EFiled: Jul 17 2023 04:04PM EDT
Filing ID 70406802
Case Number 169,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE BAKER HUGHES, A GE COMPANY, DERIVATIVE LITIGATION

PUBLIC VERSION - Filed July 17, 2023
No. 169, 2023

Court Below:
Court of Chancery
Consolidated C.A. No. 2019-0201-LWW

APPELLANTS' OPENING BRIEF

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GLOSSARY

Action	The action captioned *In re Baker Hughes, a GE Company, Derivative Litigation*, Consolidated C.A. No. 2019-0201-LWW (Del. Ch.)
AGT	Aeroderivative Gas Turbine
BCG	Boston Consulting Group
Beattie	Defendant W. Geoffrey Beattie
BHGE	Nominal Defendant, Baker Hughes Corporation
BMO	Bank of Montreal
Board	Board of Directors of BHGE
Brattle	The Brattle Group Inc.
Brenneman	Gregory Brenneman
Capital Market Transactions	The termination of the Lockup, the Repurchase, and the Secondary Offering, collectively
Cazalot	Clarence P. Cazalot, Jr.
CEO	Chief Executive Officer
CFO	Chief Financial Officer
Conflicts Committee	Conflicts Committee of the BHGE Board
Culp	H. Lawrence Culp Jr.
DPW	Davis Polk & Wardwell LLP
Ebel	Gregory L. Ebel
FCAC	Finance and Capital Allocation Committee
Flannery	John L. Flannery, former CEO of GE
Forgione	Marco Forgione
GE	General Electric Company
GE Board	Board of Directors of GE
Harbour	Lazard representative, Austin Harbour
IM	Interview Memorandum
JPM	J.P. Morgan Securities LLC
Lazard	Lazard Freres & Co.
Lockup	Contractual prohibition on General Electric Company selling BHGE common stock until July 3, 2019 without approval of BHGE's Conflicts Committee

MAF	Master Agreement Framework
MAF Amendments	Amendments to the Master Agreement Framework
Miller	Defendant Jamie S. Miller
Motion	Motion to Terminate by the Special Litigation Committee of the Board of Directors of Nominal Defendant Baker Hughes Company, filed on or about October 13, 2021
MTDs	Motions to Dismiss filed by Defendants GE, Beattie, Miller, Mulva, Rice, Simonelli, and Nominal Defendant, BHGE in June 2019
Mulva	Defendant James J. Mulva
Op.	Memorandum Opinion dated April 17, 2023 issued in the Action (attached hereto as Exhibit A)
Report	The Report of the Special Litigation Committee of the Board of Directors of BHGE recommending termination of the Action
Rice	Defendant John G. Rice
Scott	Lazard representative, Jennifer Scott
Simonelli	Defendant Lorenzo Simonelli
SLC	Special Litigation Committee of the Board of Directors of BHGE
SLC's Counsel or SLC Counsel	Quinn Emanuel Urquhart & Sullivan LLP and Abrams & Bayliss LLP
STB	Simpson Thacher & Bartlett LLP
Stockholders Agreement	The Stockholders Agreement entered into by GE and BHGE in connection with the Merger, as amended in October 2017
Transactions	The Capital Market Transactions and the MAF Amendments
Worrell	BHGE CFO, Brian Worrell

NATURE OF PROCEEDINGS

Lawsuits are "corporate asset[s] that must be managed by the board consistent with its fiduciary duties."[1] Recognizing that boards can seize control of derivative claims by forming a special litigation committee, the *Zapata* doctrine seeks "a balancing point where bona fide stockholder power to bring corporate causes of action cannot be unfairly trampled on by the board[], but the corporation can rid itself of detrimental litigation."[2] Thus, where a board commandeers—then seeks to terminate—derivative litigation, the special litigation committee must prove adherence to a high standard of independence, diligence, open-mindedness, and vigor. The standard is particularly exacting where the committee consists of a single member.[3]

The SLC violated this standard. After failing to terminate this Action via motion to dismiss, the Board took a second bite at the apple by forming an SLC, which now seeks to terminate Plaintiffs' claims challenging the fairness of conflicted, controlling stockholder Transactions. The single SLC member—Gregory Ebel—bears the burden of demonstrating, under a summary judgment standard, the absence of *any* disputed material fact regarding the SLC process.

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[1] *Diep v. Trimaran Pollo Partners, L.L.C.*, 280 A.3d 133, 149 (Del. 2022).

[2] *Zapata Corp. v. Maldonado*, 430 A.2d 779, 786-87 (Del. 1981).

[3] *Lewis v. Fuqua*, 502 A.2d 962, 967 (Del. Ch. 1985).

The trial court acknowledged myriad "flaws"[4] afflicting Ebel and his investigation, including that: (i) "[t]o be sure, the [SLC] was imperfect,"[5] (ii) neither "[h]aving a single member" on the SLC—nor that "single member['s]" SLC-related communications "with an investigation subject" *during* the investigation—were "ideal";[6] (iii) "[t]o be sure, certain of these communications should not have occurred"[7]; and (iv) "the SLC report's silence on the independence of [advisors on the Transactions] is unfortunate[.]"[8] The court ignored other flaws, including Ebel's practice of providing interviewees potential exhibits before their (unsworn) interviews despite the acknowledged possibility that doing so allowed the interviewees to strategize with counsel regarding self-serving exculpatory answers.

Nevertheless, the court granted Ebel's motion. In doing so, the court committed several reversible errors.

The trial court needed to determine, "under Rule 56 standards," whether Ebel satisfied his burden.[9] Under Rule 56 the court cannot weigh the evidence and must

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[4] Op. at 2-3.

[5] *Id.* at 2.

[6] *Id.*

[7] *Id*. at 32.

[8] *Id*. at 56.

[9] *Diep,* 280 A.3d at 151 n.107 (quoting *Zapata*, 430 A.2d at 787-89).

make reasonable inferences in the light most favorable to the nonmoving party,[10] and "[i]f the matter depends to any material extent upon a determination of credibility, summary judgment is inappropriate."[11] The court violated those principles by weighing the evidence to excuse Ebel's flaws and failures based upon SLC-friendly inferences and credibility determinations regarding Ebel's testimony.

For example, despite recognizing that "'communications from the defendant…to the [SLC] with respect to the committee's work…should be a null set,'"[12] the court relied heavily on Ebel's testimony to find no material issue of fact arising from Ebel's continual SLC-related texts and emails with a key investigation target *during the investigation*. Basing factual determinations on the credibility of self-serving testimony contravenes the governing Rule 56 standard.

The court also committed multiple errors in finding that Ebel met his burden to establish the absence of material factual disputes concerning the independence, good faith, and reasonableness of his investigation.

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[10] *See, e.g.*, *AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005).

[11] *See, e.g.*, *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002).

[12] A2328 (quoting *In re Primedia Deriv. Litig.*, C.A. No. 1808-VCL, at 54 (Del. Ch. May 12, 2008) (TRANSCRIPT)).

First, the court excused Ebel's failure to meaningfully investigate conflicts afflicting the advisors on the Transactions despite extensive evidence of conflicts.

Second, the court excused Ebel's failure to collect *any* text messages, despite evidence that (i) Defendants—and key players in the Transactions—contemporaneously texted about the Transactions, and (ii) Ebel texted with one of those Defendants about (and during) the investigation. The trial court also condoned Ebel's failure to collect any emails (or texts) from an important defendant (Mulva), even after he refused to answer any interview questions regarding certain fundamental issues.

Third, although Plaintiffs identified material problems with SLC financial advisor Brattle's economic analysis, the court held that Ebel could rely on that analysis despite *intentionally and strategically blinding himself to Brattle's work and process*. The purpose of the SLC's strategy is clear: to insulate Brattle and its work from judicial (and plaintiff) review. Brattle left no paper trail, producing only its engagement letter. Indeed, after retaining Brattle in May 2020, Ebel never interacted with them again until September 22, 2020, two days before formally deciding to terminate the Action (but weeks *after* drafting of the Report began).

It is important that, as this Court held in *Zapata*, a "corporation can rid itself of *detrimental* litigation."[13] But where an SLC "behaves in a manner inconsistent with the duty to carefully and *open-mindedly* investigate the alleged wrongdoing, its ability to instill confidence is, at best, compromised and, at worst, inutile."[14] The record in this meritorious[15] litigation reveals several disputed material issues of fact regarding Ebel's adherence to that duty. The court erred by disregarding myriad factual disputes, weighing evidence, and reaching SLC-friendly conclusions based on testimony and credibility determinations.

[13] *Zapata*, 430 A.2d at 785 (emphasis added).

[14] *Diep*, 280 A.3d at 159–60 (Valihura, J., dissenting) (quotations omitted).

[15] A0131-39.

