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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE BAKER HUGHES, A GE COMPANY, DERIVATIVE LITIGATION

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No. 169, 2023

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

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PRELIMINARY STATEMENT[1]

Affirmance of the trial court's ruling would divorce the *Zapata* doctrine from the delicate "balancing point"[2] achieved by that decision and over 42 years of jurisprudence that has developed since. Ebel's Answering Brief proves this.[3]

Ebel does not—and cannot—dispute that under *existing* Delaware law: (i) he must prove the absence of any "genuine issues of disputed material fact about the SLC's independence, good faith, and reasonableness"[4]; (ii) "*Zapata*'s first prong is subject to a summary judgment standard"[5]; and (iii) this Court's review under that prong is *de novo*.[6]

Plaintiffs' Opening Brief demonstrated that applying this settled framework requires reversal because the single-member SLC (Ebel) acted "inconsistent[ly] with the duty to carefully and open-mindedly investigate the alleged wrongdoing."[7] For

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[1] Capitalized terms not defined herein have the meanings ascribed in Appellants' Opening Brief ("OB").

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

[3] Appellee Special Litigation Committee of Baker Hughes Company's Answering Brief ("AB").

[4] AB at 5.

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

[6] *Id*.

[7] *Id.* at 159-60 (Valihura, J., dissenting) (citation and emphasis omitted).

example, Ebel—who admittedly conveyed his "lack of enthusiasm" for the SLC's investigation *to a key investigation target*—texted with that same Defendant *about* the investigation *during* the investigation, yet collected no text messages from anyone despite evidence proving key players (including that same Defendant) substantively discussed the Transactions via text. Further, despite the SLC Report's cataloguing of "*Potential*" [8] process weaknesses and characterization of the Transaction advisors as "independent" [9] and process-*enhancing*, Ebel (and his counsel) admit they overlooked myriad advisor conflicts. Ebel also strategically avoided engaging with SLC financial advisor Brattle until two days before deciding to terminate the Action, but weeks *after* Report drafting began.

The trial court dismissed proof of these failures by weighing evidence and making credibility determinations, expressly citing "[t]he record before me, *including live testimony of the committee member*,"[10] and citing Ebel's testimony 76 times in the Opinion's "Legal Analysis" section. [11] That contravened the indisputably-applicable Rule 56 standard.

Ebel's Answering Brief deploys three overarching strategies.

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[8] A0563.

[9] A0542.

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

[11] OB at 29-30.

First, Ebel repeatedly ignores evidence and legal authority presented in Plaintiffs' Opening Brief, conceding those points.

Second, Ebel seeks to circumvent the "strict Court review"[12] mandated under *Zapata* via a form-over-substance, check-the-box exercise based on investigation statistics. But highlighting the investigation's length, number of documents collected, and witness interviews conducted merely underscores Ebel's substantive failure to identify the advisor conflicts plaguing the Transactions.

Third, Ebel blames *Plaintiffs* for his investigational failures, rationalizing that Plaintiffs' *pre-discovery* complaint omitted advisor conflicts revealed in discovery (yet ignoring that Plaintiffs specifically raised advisor conflicts as a potential "Transaction Process Issue[]" during their one meeting with SLC's Counsel[13]), and accusing Plaintiffs of "strategically cho[osing] to wait" until his deposition to alert him to advisor conflicts through a *publicly-available* article.[14] This counter-offensive underscores Ebel's failure to identify conflicts that Plaintiffs uncovered despite repeatedly being stonewalled from the SLC's process and provided with only *1.5%* of the documentary record to which the SLC had access.

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

[13] B130.

[14] AB at 41.

Finally, unable to meet his burden, Ebel urges this Court to forsake the careful, Rule 56-based balance achieved since *Zapata* in favor of a new (but unspecified) standard that special litigation committees could activate by offering *any* witness testimony to support their termination motions. Ebel's attempt to rewrite the *Zapata* doctrine is ironic; he claims *Plaintiffs* "do not like *Zapata*."[15] Plaintiffs fully respect *Zapata*, and the delicate "balancing point"[16] it established. Ebel's arguments—and the trial court's decision—upend this balance and undermine the Rule 56-based "strict Court review"[17] mandated by this Court's jurisprudence.

[15] AB at 3.

[16] *Zapata*, 430 A.2d at 786-87.

[17] *Id.* at 788; *accord In re Columbia Pipeline Grp., Merger Litig.*, 2023 WL 4307699, at *52 n.26 (Del. Ch. June 30, 2023) ("The [*Zapata*] standard is also reminiscent of the enhanced scrutiny courts use to examine the actions of directors engaged in a sale of a corporation or other like transactions.") (citation omitted).

