other judges to sit temporarily in the Court of Chancery. "[T]he rule of necessity is not a rule of actual impossibility," *Glick v. Edwards*, 803 F.3d 505, 509 (9th Cir. 2015); rather, it applies where requiring recusal would be "impracticable," *Crosse*, 836 A.2d at 493 n.1. Courts across the country—including this Court—have applied the rule to excuse recusal when all the judges of a particular jurisdiction are equally conflicted, even if judges from outside the jurisdiction could theoretically hear the

case. *See, e.g.*, *Crosse*, 836 A.2d at 493 n.1 (applying rule where all justices were equally conflicted without mentioning Chief Justice's power to appoint temporary justices "from among the judges of the constitutional courts," Del. Const. art. IV, § 12); *Haase v. Countrywide Home Loans, Inc.*, 838 F.3d 665, 667 (5th Cir. 2016); *Ignacio v. Judges of U.S. Court of Appeals for Ninth Circuit*, 453 F.3d 1160, 1164–65 (9th Cir. 2006); *Switzer v. Berry*, 198 F.3d 1255, 1258 (10th Cir. 2000); *Bolin v. Story*, 225 F.3d 1234, 1238 (11th Cir. 2000); *Tapia-Ortiz v. Winter*, 185 F.3d 8, 10 (2d Cir. 1999).

Because the rule of necessity would have excused any obligation to recuse himself that Vice Chancellor Parsons had, it closes the door on Meso's Rule 60(b)(6) claim.

CONCLUSION

The Court of Chancery correctly held that Meso cannot use Rule 60(b) to vacate a five-year-old judgment based on an alleged recusal violation that is non-existent or tenuous at best. The judgment of the Court of Chancery should be affirmed.

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