SUMMARY OF ARGUMENT

1. The trial court misapplied the applicable standard of review. Instead of making reasonable inferences in the light most favorable to Plaintiffs, the court improperly weighed evidence and made credibility determinations that favored Ebel. For example, the court relied on credibility determinations to downplay improper communications between Ebel and a primary investigation target, which raised material factual disputes regarding the independence, good faith, and reasonableness of the investigation.

2. The trial court erred in finding that Ebel met his burden of proving the absence of material factual disputes concerning the independence, good faith, and reasonableness of his investigation. The evidentiary record demonstrates that the SLC inadequately investigated and overlooked significant conflicts of interest among advisors involved in the Transactions.

3. The trial court erred in finding that Ebel proved the absence of material factual disputes regarding the reasonableness of his investigation. The evidentiary record demonstrates that Ebel collected no text messages during his investigation despite evidence that key witnesses and defendants contemporaneously communicated about the Transactions via text and even though Ebel substantively texted with a key defendant (Simonelli) during the investigation. Furthermore, Ebel

collected no emails from an important defendant (Mulva), even after he acknowledged deleting emails despite receiving a litigation hold and refused to answer interview questions about critical issues in the underlying litigation for which he had unique knowledge.

4. The trial court erred in finding that Ebel proved the absence of material factual disputes regarding his investigation into the financial fairness of the Transactions. The evidentiary record lacked any support for Ebel's conclusion that the Transactions were financially fair to BHGE, because Ebel utilized a process whereby he blinded himself to any work done by the SLC's financial advisor in order to conceal the detail of that work from Plaintiffs and this Court. Ebel's decision to shield Brattle's flawed financial analysis from scrutiny made it impossible for Ebel to satisfy *his* burden of proving the reasonableness of his conclusion that the Transactions were economically fair to BHGE.

STATEMENT OF THE FACTS

I. THE TRANSACTIONS

A. GE OBTAINS CONTROL OF BHGE, THEN FACES A LIQUIDITY CRISIS

On July 3, 2017, GE obtained 62.5% of BHGE's equity and entered into a Stockholders Agreement with BHGE.[16] The Stockholders Agreement prohibited GE from selling any BHGE common stock without Conflicts Committee approval until July 3, 2019 (*i.e.*, the Lockup).[17] GE could not freely sell until July 3, 2022.[18] The Stockholders Agreement also allowed GE to designate a BHGE Board majority, including the chairman.[19] BHGE and GE also entered into various commercial and other agreements: the MAF.[20]

GE installed six directors—each a current or former GE executive and/or director with long-standing relationships with GE—on the 11-member Board.[21]

On November 13, 2017—with GE suffering a catastrophic decline and liquidity crisis[22]—new GE CEO John Flannery announced (i) a restructuring plan to

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[16] Op. at 4-5.

[17] *Id*. at 7.

[18] *Id*.

[19] *Id*. at 5.

[20] *Id*. at 7.

[21] *Id*. at 6.

[22] A0083-84.

raise $20B through asset sales in the next one-to-two years[23] and (ii) the formation of the FCAC. "The first thing [Flannery] tasked [the FCAC] to work on [wa]s evaluating [GE's] exit options on [BHGE]."[24] Mulva chaired the FCAC.[25]

B. BHGE AND THE CONFLICTS COMMITTEE RETAIN CONFLICTED ADVISORS

Following GE's November 2017 announcement, BHGE CEO/chairman Simonelli and BHGE management selected financial and legal advisors for BHGE *and* the Conflicts Committee. Nearly every financial and legal advisor was conflicted.

1. JPM (BHGE Financial Advisor)

Per an October 2018 *Financial Times* article, JPM's relationship with GE "runs [the] deepest [amongst investment banks], *dating back to 1892*," and JPM's nearly *$700M* in fees in 2001-2018 were the most GE paid to any investment bank.[26]

A document in BHGE director and GE CFO Jamie Miller's interview file confirms that GE's relationship with JPM was "on firm footing," with [redacted]

[23] A0085.

[24] A1036; *see also* A1038.

[25] A0359; A2018; A2019.

[26] A1071-76.

[redacted][27]

Another GE document in Miller's interview file, titled "JPM – Treasury Relationship Summary," (i) confirms JPM was [redacted][28] and (ii) states that JPM received approximately *$247M* in fees from GE in 2016-2018, including approximately *$150M in 2018 alone*.[29]

2. DPW (BHGE Legal Advisor)

In early June 2018, during the Transactions' negotiation, BHGE in-house counsel summarized DPW's conflict: "[DPW] has been doing an enormous amount of work for GE for the past 6 months, including advising the GE Board, and [GE in-house counsel] would not expect [DPW] to be adverse to GE."[30]

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[27] A1077-78.

[28] A1079-82.

[29] *Id.*

[30] *Id*.

The Conflicts Committee was unaware of DPW's conflicts until late August 2018.[31] DPW continued to attend BHGE Board and Conflicts Committee meetings,[32] and participate in MAF Amendment negotiations (often to the exclusion of BHGE's other legal counsel, STB).[33]

3. Lazard (Conflicts Committee Financial Advisor)

Lazard's history of representing GE included:

- Beginning in summer 2018—*and thus concurrently with the Transactions' process*—GE's divestiture of its GE Ventures business;[34]
- GE's August 2017 sale of GE Healthcare Dharmacon, Inc.;[35] and
- GE's 2014 acquisition of Alstom.[36]

C. GE INFLUENCES THE TRANSACTIONS' NEGOTIATION

The Conflicts Committee played a limited role in the Transactions, ceding negotiations to BHGE management, primarily Simonelli and Worrell,[37] who both faced conflicts vis-à-vis GE. Simonelli, for example, spent *23 years* at GE before

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[31] A1087.

[32] A1088-128.

[33] A1129-40; A1141-256.

[34] A1583-92.

[35] A1396-82.

[36] A1259.

[37] A0405; A0458.

GE appointed him BHGE CEO, and counted several GE executives (and Defendants) as his friends, and dual-fiduciary/Defendant Rice as his mentor.[38]

Further, GE continually influenced the Transactions' negotiation. On June 7, 2018, dual-fiduciary Miller wrote to dual-fiduciaries Mulva and Rice:

[redacted][39]

According to Worrell's interview memo, [redacted]…."[40]

On June 26, 2018, GE announced "an orderly separation from [BHGE] within 2 to 3 years…."[41]

On July 31, 2018, Simonelli forwarded to dual-fiduciary Beattie "the commercial items we are working [on]."[42] Beattie then summarized for GE CEO Flannery a call with Simonelli and stated, [redacted]

[38] A0797-98.

[39] A1595 (emphasis added).

[40] A1603 (emphasis added).

[41] A1610.

[42] *Id.*

[redacted]"[43] Beattie added: [redacted][44]

By early August 2018, Simonelli, Beattie, and Miller had agreed on a potential monetization transaction for presentation to the full BHGE Board. On August 2, Simonelli emailed Beattie and Miller a "recommendation page" that Simonelli planned to present.[45] The "recommendation" was non-negotiable. Beattie promptly forwarded Simonelli's recommendation to Miller, stating, [redacted][46] Beattie later forwarded this correspondence to Simonelli.[47]

GE pressed the process because "*GE knew it would lose negotiating leverage once it disclosed negative news about GE Power at the end of October 2018*, and

[43] *Id*.

[44] *Id.*

[45] A0958.

[46] *Id*. (emphasis added).

[47] *Id.*

that it was choosing not to disclose this information to BHGE before GE was required to make a public announcement."[48]

D. BHGE'S LEAD NEGOTIATORS—SIMONELLI AND WORRELL—FACE TERMINATION RISK

On October 1, 2018, amid increasing pressure to address GE's liquidity crisis, Culp replaced Flannery as GE's CEO.

Copious evidence indicates Culp wanted to fire—and pressured—Simonelli.[49] "Beattie explained that Mr. Simonelli experienced significant pressure from his GE counterparts in negotiating the Transactions" and "at some point, Mr. Culp expressed that he did not like how Mr. Simonelli was doing his job and was thinking about firing him."[50]

Simonelli also feared GE would fire Worrell. Miller's notes from a February 5, 2018 meeting with Simonelli read: [redacted][51]

E. GE EMPLOYS RETRIBUTION TO SECURE FAVORABLE TRANSACTION TERMS

On October 9, 2018, while negotiating the MAF Amendments with BHGE—and in particular those regarding AGT—the GE Aviation team terminated BHGE's

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[48] A0963 (emphasis added).

[49] A0814-15.

[50] A0988-89 (emphasis added).