ARGUMENT

I. THE COURT SHOULD REVERSE THE TRIAL COURT'S MISAPPLICATION OF THE *ZAPATA* STANDARD, NOT ADOPT A NEW STANDARD

A. THE TRIAL COURT CONTRAVENED *ZAPATA*

As this Court has unequivocally held, "*Zapata*'s first prong is subject to a summary judgment standard...."[18] Ebel concedes that "[t]he Court applies a summary judgment standard" to his termination motion,[19] and *Zapata*'s first prong requires him to "meet the normal burden under Rule 56 that there is no genuine issue as to any material fact and that the [SLC] is entitled to dismiss[al] as a matter of law."[20]

Nor does Ebel dispute that under Rule 56, 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" dispute,[21] and "[i]f the matter depends to any material extent upon a determination of credibility, summary judgment is

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[18] *Diep*, 280 A.3d at 149 (citation omitted).

[19] A0287.

[20] AB at 23-24 (quoting *Zapata*, 430 A.2d at 788).

[21] *AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005) (emphasis added).

inappropriate."[22] Far from refuting Plaintiffs' showing[23] that the trial court contravened those principles, Ebel concedes the trial court "weighed" his testimony amongst the evidence[24] and made "credibility determinations."[25] Indeed, in excusing the investigation's "flaws," the trial court invoked "the record before me, *including live testimony of the committee member*,"[26] and cited Ebel's testimony 76 times in the "Legal Analysis" section alone.[27] These concessions compel the conclusion that the trial court reversibly erred by contravening Rule 56.[28]

Ebel argues Plaintiffs waived their right to appeal this issue by not fairly presenting it below.[29] False. Plaintiffs repeatedly invoked the Rule 56 standard below,[30] and could not have predicted—or preemptively challenged—the Rule 56-

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

[23] *See, e.g.*, OB at 28-39.

[24] AB at 22.

[25] *Id.* at 28.

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

[27] OB at 29-30.

[28] Because the trial court *erroneously* weighed evidence and made credibility determinations, Ebel's attempted invocation of the standard of review for properly-made *post-trial* testimony-based findings fails. *See* AB at 23, 37, 44 & 48 (citing *CDX Hldgs., Inc. v. Fox*, 141 A.3d 1037, 1041 (Del. 2016)).

[29] AB at 3.

[30] *See, e.g.*, A0829-30.

based errors in the trial court's post-hearing opinion. Ebel's related contention that Plaintiffs waived this issue by "tacitly acced[ing] to Mr. Ebel's testimony"[31] fails because the trial court erred not in *permitting* the testimony, but in subsequently breaching Rule 56 based on that testimony. And Ebel's strawman that Plaintiffs "ask this Court to hamstring the Court of Chancery and prevent it from relying on live testimony"[32] ignores that, as with deposition testimony, Rule 56 does not preclude the trial court from relying on live testimony provided it does not weigh evidence or make credibility determinations.

Finally, Ebel proposes a new paradigm whereby special litigation committees can supplant the Rule 56-based *Zapata* inquiry by injecting live witness testimony into a termination hearing. Acknowledging the novelty of his proposed rule,[33] Ebel cites *dicta* from a *Zapata* footnote citing a lone 1979 Ninth Circuit opinion.[34] This footnote—which no court has referenced in the 42 years since—stated that the Court "d[id] not foreclose a discretionary trial of factual issues but that issue [wa]s not

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[31] AB at 28.

[32] *Id.* at 26.

[33] *Id.* at 25 ("The SLC has not identified any appeal from a *Zapata* case involving live testimony. Accordingly, this Court has not yet defined the contours of the Court of Chancery's consideration of live testimony in this context.").

[34] AB at 24 & n.6 (citing *Zapata*, 430 A.2d at 788 n.15 and *Lewis v. Anderson*, 615 F.2d 778 (9th Cir. 1979)).

presented in this appeal."[35] But there was no "trial of factual issues" here. Rather, despite acknowledging "SLCs rarely present live testimony in support of motions to terminate,"[36] Ebel proactively[37] testified to bolster his motion and seek to justify clear investigation failures. Hence, Ebel's proposed rule is untethered from the footnoted *dicta* on which it relies.

Ebel's proposed rule would also upend decades of *Zapata* jurisprudence. His pronouncement that his rule would "preserve the proper *Zapata* balance" [38] disregards that special litigation committees could escape *Zapata*'*s* Rule 56-based "strict Court review"[39] merely by offering *any* testimony to support their termination motion. This would undermine the delicate "balancing point"[40] achieved by—and since—*Zapata*.