[51] A1626.

access to important engineering tools.[52] Per the Report: "BHGE's negotiating team concluded that *GE Aviation's actions were directly in response to the IP issues BHGE was negotiating with GE Aviation* at the time," and "BHGE believed that *GE Aviation cut off access as an attempt to pressure BHGE in the negotiations*."[53] Notably, "the AGT aspects of the [MAF] were the most important to BHGE"[54] and the "most important negotiations."[55]

F. SIMONELLI AND GE FINALIZE THE TRANSACTIONS

In October 2018, Culp informed Miller that Simonelli "might need [Beattie]'s help in getting a deal squared away in their boardroom."[56] Miller stated: [redacted][57]

[52] A1629-30.

[53] A0435-37 (emphasis added).

[54] A0585.

[55] A0266.

[56] A1631-32.

[57] *Id.* (emphasis added).

GE also provided Simonelli financial analyses designed to convince BHGE's Board and Conflicts Committee to accept GE-friendly MAF Amendments. On October 16, GE Aviation's John Godsman provided Simonelli an analysis performed by GE consultant BCG "in support of GE Aviation's proposed pricing," and told Simonelli: [redacted][58]

In an October 23 email to Culp with the subject line "Beattie / BHGE," Miller wrote: [redacted][59]

On November 12, Culp emailed Beattie: [redacted] that would apply to GE as part of the Capital Markets Transactions.[60] Shortly thereafter, Beattie responded: [redacted][61]

The Conflicts Committee approved the Transactions that same morning.[62]

[58] A0430; A0889 (emphasis added).

[59] A1633-34.

[60] A1635-36.

[61] *Id*.

[62] *Id*.

G. THE UNFAIR TRANSACTIONS

On November 13, 2018, BHGE disclosed the Transactions,[63] through which BHGE agreed to:

- immediately terminate the Lockup;
- repurchase $1.5B in BHGE common stock from GE at undiscounted prices; and
- permit GE to sell $2.5B of BHGE common stock in a secondary public offering.

Those three Capital Market Transactions provided GE *~$4B* of desperately needed cash, while GE retained over 50% of BHGE's voting power.

Further, the MAF Amendments benefited GE at BHGE's expense. BHGE disclosed that the MAF Amendments (i) had a "net financial impact" that was "slightly negative" on BHGE's "operating margin rates of approximately 20 to 40 basis points"[64] and (ii) could trigger "one-time charges related to separation from GE of approximately $0.2 to $0.3 billion over the next 3 years."[65]

Several analysts panned the Transactions. For example, BMO discussed the "disappointing economics" from BHGE's perspective, [66] noting the MAF

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[63] Op. at 16.

[64] *Id*.

[65] *Id*.

[66] A0075; A0094; *see also* A0094-95 (Wells Fargo Report).

Amendments would cost BHGE ~$75M per year[67] and that BMO "expected GE to offer a 'sweetener' to escape its 7/19 lockup early, but the sweetener seems to be *extend[ing] commercial arrangements at worse terms*."[68]

II. PLAINTIFFS COMMENCE SUIT AND OVERCOME DEFENDANTS' MTDS

In March 2019, Plaintiffs filed subsequently consolidated derivative complaints.[69]

On October 8, 2019, then-Chancellor Bouchard substantially denied Defendants' MTDs from the bench, holding: (i) demand was excused because a Board majority—including Simonelli—lacked independence from GE, (ii) Plaintiffs alleged viable claims under Rule 12(b)(6) that BHGE's conflicted directors breached their fiduciary duties as to the Transactions, and (iii) entire fairness governed the Transactions.[70]

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[67] A0075; A0094.

[68] *Id*. (emphasis added).

[69] A0073-101; A0102-130.

[70] *See generally* A0219-38.

III. EBEL'S FAULTY INVESTIGATION

On October 31, the Board formed the SLC, appointing Ebel as sole member.[71] Ebel's counsel met with Plaintiffs' counsel on December 17, 2019.[72] Ebel declined to attend[73] and does not recall receiving Plaintiffs' presentation.[74]

On May 6, 2020—approximately *six months* after the SLC's formation—SLC Counsel retained Brattle as Ebel's financial advisor.[75] Thereafter, Ebel engaged with Brattle on only *one* occasion: a 70-minute September 22, 2020 meeting—two days before formally deciding to terminate the litigation, but weeks after drafting of the Report had begun—in which Brattle provided no written work product.[76]

Other than its engagement letter, Brattle produced no documents to Plaintiffs, claiming every document or communication was privileged and/or work product.[77]

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[71] Op. at 20-21.

[72] A2022.

[73] *Id*.; A2375.

[74] A2022; A2375.

[75] Op. at 22; A1775-76.

[76] A1838; A1957.

[77] A2382; A2040.

A. EBEL FAILS TO COLLECT ANY CUSTODIAN TEXTS

Despite texting (and emailing) with Simonelli *during* the SLC investigation—and record evidence confirming Simonelli texted about the Transactions during the Transactions' process[78]—Ebel did not collect text messages from Simonelli or anyone else.[79] Nor did Ebel have searches run to identify additional evidence of substantive text messaging during the Transactions' process.[80]

The trial court found this failure presented no material fact dispute.[81]

B. EBEL FAILS TO COLLECT ANY EMAILS FROM MULVA

Ebel likewise collected no emails from Mulva, a dual-fiduciary and Chairman of the FCAC tasked with monetizing GE's assets (including its BHGE stake).[82] Mulva deleted his emails after receiving a litigation hold notice.[83] Ebel made no effort to retrieve them,[84] even after Mulva refused to answer any interview questions

[78] A1629.

[79] A0506; A2018-19; A2371; A2372; A2019.

[80] A2372-73.

[81] Op. at 59.

[82] A0505; A2018; A2019.

[83] A0505; A2018; A2019.

[84] A2374; A2018.

regarding two fundamental issues: GE Board-level discussions and GE's negotiation-related deliberations.[85]

The trial court found this failure also produced no material fact dispute.[86]

C. EBEL FEEDS INTERVIEWEES POTENTIAL EXHIBITS BEFORE THE INTERVIEWS

All of the interviews—which were *not* conducted under oath[87]—occurred via video or teleconference,[88] yet none were transcribed or recorded.[89] Ebel conceded that (i) he "provided all of the interviewees with copies of all the documents [he] wanted to talk about before the interview,"[90] (ii) "the interviewees were allowed to share [the provided documents] with their counsel;"[91] and (iii) this enabled interviewees to prepare self-serving, exculpatory answers before the interviews.[92]

The trial court ignored these failings.

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[85] A0507-08.

[86] Op. at 59-60.

[87] A2020; A2312-13.

[88] A0507; A2020.

[89] A2020.

[90] A2375; A2022.

[91] A2376.

[92] A2376-77.

D. EBEL FAILED TO ADEQUATELY INVESTIGATE—OR IDENTIFY *ANY*—ADVISOR CONFLICTS

As explained *supra* Section I.B, BHGE engaged conflicted advisors on the Transactions. Ebel failed to meaningfully investigate these conflicts,[93] and the Report neither identifies nor analyzes *any* potential advisor conflicts. Rather, the Report *touted* the Conflicts Committee's "*Independent* And Knowledgeable Advisors."[94]

The trial court found no material fact dispute regarding these issues.[95]

E. EBEL BACKCHANNELS WITH SIMONELLI DURING THE SLC PROCESS

Throughout the SLC investigation, Ebel and defendant Simonelli engaged in behind-the-scenes communications regarding the investigation's process and substance.[96]

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[93] A2054; A2055; A2057; A2058; A2059; A2060.

[94] A0542 (emphasis added).

[95] Op. at 50.

[96] Plaintiffs moved to compel the production of more such communications, but the court denied that request. A0716-77.

1. March 6, 2020 Email

On March 6, 2020, Ebel emailed Simonelli: "Btw—I do need to speak with you about an SLC matter. Your thoughts would be helpful before I reach out to Geoff B[eattie]."[97]

Ebel's explanation of this email's meaning has varied.[98]

2. April 8, 2020 Email

On April 8, 2020, Ebel emailed Simonelli reporting "a good video interview today with [BHGE employee] Marco Forgione in Florence on the special litigation front. Good outcome despite taking 3 hours."[99]

The trial court noted, "Undoubtedly, Ebel had no reason to tell Simonelli about the quality of the SLC's interview."[100]

3. April 19, 2020 Email

On April 19, 2020, Ebel emailed Simonelli: "I need to speak with you this week about the special litigation committee. *All good* just some delays (for obvious reasons) and, as such, lawyers are wondering whether we should revisit membership given [Board] changes. Let me know what might work with your sched[ule]

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[97] A2087-89.

[98] A0710; A2034; A2035; A2349.

[99] A2090-92.

[100] Op. at 39.