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[35] *Zapata*, 430 A.2d at 788 n.15.

[36] AB at 25.

[37] *See, e.g.*, *id.* at 19.

[38] *Id.* at 27.

[39] *Zapata*, 430 A.2d at 788; *accord Columbia Pipeline*, 2023 WL 4307699, at *52.

[40] *Zapata*, 430 A.2d at 786-87.

B. THE TRIAL COURT EXCUSED EBEL'S BACKCHANNELING IN CONTRAVENTION OF RULE 56

During his investigation, Ebel undisputedly communicated with investigation target Simonelli regarding the investigation. The trial court acknowledged such communications should be a "null set"[41] and at least some "should not have occurred."[42] Ebel does not dispute that the trial court cited his testimony *44* times in the section regarding these communications and concedes that "[i]n three places, the opinion calls out [his] credibility."[43] By excusing these communications based on evidence-weighing and credibility determinations, the trial court contravened the *Zapata* standard and reversibly erred.

Ebel mischaracterizes Plaintiffs' position as seeking a ruling that "***any*** communication between an SLC member and a defendant requires the Court of Chancery to deny a motion to terminate."[44] Not so. Established Delaware law—which the trial court acknowledged—prohibited Ebel's communications with Simonelli because "communications from the defendants to the [SLC] *with respect*

[41] Op. at 33 n.162 (citation omitted).

[42] *Id.* at 32-33.

[43] AB at 28.

[44] *Id.* at 31.

to the committee's work should be a null set."[45] As detailed in Plaintiffs' Opening Brief,[46] Ebel undisputedly—and repeatedly—engaged in private communications with Simonelli "with respect to the committee's work" during the investigation.[47]

Unable to verify Ebel's ever-shifting claims regarding the substance of these documented improper communications (and the *undocumented* oral communications reflected therein),[48] the trial court could only find that Ebel met his burden to show the absence of a material factual dispute by deeming his self-serving testimony credible. That constitutes legal error. "If the SLC process is to have any sanctity and credibility in dismissing claims simply by having a committee investigate them, the SLC's independence must be above reproach."[49] To that end, "the 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

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[45] Op. at 33 n.162 (quoting *In re Primedia Deriv. Litig.*, C.A. No. 1808-VCL, at 54 (Del. Ch. May 12, 2008) (TRANSCRIPT) (alterations omitted)).

[46] OB at 22-25.

[47] These known communications also raise the question how many *other* times Ebel spoke with Simonelli—or any other investigation target(s)—about the investigation *without* such written documentation.

[48] OB at 23-24.

[49] *Diep*, 280 A.3d at 175 (Valihura, J., dissenting).

that the committee can act with integrity and objectivity."[50] Ebel's back-channel communications with Simonelli undermine any such confidence.

Ebel cannot explain why he communicated directly with Simonelli about substantive SLC matters outside formal Board meetings and the presence of SLC Counsel—*i.e.*, where those matters could—and should—have been addressed.[51] Further, Ebel's repeated SLC-related communications with his investigation target starkly contrast with Ebel's self-imposed moratorium on communicating *with his own financial advisor* until two days before formally issuing his termination decision.

Ebel's reliance on *Diep* is unavailing.[52] *Diep* involved limited conclusory statements by a director *before* the multi-member special litigation committee was even formed,[53] *not* communications concerning "the committee's work."[54]

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[50] *Id*. at 152 (citation and alterations omitted) (emphasis added).

[51] AB at 29-30 (referencing instances in which Ebel communicated with SLC Counsel about potential SLC expansion).

[52] AB at 31-35.

[53] *See Diep*, 280 A.3d at 143-144, 147. Further, the communications were analyzed solely to determine whether committee members had prejudged the litigation. *Id.*

[54] *Primedia*, C.A. No. 1808-VCL, Tr. at 54.

Finally, Ebel argues that notwithstanding any reversible error, this Court should affirm the trial court's excusal of the communications because their "context and plain language…are clear."[55] This argument transparently seeks improper, counterfactual inferences *against* Plaintiffs. Despite acknowledging there was *no reason* to have such communications with Simonelli,[56] for at least one improper communication Ebel testified that he could not definitively say what Simonelli wanted to talk about.[57] Relying on Ebel's "credibility" to excuse admittedly improper communications is thus highly problematic.

Ebel acknowledges that several challenged communications "address the potential expansion of the SLC."[58] As explained in Plaintiffs' Opening Brief,[59] it was highly improper for Ebel to privately discuss *with his investigation target* whether, when, or with whom to expand the SLC. Thus, Ebel's attempt to equate his conduct to "in-house counsel asking an HR employee about the start date for a new legal employee"[60] borders on absurdity. And in a quintessential example of

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[55] AB at 29; *see also id.* at 28-34.

[56] A2351.

[57] A2355.

[58] *Id.* at 29.

[59] OB at 37.

[60] AB at 32.

circularity, Ebel cites—and credits—his own hearing testimony to argue he did not "discuss[] more than logistics with Mr. Simonelli."[61] The paper record supports no such conclusion, and this Court should reject Ebel's request for that counterfactual and legally improper inference.

Further, Ebel's discussion of his April 8 email and June 30 text message exchanges with Simonelli fails to refute the arguments in Plaintiffs' Opening Brief, and seeks legally improper inferences.[62]

In sum, Ebel fails to meet his burden to demonstrate the absence of a material factual dispute.

[61] *Id.* at 31 (citing A2034-36).

[62] *Compare* AB at 32-34 to OB at 33-34 & 37-39.

II. THE TRIAL COURT ERRONEOUSLY FOUND NO MATERIAL FACTUAL DISPUTE REGARDING EBEL'S FAILURE TO ADEQUATELY INVESTIGATE ADVISOR CONFLICTS

The trial court reversibly erred in finding no material factual dispute regarding Ebel's "unfortunate"[63] failure to adequately investigate Transaction advisor conflicts. Ebel's attempts to reframe his investigation as reasonable fail.

A. THE RECORD CONFIRMS EBEL'S INADEQUATE INVESTIGATION

Plaintiffs' Opening Brief established that (i) Lazard, JPM, and DPW had apparent, concurrent conflicts;[64] (ii) Ebel failed to identify or address *any* such conflict—and instead deemed the advisors "independent" and process-*enhancing*—within the Report, which "wouldn't have intentionally omitted...potential weaknesses [Ebel] identified"[65]; and (iii) the SLC failed to identify those conflicts because it unreasonably failed to use evidence of conflicts with witnesses, and to follow up on non-answers and self-serving answers from witnesses.[66]

At the hearing, Ebel testified that he recognized the importance of having independent advisors, and that it would not have been reasonable to engage such

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[63] Op. at 56.

[64] OB at 9-11.

[65] *Id.* at 22, 41, 47-48.

[66] *Id.* at 40-47.

advisors without vetting them for conflicts.[67] He also testified that, just as it was important for the SLC's advisors to be independent, it was important for BHGE's advisors on the underlying Transaction to be conflict-free.[68]

Yet, Ebel simultaneously acknowledged *both* the existence of the Transaction advisor conflicts *and* that he and his counsel failed to identify them,[69] attributing their failures to witnesses not providing "perfect information."[70] Ebel's counsel stated the Report omitted certain advisor conflicts because "we asked these witnesses about the conflicts and we got the answers that we did, [so] we did not identify this as a weakness in the process. So when we did list the weaknesses in the process, we did not identify these conflicting representations by Lazard."[71]

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[67] A2358.

[68] *See* A2360.

[69] *See, e.g.*, A2405 (SLC Counsel: "Both of the Lazard interviewees were asked about Lazard's ties to GE. Are we aware of more ties now? Yes."); A2408 (SLC Counsel: "And, again, would it have been better had we known more about these Lazard conflicts? Sure.").

[70] A2403 (SLC Counsel: "So the suggestion that we never focused on it, we never asked about it is just factually incorrect. We did. We didn't get perfect information….").

[71] A2406.

Ebel now asserts he "adequately investigated potential advisor conflicts,"[72] citing certain documents and interview questions.[73] But his brief sidesteps the obvious and critical question: how could Ebel's "reasonable investigation" overlook myriad conflicts that *Plaintiffs* identified through a few simple Google searches and access to just 1.5% of the documents, and with no involvement in witness interviews?

The answer lies in the investigation's inadequacy, as confirmed by Ebel's testimony:

> Q. Did the SLC do *anything* to vet [JPM's] independence in connection with its investigation of the 2018 transaction?
>
> A. No.[74]
>
> ***
>
> Q. And because you made no investigation of [JPM's] conflicts from its history of representing GE, nothing of that is mentioned in the report either; right?
>
> A. Correct.[75]

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[72] AB at 37.

[73] *Id.* at 38.

[74] A2054 (emphasis added).