Monday or Tuesday aft[ernoon]."[101] Simonelli responded that day: "Hi Greg, Hope you had a good weekend and let me know when convenient to connect on the SLC."[102]

Ebel testified that upon connecting with Simonelli they discussed potentially expanding the SLC,[103] an issue on which Ebel had received legal advice from SLC Counsel.[104]

4. May 21, 2020 Text

On May 21, 2020, Simonelli texted Ebel: "Morning Greg, let me know when you have a few minutes to connect on SLC. Thanks, Lorenzo." Ebel responded via text the same day: "Can chat this evening or before 8:30 tomorrow."[105]

Ebel's best recollection was that "[t]hese messages may have been in connection with a potential expansion of the SLC."[106]

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[101] A2095.

[102] A2094.

[103] A2036.

[104] A0709.

[105] A2101-04.

[106] A0711; A2036 (stating, regarding Simonelli's request, "I don't recall specifically, but I imagine it was about the—what was the SLC's decision on adding a director.").

5. June 30, 2020 Text

On June 30, 2020, Ebel again texted Simonelli: "Hi Lorenzo. Excellent discussion I thought. Seems like a really good choice. I am on an slc video for next 3 hours with Geoff Beattie and a bunch of lawyers (lucky me). Perhaps we could chat later in day quickly. Say 4:30. If not perhaps tomorrow. Thanks for the wine btw!"[107]

Ebel represented that the text's first two sentences concerned BHGE's recruitment of a new executive, and the third sentence conveyed Ebel's "lack of enthusiasm for spending three more hours with 'a bunch of lawyers.'"[108]

* * *

The court acknowledged that "certain of these communications should not have occurred,"[109] and that Delaware precedent holds that communications between an SLC and a defendant regarding the SLC's work "should be a null set."[110] Nevertheless—weighing evidence, rendering determinations regarding Ebel's

[107] A2105-06.

[108] A0705-06.

[109] Op. at 32-33.

[110] *Id.* at 33 n.162 (citation omitted).

credibility, and drawing inferences in his favor—the court found no material fact dispute regarding these communications.[111]

F. EBEL MOVES TO TERMINATE THE ACTION

On or around August 31, 2020, Ebel's advisors began drafting the Report,[112] which Ebel "always assumed we were writing[.]"[113]

On September 24, 2020—two days *after* his only discussion with Brattle—Ebel formally determined to terminate the Action.[114]

On October 13, the SLC issued the Report and filed the Motion.[115]

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[111] *Id*. at 33.

[112] A2037; A2038; A1825.

[113] A2034; A2033-34.

[114] A2001.

[115] Op. at 22-23.

ARGUMENT

I. THE COURT VIOLATED THE SUMMARY JUDGMENT STANDARD BY WEIGHING EVIDENCE AND MAKING CREDIBILITY DETERMINATIONS

A. QUESTION PRESENTED

Whether the trial court erred in contravening the summary judgment standard applicable to Ebel's Motion by granting the Motion on the basis of evidence-weighing and credibility determinations.

The issue was preserved.[116]

B. SCOPE OF REVIEW

"On appeal, *Zapata*'s first prong is subject to a summary judgment standard, our review of which is *de novo*."[117]

C. MERITS OF THE ARGUMENT

1. The Summary Judgment Standard Forecloses Weighing of Evidence and Making Credibility Determinations

"*Zapata*'s first prong is subject to a summary judgment standard[.]"[118] "To terminate derivative litigation, the SLC must show, and the court must be satisfied,

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[116] *See id*. at 26-28; A2420-21.

[117] *Diep*, 280 A.3d at 149 (quotations omitted); *see also Berger v. Intelident Solutions, Inc.*, 906 A.2d 134, 136 (Del. 2006) (reversing where the court articulated the correct standard, but misapplied it); *C&J Energy Servs., Inc. v. City of Miami Gen. Emps. & Sanitation Emps. Ret. Tr.*, 107 A.3d 1049, 1066 (Del. 2014) (same).

[118] *Diep*, 280 A.3d at 149 (quotations omitted).

that no disputed issues of material fact exist about the independence, good faith, and reasonableness of the SLC's investigation…."[119]

Under the summary judgment standard, the court must "make reasonable inferences [] in the light most favorable to the nonmoving party" without "weigh[ing] the evidence" to determine any "material fact" disputes.[120] "If the matter depends to any material extent upon a determination of credibility, summary judgment is inappropriate."[121] Thus, "[w]hen issues presented on a motion for summary judgment require the Court to make a credibility determination… summary judgment should be denied."[122]

2. The Trial Court Violated the Summary Judgment Standard By Weighing Evidence and Making Credibility Determinations

The trial court violated "Rule 56 standards"[123] by weighing evidence and making credibility determinations to find that Ebel proved the absence of any

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[119] *Id.* at 151 (quotations omitted).

[120] *AeroGlobal*, 871 A.2d at 444.

[121] *Cerberus*, 794 A.2d at 1150.

[122] *AM Gen. Holdings LLC v. Renco Grp., Inc.*, 2019 WL 1567488, at *3 (Del. Ch. Apr. 10, 2019), *order clarified sub nom. AM Gen. Holdings LLC v. Renco Grp.*, *Inc.*, 2019 WL 5232402 (Del. Ch. July 1, 2019).

[123] *Zapata*, 430 A.2d at 786.

material issue of fact regarding the investigation's admitted "flaws."[124] By misapplying this standard, the court failed to identify material factual disputes regarding "the independence, good faith, and reasonableness of [Ebel]'s investigation"[125] that would preclude termination.

The trial court's assessment and weighing of Ebel's testimony *materially* impacted its decision to grant Ebel's Motion. After conceding the SLC's "flaws" at the Opinion's outset, the court nevertheless held that, "[t]he record before me, *including live testimony of the committee member*, demonstrates that the [SLC] has met its burden."[126] This is confirmed by the Opinion's substance. Within the 10-page subsection addressing Ebel's backchannelling with Simonelli, the court quoted and relied on Ebel's testimony *44* times. As reflected in the following chart, the trial court quoted and relied on Ebel's testimony *76* total times in its "Legal Analysis" section, including when addressing the improper Ebel-Simonelli communications,[127]

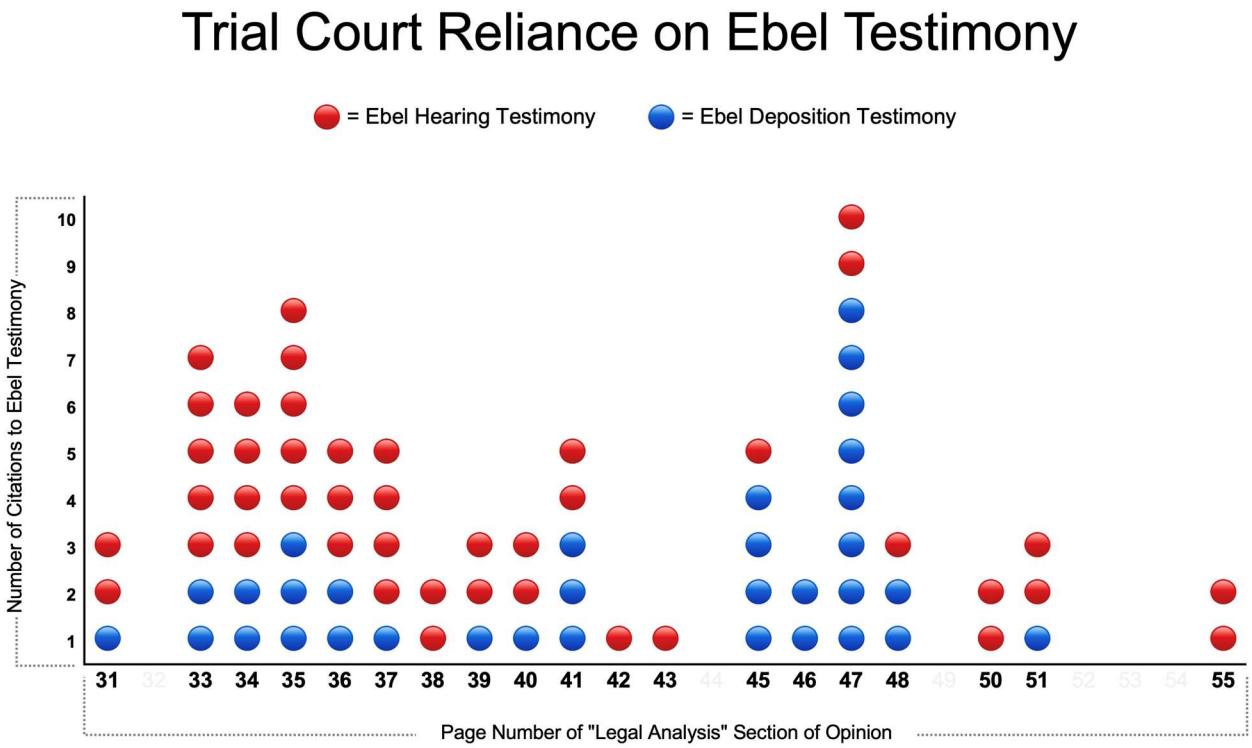
[124] Op. at 2-3.