[75] A2368. *See also, e.g.*, A2054 (assuming BHGE vetted JPM for conflicts); *id*. (failing to recall anything about JPM's process for vetting conflicts "other than saying there's a process" and admitting he did not know whether that process was even followed); *id.* (admitting unfamiliarity with GE and JPM's pre-transaction relationship); A2055 (not knowing JPM's fees from GE as of 2018); A0256

Ebel's hearing testimony corroborated these failures.[76] While Ebel accuses Plaintiffs of "cherry-pick[ing] questions from [his] deposition to pretend the SLC made no attempt to investigate advisor conflicts,"[77] he tellingly avoids addressing the cited testimony—or his corroborative hearing testimony—and provides no counter-citations.[78]

Standing alone, Ebel's testimony—and failure to identify *any* advisor conflict (not one!) in the SLC's 320-page Report—creates a disputed material fact issue concerning his investigation's reasonableness.

B. EBEL'S *POST HOC* RATIONALIZATIONS FAIL

Ebel now seeks to justify his investigational failures by suggesting his overlooked conflicts were merely "***potential***" and therefore irrelevant.[79] This contradicts the record.

(unaware of JPM's nearly $700M in GE fees); A2060 (unaware of Lazard's concurrent conflict and whether the Conflicts Committee knew of it); A2057 (no follow-up about the extent of Lazard's conflict and no inquiry regarding Lazard's conflict review process); A2058 (not knowing if Lazard disclosed prior GE engagements); A2059 (neither Lazard witness offered conflict review process insights).

[76] *See, e.g.*, A2364-68 (reiterating JPM-related deposition testimony); A2368-69 (same for Lazard).

[77] AB at 38.

[78] *Id.*

[79] AB at 41.

Ebel admitted that JPM's ~$700M in fees from GE—of which he was unaware—"would have been something material."[80] Further, Ebel says he "*assumed*" there were advisor conflicts,[81] and acknowledges that advisor conflicts influenced negotiations.[82] And even the 1.5% of the documentary record Ebel provided to Plaintiffs refutes his claim that the conflicts were irrelevant:

- A GE document establishes that JPM received ~$247M in fees from GE during 2016-2018, including *~$150M in 2018 alone*, and confirms JPM's status as "[o]ne of [GE's] most significant bank relationships" and JPM's ongoing involvement in "lucrative [GE] mandates[.]" This document was not discussed in any interview or the Report;[83]

- Another GE document—again not discussed in any interview or the Report—confirms GE's relationship with JPM was "on firm footing," with "JPM comfortable with [at least seven] credit and mandated roles";[84] and

- A BHGE in-house counsel email states, "*[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*

[80] A2368 (Q. "If [JPM] had disclosed to you that they had earned…almost $700 million of fees from GE, that would have been something material to put in your report—in the interview summary; right?" A. "Correct.").

[81] AB at 39; *see also id.* at 42 ("SLC expected connections between GE and DPW.").

[82] *Id.* at 42 ("One document on which Plaintiffs rely shows that BGHE took DPW's conflicts into account in negotiations.").

[83] A1079-82.

[84] A1077-78.

GE."[85] This email was omitted from the Report and only raised during *BHGE* employee Nicola Jannis's interview.[86]

Rather than using these documents to investigate the materiality of the conflicts reflected therein, Ebel (i) only showed *one* of the documents to *one* witness, and sent it to him—with every other potential exhibit—*before* his unsworn interview;[87] and (ii) narrowly focused interview questions on the advisors' conflict processes[88] and views on conflicts.[89] Ebel and his counsel have tacitly recognized that approach was inadequate.[90]

Ebel also fails to justify his failure to identify conflicts evidenced by news articles discoverable through basic Google searches. For instance:

- An October 2018 *Financial Times* article stated JPM's relationship with GE "runs [the] deepest [amongst investment banks], *dating back to 1892*," and highlighted JPM's nearly *$700M* in fees in 2001-2018, the highest GE paid to *any* investment bank;[91] and

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[85] A1083-84 (emphasis added).

[86] A1646-47.

[87] A2022; A2375-77.

[88] *See, e.g.*, A2110; *see also* A2054.

[89] *See, e.g.*, A1645 (Jannis stating he had "no concerns" about JPM).

[90] A2404 (SLC Counsel: "And what he said was, we didn't think we had a conflict—*of course, they never do*...") (emphasis added); AB at 27 (recognizing the trial court's tendency to prioritize documentary evidence over "self-interested testimony").

[91] A1071-76.

- A June 2019 *Axios* article disclosed that Lazard advised a GE affiliate *while advising the Conflicts Committee on the Transactions*.[92]

Despite otherwise trumpeting his investigation's purported comprehensiveness,[93] Ebel blames Plaintiffs for his failure to uncover these conflicts, even accusing Plaintiffs of "strategically cho[osing] to wait until [his] deposition" to flag the above-referenced *publicly-available Financial Times* article.[94] But Plaintiffs filed their complaint without the benefit of *any* discovery, specifically flagged potential advisor conflicts in their *only* meeting with SLC's Counsel,[95] and repeatedly—but unsuccessfully—requested inclusion in the SLC's process. Plaintiffs never imagined Ebel's nine-month investigation would overlook conflicts publicly reported by the mainstream press.

Ebel's rationalization that *every* advisor conflict missing from his Report was not an "actual" conflict contradicts the record. Ebel simply missed them given his inadequate investigation. Consequently, it was *impossible* for Ebel to reasonably

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[92] A1583-92.

[93] *See, e.g.*, AB at 33 (citing statistics); *id.* at 5 ("The SLC investigated the issue anyway.").

[94] *Id.* at 41.

[95] *Compare* AB at 38 ("[D]uring their meeting with the SLC's Counsel, Plaintiffs and their counsel never identified potential advisor conflicts as a point of concern.") *with* B130 ("Conflicts Committee failed to obtain financial advice and/or fairness opinion from independent financial advisor?").

assess their materiality. Ultimately, however, "the question is not whether there were disputed issues of material fact about [a] merits-based issue[]," but rather "whether disputed issues of material fact were raised about the scope of the investigation and the reasonableness of the SLC's conclusions."[96] Thus, the dispositive question is not each advisor conflict's precise materiality, but whether Ebel met *his* burden to prove the absence of any material factual dispute regarding his investigation's adequacy. The trial court erred in finding he did.

[96] *Diep*, 280 A.3d at 155.

III. EBEL'S UNREASONABLE DECISIONS CONCERNING EVIDENCE COLLECTION RAISED MATERIAL FACTUAL DISPUTES

Ebel neglected to "explor[e] all relevant facts *and sources of information* that bear on the central allegations."[97] Specifically, Ebel failed to collect (i) *any* text messages, despite his text message communications with lead BHGE negotiator Simonelli *during the SLC investigation* and evidence proving that key players—including Simonelli—texted regarding the Transactions; and (ii) any emails from dual-fiduciary and FCAC chair Mulva. Ebel's Answering Brief ignores Plaintiffs' authorities, relies on inapposite decisions, and contradicts the record.

A. TEXT MESSAGES

Ebel seeks to excuse his failure to collect *any* text messages by claiming, "[t]here is no reason to think text messages would have revealed material information regarding the negotiations beyond what was in the 111,000 documents the SLC's Counsel reviewed."[98] Wrong. Ebel ignores both that he knew from his own texts with Simonelli that Simonelli texted regarding BHGE business[99] and that

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[97] Op. at 44 (citation omitted) (emphasis added). Ebel stresses the phrase "that bear on the central allegations," insinuating Plaintiffs misattributed the quote to *Zapata*. AB at 45. False. *See* OB at 49 (quoting full passage and citing Opinion and *London v. Tyrell*, 2010 WL 877528 (Del. Ch. Mar. 11, 2010)).

[98] AB at 46.

[99] A1629.

even the 1.5% of the documentary record produced to Plaintiffs *proves* the existence of substantive texting concerning Transaction-related negotiations.[100] Ebel's assertion is also fatally circular. He had "no reason to think" the uncollected texts were relevant because he never checked. He did not even conduct keyword searches in the emails to identify (additional) evidence of substantive texting.[101]

Ebel also ignores Plaintiffs' authorities highlighting that text message production is "presumptively always appropriate" because "[i]t's how people communicate," rendering texts a potent source "of probative information...."[102]

Ebel likewise ignores *Lao v. Dalian Wanda Group*, where the special litigation committee "failed to identify [the CEO's] WeChat messages as a relevant source of documents, despite those documents becoming a key aspect of its report" after the plaintiff pressed for their collection.[103] This failure was "troubling," "reflect[ed] poorly on the SLC's diligence,"[104] and "cast doubt on the adequacy of

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[100] A2371-73.

[101] A2373.

[102] *See* OB at 50 & n.215; *see also, e.g.*, *In re Madison Square Garden Ent. Corp. S'holder Litig.*, C.A. No. 2021-0468-KSJM, at 102 (Del. Ch. Jan. 17, 2023) (TRANSCRIPT) (granting motion to compel where "the key information came to light in the form of a late-produced text message thread").