[125] *Diep*, 280 A.3d at 151.

[126] Op. at 3 (emphasis added).

[127] *Id*. at 31-55.

the Transaction advisor conflicts,[128] and Ebel's decision to insulate himself from Brattle:[129]



In basing key factual findings and ultimate conclusions on Ebel's self-serving testimony alone, the trial court rendered improper credibility determinations, resolving factual disputes against Plaintiffs and rejecting reasonable inferences that cast doubt on the reasonableness and impartiality of his investigation. The court's treatment of Ebel's improper communications with a primary investigation target exemplifies these failures.

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[128] *Id*. at 50-56.

[129] *Id*. at 46-49.

The trial court correctly recognized that, under Delaware law, "'communications from the defendants…to the [SLC] with respect to the committee's work…should be a null set.'"[130] This is particularly important in a single-member SLC, which must be "above reproach."[131] Nevertheless, during his investigation, Ebel repeatedly texted and emailed *about* the investigation *with a primary investigatory target*, Simonelli. At minimum, Ebel's conduct raised a material question as to whether the SLC "act[ed] with the required degree of impartiality."[132] The court erred by holding otherwise.

Ebel communicated with Simonelli about the SLC investigation *during* the investigation at least five times that Plaintiffs know about.[133]

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[130] *Id*. at 33 n.162 (quoting *Primedia*, C.A. No. 1808-VCL, Tr. at 54).

[131] *Fuqua*, 502 A.2d at 967; *Gesoff v. IIC Indus. Inc.*, 902 A.2d 1130, 1146 n.101 (Del. Ch. 2006) ("[I]n the context of a special litigation committee, [above reproach] has been used repeatedly to describe the responsibilities of directors charged with managing committees.…") (modification in original).

[132] *In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 947 (Del. Ch. 2003).

[133] Plaintiffs moved to compel the production of crucial documents shedding light on the integrity of Ebel's investigation. A0677-92, A0714-77. Ebel's attempts to restrict communications between himself and outside parties regarding the investigation's specifics, including its "process and logistics," raise serious concerns about Ebel's impartiality. A0771. Despite acknowledging the problematic nature of the Ebel-Simonelli communications, the trial court denied Plaintiffs' request to compel production of such communications. A0771-72.

First, on March 6, 2020—approximately four months into the investigation—Ebel e-mailed Simonelli: "I do need to speak to you about an SLC matter. Your thoughts would be helpful before I reach out to Geoff B[eattie]."[134] Ebel testified—and the trial court held—that Ebel's outreach to Simonelli pertained to potentially expanding the SLC to include a new director alongside Ebel.[135]

Standing alone, Ebel's discussion of potentially changing the SLC's composition *with a primary investigation target* creates a material issue of fact.

Even more problematic, the trial court credited Ebel's hearing testimony, accepting his explanation that he merely sought to discuss the logistics of adding a new SLC member.[136] However, ten months before, on February 9, 2022, Ebel declared that he "d[id] not recall specifically what 'SLC matter' I was referring to in this email."[137] Later, during his deposition, he provided a more definitive statement, acknowledging that the email involved a "discussion [on] *whether* the SLC thought we should have another member."[138] Moreover, Ebel never provided a valid

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[134] A2087-89.

[135] Op. at 33.

[136] *Id*. at 36.

[137] A0710.

[138] A2034 (emphasis added).

justification for conducting this discussion directly and privately with Simonelli regardless of the discussion's exact nature.

Even accepting Ebel's unproven, self-serving assertion that he sought details about a new Board member, such discussions create a material issue of fact concerning whether Ebel met his burden to establish that he investigated Simonelli (and others) with the requisite "full vigor."[139] Indeed, it is unfathomable that a prosecutor would consult *an investigation target* regarding whether and/or how another prosecutor would join the investigation.[140]

Second, on April 8, 2020, Ebel informed Simonelli via email that he "had a good video interview today with [BHGE] employee Marco Forgione in Florence on the special litigation front. Good outcome despite taking 3 hours."[141] Notably, SLC Counsel's memorandum regarding the Forgione interview memorializes that, as the trial court described it, "the interview was beset by a spotty internet connection."[142] Nevertheless, Ebel declared that '"good video interview' and '[g]ood outcome' refer

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[139] *Oracle*, 824 A.2d at 941.

[140] Ebel's testimony regarding the March 6 email evolved. During the hearing, he claimed the email was related to "logistics" concerning a "decision" he had "to make." A2349. However, this statement contradicts his later testimony, which acknowledged that the decision to add an SLC member would *not* be his alone because he lacked the authority to unilaterally make such additions. A2404.

[141] A2090-92.

[142] Op. at 39.

to a positive experience with videoconferencing logistics," not the "substance of the interview."[143] Ebel admitted the quality of Forgione's interview was none of Simonelli's business,[144] prompting the trial court's acknowledgment that: "Undoubtedly, Ebel had no reason to tell Simonelli about the quality of the SLC's interview."[145]

Nevertheless, the trial court excused the communication upon determining that "Ebel *credibly testified* that [the email] referred to the interview having been completed despite the COVID-19 lockdown in Italy."[146] That conclusion—which rests on a credibility determination that independently requires reversal—erroneously found no material issue of fact as to the vigor and adequacy of Ebel's investigation.[147] Indeed, even crediting Ebel's explanation, his email reveals an improper familiarity with Simonelli—the GE executive who recruited him to the Board, and possibly the SLC—respecting the SLC investigation.

Third, on April 19, 2020—well into the SLC investigation—Ebel emailed[148]

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[143] A0710-11.

[144] A2350 ("Q: It wasn't Mr. Simonelli's business to know about the quality of the interview with Mr. Forgione, right? A: Correct.").

[145] Op. at 39.

[146] *Id*. (emphasis added).

[147] *Id*.

[148] A2094-95.

and subsequently discussed[149] with Simonelli potentially expanding the SLC. That was a critical issue and one for which Ebel received legal advice (which he apparently divulged to Simonelli). Discussing this central issue with an investigation target raises material questions of fact regarding Ebel's compliance with the "unyielding standards of diligence and independence" required of the single-member SLC.[150]

The trial court characterized this exchange as merely a "follow-up" to Ebel and Simonelli's "prior exchange"[151] regarding potentially expanding the SLC. This exacerbates—not alleviates—the concerns over the communication by confirming that Ebel directly discussed this critical and sensitive subject with his investigation target multiple times.[152]

Fourth, on May 21, 2020, *Simonelli* texted *Ebel*, asking to discuss the SLC.[153] Ebel *does not remember* what Simonelli wanted to discuss. He did not know when he submitted his February 9, 2022 declaration,[154] nor at his April 27, 2022

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[149] A2035-36.

[150] *Sutherland v. Sutherland*, 2007 WL 1954444, at *3 n.10 (Del. Ch. July 2, 2007).

[151] Op. at 36.

[152] A2095.

[153] A2101-04.

[154] A0711.

deposition.[155] Indeed, the trial court acknowledged that "Ebel could not recall the details of this communication during the litigation…."[156] Testifying in court, he produced a *potential* explanation: he wanted to discuss with Simonelli "any views on how long it would take new directors to get up to speed" in connection with expanding the SLC.[157] But he confirmed he could not be sure about the text message's meaning.[158] Because Ebel cannot explain the text message, the SLC cannot carry its burden.[159]

Further, even if the text related to potentially expanding the SLC, that is a *substantive* issue. The SLC's composition is a matter "[c]ritical to the accomplishment of [the SLC's] objectives."[160] The trial court, however, concluded that there was nothing "strange" about Simonelli—an investigation target—texting

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[155] A2036.

[156] Op. at 37.

[157] A2330.

[158] A2355.

[159] The trial court accepted Ebel's testimony and dismissed the inconsistencies between his varying statements, stating "[i]ndependence is not a memory test." Op. at 35 n.172. But Ebel's inability to remember undermines the SLC's ability to fulfill its *affirmative burden* of *proving* he did not discuss the SLC investigation's substance. This issue was recognized in *In re Freeport-McMoran Sulphur, Inc. S'holder Litig.*, 2005 WL 1653923, at *10 (Del. Ch. June 30, 2005), where a director's inability to recall important facts raised substantial questions about independence.

[160] *Biondi v. Scrushy*, 820 A.2d 1148, 1156 (Del Ch. 2003).

Ebel about the SLC expansion because "Simonelli knew from prior exchanges that Ebel was interested" in the issue.[161] But the question is not whether Simonelli believed Ebel wanted to discuss the SLC's composition with him; it is whether Ebel *should have* discussed that vital topic with an investigation target. He clearly should not have.

Fifth, on June 30, 2020, Ebel again texted Simonelli, this time about a video interview with key witness Beattie and thanking him for a gift of wine.[162] In this exchange, Ebel complains—*to the SLC's target*—about being on an "slc video." Ebel himself explained that his comment "lucky me" was sarcastic and "reflected a "*lack of enthusiasm*" for the investigation.[163] This raises, at minimum, a material issue of fact regarding "the care, attention and sense of individual responsibility to the performance of one's duties…that generally touches on independence."[164] As this Court has cautioned, there "are dangers posed by investigators who harbor

[161] Op. at 37.

[162] A2105-06. It is likewise concerning that Ebel's complaint arose in the context of an interview of Beattie—a dual-fiduciary and primary alleged wrongdoer.

[163] A0705-06 (emphasis added).

[164] *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984) (analyzing independence for demand futility purposes), *rev'd on other grounds, Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

reasons not to pursue the investigation's targets with *full vigor*."[165] An investigator who *openly confesses in a text message to his investigation target a* "*lack of enthusiasm*" *for that investigation* lacks "full vigor."

The trial court largely ignored Ebel's confessed "lack of enthusiasm" for the investigation and instead attempted to rehabilitate it by noting that Ebel attended (remotely) "most of the SLC interviews," "oversaw" the investigation, read documents, and met with advisors.[166] But "[t]he composition and conduct of a special litigation committee...must be such as to instill confidence in the judiciary and, as important, the stockholders of the company";[167] more is required than reluctantly going through the motions.

This text message also contains Ebel's thanking of Simonelli for his gift of wine, which underscores the familiarity between Ebel and his investigation target. Indeed, Simonelli was seemingly *the only Board member* with whom Ebel texted.[168] These facts create a material question as to whether their relationship might have "be[en] on the mind of the SLC member[ ] in a way that generates an unacceptable

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[165] *Oracle*, 824 A.2d at 941 (emphasis added).

[166] Op. at 40-41.

[167] *Diep*, 280 A.3d 152 (quoting *Oracle*, 824 A.2d at 940).

[168] A2036.

risk of bias."[169] The trial court disregarded these concerns because other directors *also* received wine from Simonelli. That Simonelli gave gifts to other directors does not erase the material issues arising from the clear familiarity between Ebel and Simonelli reflected in this text message.

* * *

In sum, the court contravened its Rule 56 obligation not to make credibility determinations[170] or "weigh the evidence," and instead to "make reasonable inferences [] in the light most favorable to the nonmoving party[.]"[171] That error and its impact are magnified because much of the relevant testimony pertained to Ebel's state of mind—whether he "open-mindedly investigate[d] the claims"[172] and "pursue[d] the investigation's targets with full vigor[.]"[173] Because "a party's state of mind [wa]s at issue," the credibility determination was "central" to the trial court's decision to grant Ebel's Motion,[174] compounding the error.

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[169] *Oracle*, 824 A.2d at 947.

[170] *Cerberus*, 794 A.2d at 1150.

[171] *AeroGlobal*, 871 A.2d at 444.

[172] *Diep*, 280 A.3d at 158 n.3 (Valihura, J., dissenting).

[173] *Oracle*, 824 A.2d at 941.

[174] *Sciabacucchi v. Liberty Broadband Corp.*, 2022 WL 1301859, at *12 (Del. Ch. May 2, 2022) (quotations omitted).

II. THE COURT ERRED IN FINDING NO MATERIAL ISSUE OF FACT REGARDING THE SLC'S FAILURE TO ADEQUATELY INVESTIGATE—AND THUS, IDENTIFY—TRANSACTION ADVISOR CONFLICTS

A. QUESTION PRESENTED

Whether the court erred in finding no material factual dispute regarding the SLC's failure to adequately investigate—and thus identify—the advisor conflicts pervading the Transactions.

The issue was preserved.[175]

B. SCOPE OF REVIEW

"On appeal, *Zapata*'s first prong is subject to a summary judgment standard, our review of which is *de novo*."[176]

C. MERITS OF THE ARGUMENT

One of the "flaws" of the "imperfect" SLC process identified by the trial court is that "[t]he [Report] omits any discussion of the potential transaction advisor conflicts it investigated."[177] That characterization severely understates the underlying deficiency.

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[175] *See, e.g.*, Op. at 50-58; A2436-46.

[176] *Diep*, 280 A.3d at 149 (quotations omitted).

[177] Op. at 2-3.

Despite acknowledging the importance of advisor conflicts to assessing the Transactions' fairness, Ebel's testimony confirms he failed to adequately investigate—and failed to identify—the conflicts afflicting advisors to BHGE (JPM and DPW) and the Conflicts Committee (Lazard). Although JPM, DPW, and Lazard had all represented or were *concurrently representing* GE, the Report neither identified nor addressed a single potential advisor conflict. To the contrary, the Report *touted* the Committee's "*Independent* And Knowledgeable Advisors."[178]

The court's holding that Ebel demonstrated he "reasonably investigated these potential conflicts in good faith"[179] is directly contrary to the evidence. When Ebel *asked* about conflicts, he received nothing but a series of "I don't knows" in response. And he never followed up to get actual answers. His failure to do so was material, as there were serious conflicts with the Company's advisors in the Transactions (including one advisor's *simultaneous* representation of GE), which Ebel first learned about during his deposition.

As explained above, JPM, Lazard, and DPW were materially conflicted by their relationships with BHGE's counterparty in the Transactions, GE. Ebel himself affirmed the importance of BHGE and the Conflicts Committee having *independent*

[178] A0542 (emphasis added).

[179] Op. at 50.

financial advisors on the Transactions.[180] But he failed to conduct an adequate investigation or uncover *any* potential advisor conflicts.

1. JPM

Ebel confirmed that the Report is silent about JPM conflicts *because* the SLC did not vet JPM's independence:

> **Q.** Did the SLC do anything to vet [JPM's] independence in connection with its investigation of the 2018 transaction?
>
> **A.** No.[181]
>
> * * *
>
> **Q.** And because you made no investigation of [JPM's] conflicts from its history of representing GE, nothing of that is mentioned in the [R]eport either; right?
>
> **A.** Correct.[182]

Ebel further testified that he (i) did not know whether GE had engaged JPM before November 2017, or what fees JPM received from GE as of 2018;[183] (ii) could not recall whether BHGE ever vetted JPM's conflicts;[184] and (iii) knew about the *Financial Times* article noting JPM's 2001-2018 receipt of *~$700 million* in fees

[180] A2364; A2052.

[181] A2054.

[182] A2368.

[183] A2054; A2055.

[184] A2365.

from GE,[185] which was never discussed in any SLC interview. Similarly, the SLC apparently never mentioned in *any* witness interview the document confirming that GE's relationship with JPM was "on firm footing[.]"[186]

To hold that "the SLC demonstrated that it appropriately evaluated this matter," the trial court disregarded all of this in favor of Ebel's (contradictory) hearing testimony that "the [JPM] folks walk[ed] through what their process was to make sure there weren't conflicts.'"[187] Even if that evidence-weighing and credibility assessment were proper (they are not, *see supra* Argument Section I.C.), the interview memorandum for the JPM witness referenced by Ebel—and relied on by the trial court—raises further concerns. For example, the interviewee (Weir) "did not know if other [JPM] teams were working for GE or its subsidiaries at the same time his team was working for [BHGE.]"[188] Further, Weir generally averred that JPM "has a strict and rigorous conflicts process," but nothing indicates whether that process was followed concerning the Transactions (nor what such process even entailed).[189]

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[185] A2055.

[186] A1077-78.

[187] Op. at 51 n.248.

[188] A2110.

[189] A2054.

The trial court's remaining basis for excusing Ebel's JPM conflict investigation failures—*i.e.*, that a *BHGE* witness, Nicola Jannis, stated he "had 'no concerns' about [JPM's] work or loyalties"[190]—underscores BHGE's ignorance of and/or disregard for the clear conflict. Jannis's only "explanation" for this lack of concern was an after-the-fact assessment that JPM "did a good job for BHGE."[191]

2. Lazard

Ebel testified that neither he nor the Conflicts Committee knew Lazard was *concurrently representing GE* while advising the Committee on the Transactions:

> **Q.** [A]t the same time Lazard was representing the [C]onflicts [C]ommittee in negotiations against GE, Lazard was representing GE in connection with an entity called GE Ventures; right?
>
> **A.** Correct.
>
> **Q.** And when I deposed you about that concurrent representation, you had no idea about that; right?
>
> **A.** Correct.
>
> **Q.** In fact, you don't know if the [C]onflicts [C]ommittee was aware of that; right?
>
> **A.** Correct.[192]

[190] Op. at 52.