[103] C.A. No. 2019-0303-JTL, at 15 (Del. Ch. Nov. 30, 2022) (TRANSCRIPT).

[104] *Id.* at 21.

the SLC's investigation."[105] Ebel's failure is significantly *more* severe given (i) the evidence—and Ebel's own knowledge—that key players texted regarding the Transactions; and (ii) that texts are far more ubiquitous than WeChat messages.

Ignoring *Lao* and Plaintiffs' other relevant authorities,[106] Ebel diverts the Court to irrelevant cases. He cites six that do not address the failure to collect an entire *category* of evidence,[107] and two focusing on limitations regarding a *plaintiff's* discovery into a special litigation committee's investigation rather than the investigation itself.[108]

Ebel cites certain "factors" purportedly considered in electing to forgo this standard and vital evidentiary source: (i) the existence of email discovery; (ii) certain (unspecified) Europe-based custodians; and (iii) his "assessment of the likelihood substantive text messages existed and would affect the SLC's evaluation."[109] These routine and/or ancillary considerations cannot satisfy Ebel's burden to show his investigation of a multi-billion-dollar corporation was "reasonable" despite

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[105] *Id.* at 15.

[106] Ebel ignores all 10 Court of Chancery decisions cited in OB 49-55.

[107] AB at 45 n.14.

[108] *Id.* at 45-46.

[109] *Id*. at 44-45.

knowingly forgoing text message evidence. He possessed concrete proof that relevant and substantive text messages existed but neglected even to investigate their extent or volume. Finally, Ebel's lamentation regarding "the short time [he] had to complete [hi]s investigation"[110] is irreconcilable with the investigation's *nine-month* duration.[111]

B. MULVA'S EMAILS

Likewise, Ebel's failure to collect emails from Mulva raised a material factual dispute regarding the good faith and reasonableness of Ebel's investigation. Plaintiffs are not "ask[ing] this Court to mandate a playbook in response to custodians who delete documents and refuse to answer certain questions."[112] Rather, Plaintiffs ask this Court—consistent with the summary judgment standard—to find that Ebel's failure prevents him from meeting *his* burden to establish the requisite "full vigor" [113] and that he "acted in good faith and conducted a thorough investigation."[114]

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[110] *Id*. at 45.

[111] *Id*. at 2.

[112] AB at 46.

[113] *In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 941 (Del. Ch. 2003).

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

C. UNDERMINING THE UNSWORN INTERVIEWS

Ebel's failure to adhere to baseline discovery practices also compromised the interviews and, consequently, the reasonableness of his investigation.

Ebel admits furnishing all potential exhibits to interviewees *before* their *unsworn* interviews[115] and permitting them to share these exhibits with counsel and formulate answers beforehand.[116] No proficient attorney deposing a witness would entertain such a procedure.

Ebel's explanation further indicts his investigation. He claims the procedure ensured interviewees could reference documents "in the event of a screen-sharing glitch."[117] Such concerns are routinely resolved through various means that *do not* compromise the process, like sending digital and/or hard copy exhibits to the witness's counsel under the condition that they are not accessed until the deposition. Ebel also claims he intended to "let interviewees refresh their recollection and provide more detailed explanations" because he did not "assume interviewees were malefactors who would use the documents to concoct fabrications."[118] In essence,

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[115] A2375; A2022.

[116] A2376-77.

[117] AB at 47.

[118] *Id.*

Ebel conducted his investigation as a cooperative endeavor, rather than an arm's-length investigative process involving named defendants in active litigation.

That underscores the issue. A single-member SLC whose investigation must be "above reproach" does not meet his "unyielding standards of diligence and independence"[119] by previewing questions ahead of unsworn interviews and presuming the best intentions of witnesses facing potentially significant liability.

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

IV. EBEL'S STRATEGIC INSULATION FROM HIS FINANCIAL ADVISOR RAISED MATERIAL FACTUAL DISPUTES

Ebel's Answering Brief (i) mischaracterizes Plaintiffs' position as claiming special litigation committees may *never* rely on advisors; and (ii) focuses upon the absence of "draft SLC reports."[120] That significantly misconstrues Plaintiffs' argument.