[191] A1645.

[192] A2368-69; *accord* A2060.

Ebel also testified that he (i) was unaware of the Conflicts Committee's efforts (if any) to investigate Lazard's conflicts;[193] (ii) never followed up to determine whether Lazard had worked for GE beyond the 2014 Alstom transaction identified by a Lazard interviewee; [194] and (iii) never asked about Lazard's conflict review process.[195]

The trial court discounted this evidence because Ebel confirmed that *BHGE and the Conflicts Committee*—like Ebel himself—"had no concerns" about any potential Lazard conflict.[196] Again, far from excusing Ebel's investigative failures, BHGE's and the Committee's ignorance of Lazard's conflict *underscores* the conflict's detrimental impact on the deal process.

Lastly, the trial court relied on two Lazard representatives (Harbour and Scott), who failed to recall—during their unsworn interviews four years after the Transactions—"any conflicts on their teams."[197] In doing so, the court overlooked Ebel's testimony regarding Harbour and Scott's failure to identify *any* process to identify potential conflicts, and the SLC's failure to investigate potential conflicts:

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[193] A2059.

[194] A2057.

[195] *Id.*

[196] Op. at 55-56 (quoting Cazalot Interview Mem.).

[197] Op. at 56 & n.271.

> **Q.** So neither Mr. Harbour nor Ms. Scott was able to provide any information to the SLC regarding the processes, if any, that Lazard ran to ensure that it did not have any conflicts with GE before being retained to act as the financial advisor to the Conflicts Committee, right?
>
> **A.** Correct.[198]
>
> * * *
>
> **Q.** [D]id the SLC follow up to determine whether and to what extent Lazard had done work for [GE]?
>
> **A.** No.[199]

Neither Harbour nor Scott participated in the process by which the Conflicts Committee retained Lazard.[200]

3. DPW

An email drafted by BHGE in-house counsel *during* the Transactions' process revealed that DPW "has been doing an enormous amount of work for GE for the past 6 months" and was not expected by *GE* in-house counsel "to be adverse to GE."[201] Ebel never showed that document to the lone DPW representative he interviewed, instead accepting that interviewee's self-serving denial of any conflict. In excusing

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[198] A2059.

[199] A2057.

[200] A2056 (addressing Harbour), A2058-59 (addressing Scott).

[201] A1084.

Ebel's investigative failures, the trial court similarly relied on that denial, and a BHGE witness's assertion that he "was not concerned" about a potential conflict.[202]

The court also downplayed DPW's role in the Transactions, including because DPW's conflict resulted in STB's involvement in negotiations over the commercial agreements.[203] But the evidence establishes not only DPW's continued attendance at Board and Committee meetings, but also *DPW's direct involvement in Transaction negotiations, often to STB's exclusion*.[204]

* * *

In sum, the court erred by overlooking the material factual disputes regarding Ebel's inadequate investigation of advisor conflicts. The Report's "unfortunate" "silence on the independence of [JPM], [DPW] and Lazard"[205] confirms the insufficiency of Ebel's investigation. Indeed, Ebel affirmed that the SLC "wouldn't have intentionally omitted from [the Report] potential weaknesses that it identified[.]"[206] Rather, SLC Counsel stated that the Report omitted any conflicts discussion "because we asked these witnesses about the conflicts and got the answers

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[202] Op. at 54.

[203] *Id*.

[204] A0805 & n.78.

[205] Op. at 56.

[206] A2369-70.

that we did, [so] we did not identify this as a weakness in the process."[207] The failure to identify these conflicts undermines the investigation's validity and prevents Ebel from satisfying his Rule 56 burden.

Finally, the trial court's speculation that Ebel's conclusion would remain unchanged even with a proper investigation is unsupported and legally irrelevant.[208] The dispositive question is whether Ebel's failure to adequately investigate and identify these conflicts raises a material factual dispute regarding his diligence and duty to thoroughly "investigate the alleged wrongdoing."[209] It does.

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[207] A2406.

[208] Op. at 56-58.

[209] *Sutherland*, 2007 WL 1954444, at *3 & n.10; *Diep*, 280 A.3d at 159 (Valihura, J., dissenting) (quotations omitted).

III. THE TRIAL COURT ERRONEOUSLY HELD THAT EBEL'S FAILURE TO COLLECT TEXT MESSAGES OR MULVA'S EMAILS RAISED NO MATERIAL FACTUAL DISPUTE

A. QUESTION PRESENTED

Whether the trial court erred in finding no material factual dispute regarding Ebel's failure to collect text messages or Mulva's emails despite (i) evidence of substantive text messages regarding the Transactions, (ii) Simonelli's use of text messaging to communicate with Ebel during the SLC investigation, and (iii) Mulva's refusal to answer key questions during his interview.

The issue was preserved for appeal.[210]

B. SCOPE OF REVIEW

"On appeal, *Zapata*'s first prong is subject to a summary judgment standard, our review of which is *de novo*."[211]

C. MERITS OF THE ARGUMENT

As the trial court acknowledged, an SLC should "explor[e] all relevant facts *and sources of information* that bear on the central allegations."[212] Ebel, however, failed to collect (i) *any* text messages or (ii) *any* emails from dual-fiduciary and

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[210] A1807; A2375-76.

[211] *Diep*, 280 A.3d at 149 (quotations omitted).

[212] Op. at 44 (quoting *London v. Tyrell*, 2010 WL 877528, at *17 (Del. Ch. Mar. 11, 2010)) (emphasis added).

FCAC chairman Mulva, who had a central role in—and knowledge of—the Transactions and GE's liquidity needs. Both topics are central to this litigation. These failures raise material factual disputes regarding whether Ebel "acted in good faith and conducted a thorough investigation."[213] The court erred in holding otherwise.[214]

1. Text Messages

With text messages an increasingly ubiquitous medium for transacting business, Delaware courts have recognized that their production is "presumptively always appropriate" because "[i]t's how people communicate" and, therefore, "text messages can be the source of a lot of probative information in cases."[215]

Indeed, the Court of Chancery has stressed the necessity of investigating a *more* esoteric medium (*i.e.*, WeChat messages) while addressing an SLC's

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[213] Op. at 44 (citation omitted).

[214] *London*, 2010 WL 877528, at *17 ("If the SLC fails to investigate facts or sources of information that cut at the heart of plaintiffs' complaint this will usually give rise to a material question about the reasonableness and good faith of the SLC's investigation.").

[215] *In re Appraisal of Kate Spade & Co.*, Consol. C.A. No. 2017-0714-AGB, at 23:9-10; 50:7-18 (Del. Ch. June 21, 2018) (TRANSCRIPT); *see In re CVR Refin., LP Unitholder Litig.*, C.A. No. 2019-0062-KSJM, at 42:18-23 (Del. Ch. Apr. 5, 2021) (TRANSCRIPT) ("[T]ext messages do seem to be a repository—very frequently, at least—of responsive information."); *Schnatter v. Papa John's Int'l, Inc.*, 2019 WL 194634, at *16 (Del. Ch. Jan. 15, 2019) ("[T]ext messages…in the court's experience often provide probative information.").

shortcomings in *Lao v Dalian Wanda Group*.[216] The *Lao* court noted that "the SLC initially did not recognize WeChat messages as a potential source of documents. The plaintiff identified and pressed this oversight, and those messages ended up being a central focus of the SLC report."[217] The *Lao* court explained, "[T]he failure to collect and consider these documents is troubling and reflects poorly on the SLC's diligence."[218]

Here, instead of concluding that Ebel's failure to collect texts was "troubling and reflects poorly on [his] diligence," the trial court adopted his narrative that he "weighed the likelihood that substantive text messages existed against the distraction, burden, and delay of collecting data from multiple custodian's personal devices" and made the "reasoned choice not to collect text messages."[219] For several reasons, Ebel had no need to "weigh[ ] the likelihood that substantive text messages existed."[220]

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[216] C.A. No. 2019-0303-JTL (Del. Ch. Nov. 30, 2022) (TRANSCRIPT).

[217] *Id.* at 9.

[218] *Id.* at 21.

[219] Op. at 59.

[220] *Id*.

First, even the microscopic subset of documents Ebel produced—*1.5%* of the evidentiary record Ebel collected[221]—revealed "substantive text messages." For example, on October 9, 2018—the same day the GE Aviation team negotiating the Transactions terminated BHGE's access to important engineering tools—lead BHGE negotiator Simonelli emailed BHGE's other lead negotiator (Worrell): "Just got sms from Beattie and they are reviewing items on GE Board call."[222]

Second, Ebel could have run keyword searches in the collected documents (*e.g.*, "text message," "texted," "text," "sms," etc.) to identify further evidence of text messaging. He never did.[223]

Finally, Ebel knew from his own text exchanges with Simonelli about Simonelli's practice of texting regarding BHGE business.