Plaintiffs do not contend that Ebel was prohibited from relying on legal or financial advisors.[121] Rather, the issue is Ebel's strategic decision to avoid any direct interaction with his chosen financial advisor (Brattle) in order to cloak all of Brattle's financial analysis and work in privilege. That decision raised a material fact issue as to Ebel's good faith and the reasonableness of Brattle's conclusions blindly relied upon by Ebel to support his decision to terminate the Action. Stated more simply, there is no evidence from which to evaluate whether Brattle's process and analysis were sound and reliable. Having elected to cloak *all* of Brattle's work in

[120] AB at 51.

[121] Indeed, given that Ebel retained Brattle two-and-a-half months *after* the SLC's interviews began, he might have been well-served to engage a financial advisor significantly earlier. *Compare* AB at 49 (Brattle hired on May 7, 2020) *with* A0664-A0676 (nearly half of SLC interviews were conducted between February and April 2020).

privilege[122]—including all of Brattle's communications, workpapers, financial analyses, *and* all Report drafts—Ebel cannot meet *his* burden to prove that the investigation was reasonable.

Ebel does not dispute he completely insulated himself from Brattle and never requested to review any Brattle work product.[123] Instead, he claims his decision to rely blindly on the SLC's advisors was reasonable. Ebel's decision to entirely abdicate any responsibility with respect to Brattle's work—including discussing it with Brattle, reviewing the work product, or otherwise ensuring that what Brattle was doing was appropriate—creates, at minimum, a material factual dispute.[124]

Further, Ebel wants the Court to accept that relying on Brattle's advice was reasonable, yet refuses to disclose that advice or any of its underlying analysis.[125]

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[122] *See, e.g.*, A1928-1929 (counsel instructing Brattle's Austin-Smith not to answer questions regarding approach to providing analyses to Ebel).

[123] As Brattle's Hutchings testified when asked why Brattle provided no work product to Ebel: "I guess the SLC didn't ask...." A1832.

[124] *See, e.g.*, *In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 290 (Del. Ch. 2003) (finding that director's ostrich-like conduct was either "not in good faith" or "involve[d] intentional misconduct) (citation omitted).

[125] The SLC maintains that "Brattle's communications with the SLC's Counsel fell outside the scope of *Zapata* discovery. They were also work product." *See* AB at 50 n.16.

This creates a classic "sword and shield" problem, and is thus improper.[126] Ebel's assertion of privilege over all Brattle communications and work product forecloses his ability to meet his burden.

Ebel relies on *Kikis v. McRoberts*[127] for the proposition that he was not required to "double-check" the expert's analysis.[128] But the issue in *Kikis* was merely that the special litigation committee could not identify specific companies used in a market analysis.[129] In contrast, Ebel strategically avoided *all* interaction with the financial expert until two days before issuing his formal termination decision. *Katell v. Morgan Stanley Group*[130] is equally inapposite. Whereas in *Katell* there was no basis to question the expert's work, Plaintiffs here identified several material issues with Brattle's approach and analysis.[131] For example, Brattle used a frame of reference to evaluate the Transactions' financial fairness that was

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[126] *See Sealy Mattress Co. of N.J., Inc. v. Sealy, Inc.*, 1987 WL 12500, at *6 (Del. Ch. June 19, 1987) ("[A] party cannot take a position in litigation and then erect the attorney-client privilege in order to shield itself from discovery by an adverse party who challenges that position.").

[127] C.A. No. 9654-CB (Del. Ch. May 19, 2016) (TRANSCRIPT).

[128] AB at 50.

[129] OB at 58 n.245.

[130] 1995 WL 376952, at *10 (Del. Ch. June 15, 1995).

[131] *See, e.g.*, OB at 58.

inconsistent[132] with (i) Plaintiffs' claims, which the SLC was tasked with evaluating; and (ii) how the Transactions were *contemporaneously* viewed, analyzed, and publicly disclosed.[133] Ebel even admitted that the lone document cited to support Brattle's frame of reference was commissioned by *GE* and fed to lead BHGE negotiator—and GE loyalist—Simonelli *as a "negotiating tool"* [134] with the instruction: "*I trust this will do what you need it to do with the [BHGE] Board*."[135]

Ebel's strategic decision to shield Brattle's analysis from scrutiny raises material fact issues regarding his approach and prevents him from satisfying his burden to show that blindly relying on Brattle was reasonable.

[132] The SLC contends Plaintiffs merely "disagree[] with the SLC's conclusions." AB at 51. The SLC's conclusions were indeed wrong, but Plaintiffs' argument is—and has been—that the SLC did not meet *its* burden of demonstrating a reasonable and good faith investigation.

[133] A0582; A0889.

[134] A2388.

[135] A0889 (emphasis added).

CONCLUSION

The appealed-from Order should be REVERSED.

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