Ebel's decision to forgo collecting texts—purportedly due to "distraction, burden, and delay"—is particularly indefensible because it represented a retreat from his original (and correct) decision to seek text messages.[224] Indeed, the Court of

[221] A2370-71 (75:23-76:17).

[222] A1629.

[223] A2373.

[224] Op. at 59.

Chancery routinely rejects producing parties' ubiquitous refrain of "distraction, burden, and delay[.]"[225]

The trial court apparently confused the mandatory standard for an SLC investigation (*viz.*, to "explor[e] all relevant facts and sources of information") with the discretionary standard following an SLC's thorough and good-faith investigation (*viz.*, whether termination is in the "best interests of the corporation").[226]

2. Mulva's Emails

Ebel's failure to collect any emails (or texts) from Mulva—who had a central role in the Transactions—likewise raises a material factual dispute regarding whether Ebel "acted in good faith and conducted a thorough investigation."[227]

The trial court supported its contrary conclusion by noting Mulva's 30-year practice of deleting emails "soon after receipt" and that "[h]e did not change this

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[225] *See, e.g.*, *In re Oxbow Carbon LLC Unitholder Litig.*, 2017 WL 959396, at *3 (Del. Ch. Mar. 13, 2017) ("The Koch Parties relied primarily on generic objections about relevance and burden. Those objections are overruled. The Koch Parties will produce the information sought."); *Feeley v. NHAOCG, LLC*, C.A. No. 7304-VCL, at 31 (Del. Ch. July 9, 2013) (TRANSCRIPT) ("If you say 'unduly burdensome,' you better explain why it's unduly burdensome.").

[226] *Zapata*, 430 A.2d at 788.

[227] Op. at 44.

practice in response to a litigation hold."[228] But that fact alone raises a disputed issue of material fact.[229]

Yet, even after Mulva refused to answer *any* interview questions regarding GE Board-level discussions or GE's internal negotiation-related deliberations[230]—which were critical to assessing GE's liquidity needs and negotiation leverage—Ebel never attempted to retrieve Mulva's emails, collect his texts, or re-interview him.[231]

An SLC exploring "all relevant facts and sources of information" cannot forgo *all* written communications of an obstructionist and pivotal dual fiduciary.[232] Ebel provided no evidence—nor did the trial court cite any—that "documents from other

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[228] Op. at 59.

[229] *See Beard Rsch., Inc. v. Kates*, 981 A.2d 1175, 1189 (Del. Ch. 2009) (concluding that various parties "[we]re responsible with varying degrees of culpability for the spoliation of potentially relevant evidence" and drawing adverse inferences against them).

[230] A0507-08.

[231] *Id*.

[232] *See, e.g.*, *Hamilton Partners, L.P. v. Highland Cap. Mgmt., L.P.*, 2016 WL 612233, at *6 (Del. Ch. Feb. 2, 2016) (observing that "[o]bjections to discovery on" the basis of "duplication" are "usually denied, however, unless 'the discovery request is *fully* duplicative and meant to harass the producing party.'") (emphasis in original).

GE Board designees" or other "internal communications" provided all relevant evidence, or that Mulva's documents would be "*fully* duplicative."[233]

Ebel's general interview practice further undermines the reasonableness of his information collection efforts. Ebel provided potential exhibits to interviewees before their interviews.[234] Thus, the interviewees were allowed to share the provided documents with their counsel and prepare self-serving, exculpatory answers before the interviews.[235]

For these additional reasons, the trial court reversibly erred.

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[233] Op. at 59-60; *QuietAgent, Inc. v. Bala*, C.A. No. 10813-VCZ, at 31 (Del. Ch. Jan. 10, 2019) (TRANSCRIPT) (granting motion to compel where "Houlihan has not shown how its production would be duplicative beyond the simple statements that others have already produced documents").

[234] A2375; A2022.

[235] A2376-77.

IV. THE TRIAL COURT ERRED IN FINDING NO MATERIAL ISSUE OF FACT ARISING FROM EBEL'S STRATEGIC DECISION TO REMAIN IGNORANT OF HIS FINANCIAL ADVISOR'S WORK

A. QUESTION PRESENTED

Whether the trial court erred in finding no material factual issue arising from Ebel's strategic decision to insulate critical aspects of the SLC investigation from scrutiny instead of fully educating himself regarding the Transactions' financial aspects.

The issue was preserved.[236]

B. SCOPE OF REVIEW

"On appeal, *Zapata*'s first prong is subject to a summary judgment standard, our review of which is *de novo*."[237]

C. MERITS OF THE ARGUMENT

The trial court erred by accepting Ebel's assertion that he conducted a reasonable investigation, despite his *intentional* avoidance of evidence that may not have fit his narrative and any meaningful engagement with Brattle, the SLC's financial advisor.[238] Ebel's decision to cloak the process in privilege rather than seek

[236] Op. at 46-49.

[237] *Diep*, 280 A.3d at 149 (quotations omitted).

[238] Op. at 49; A1775-76; A1838; A1957.

a comprehensive understanding of the Transactions' financial aspects raises material fact issues concerning the investigation.[239]

First, Ebel relied on SLC Counsel to review the documents collected and to conduct all of the interviews. Although Ebel produced a curated set of documents cited in the Report to justify his decision to terminate, SLC Counsel declined to produce other material they collected but chose not to cite, and they withheld as privileged all drafts of the Report, preventing Plaintiffs from exploring when or how it was drafted.

Second, Ebel strategically had SLC Counsel shield *all* of Brattle's underlying work as privileged. Ebel's sole interaction with Brattle occurred at the investigation's conclusion; a 70-minute meeting weeks *after* drafting of the Report had begun,[240] and during which Brattle provided no written work product, and thus nothing for Plaintiffs or the Court to assess. When asked why Brattle did not provide any work product to Ebel, Brattle's Hutchings testified: "I guess the SLC didn't ask[.]"[241] Simply put, Plaintiffs—and the Court—were prevented from adequately evaluating whether Brattle's process or analysis was sound and reliable.

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[239] A2378-79.

[240] A2295; A2038.

[241] A1832.

Ebel's choice to isolate himself from Brattle's process and work, aiming to shield it from scrutiny, goes beyond his confessed "lack of enthusiasm." This "ostrich-like" behavior[242] raises material questions about whether Ebel conducted his investigation with "full vigor," *why* he wanted to hide Brattle's work, and *whether* it was reasonable for Ebel to rely on Brattle in determining that the Transactions were financially fair to BHGE. This prioritization of insulation over education created an evidentiary blind spot, casting doubt on Ebel's state of mind and approach to the investigation.

The trial court's ruling, which sanctioned Ebel's decision to strategically blind himself to Brattle's process and work while asserting his "entitle[ment] to rely" on it, is misguided.[243] On this basis, the trial court failed to recognize the material issues with Brattle's analysis highlighted by Plaintiffs, including: (i) using an inconsistent frame of reference;[244] (ii) inadequate holistic evaluation; and (iii) the lack of damages analysis for the Capital Market Transactions.[245]

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[242] *Walt Disney*, 825 A.2d at 288.

[243] Op. at 69; *see also id*. at 72 ("The SLC reasonably relied on each Brattle expert….").

[244] A0582.

[245] The Court's reliance on *Kikis v. McRoberts*, C.A. No. 9654-CB (Del. Ch. May 19, 2016) (TRANSCRIPT) is misplaced. There, the court accepted that the special litigation committee relied on expert advice to determine reasonable compensation for a company's CEO, even though the committee could not identify the specific

But more importantly, based on the available record, there is simply no way to have any confidence in the integrity of Ebel's investigation. By cloaking the substance of his investigation in privilege, Ebel cannot satisfy *his burden* to establish the investigation's reasonableness and good faith.[246] Regarding the alleged fairness of the Transactions, Ebel's Report cited only a single document *supplied by GE*,[247] which even Ebel admits was provided *as a negotiating ploy*.[248] By shielding Brattle's financial analysis from scrutiny, yet asking the Court to credit his determination that the Transactions were entirely fair because he "relied on" material he refuses to produce, Ebel has created a disputed question of material fact that is fatal to satisfying *his burden* of proof.

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companies used in the market survey data. Here, however, Ebel deliberately avoided *any* interaction with the expert during the process (except one meeting on September 22, 2020), which raises questions about his state of mind and investigation.

[246] *Diep*, 280 A.3d at 151.

[247] A2387-88.

[248] A2388.

CONCLUSION

The trial court's Order Granting Termination, dated April 17, 2023, should be REVERSED.

Dated: June 30, 2023

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