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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE ORACLE CORPORATION DERIVATIVE LITIGATION	No. 139, 2024 Case Below: Court of Chancery of the State of Delaware Cons. C.A. No. 2017-0337-SG

APPELLEES' ANSWERING BRIEF

POTTER ANDERSON & CORROON LLP
Kevin R. Shannon (#3137)
Berton W. Ashman, Jr. (#4681)
1313 North Market Street
Hercules Plaza, 6th Floor
Wilmington, Delaware 19801
(302) 984-6000

Attorneys for Appellee / Non-Party-Below Special Litigation Committee of the Board of Directors of Oracle Corporation

OF COUNSEL:

Arthur H. Aufses III
Jonathan M. Wagner
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-910

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NATURE OF PROCEEDINGS

As detailed in the briefs submitted by the other parties, this case (the "Action") concerns derivative claims relating to the acquisition of NetSuite Corporation by Oracle Corporation ("Oracle" or the "Company") in 2016. Plaintiffs have appealed the Court of Chancery's May 12, 2023, post-trial Memorandum Opinion finding in favor of defendants as to those derivative claims.[1]

Plaintiffs also appealed the trial court's prior decisions, dated December 4, 2019 and July 9, 2020, denying Lead Plaintiff's attempt to obtain the witness interview memoranda ("Interview Memoranda") prepared by counsel to the Special Litigation Committee (the "SLC") created by the Oracle Board of Directors. Plaintiffs do not dispute that the Interview Memoranda are protected work product. Rather, they contend, erroneously, that they are entitled to that work product for various reasons.

After an extensive investigation and failed efforts to settle the derivative claims, the SLC determined to allow Lead Plaintiff to proceed with the derivative claims on behalf of the Company. Not surprisingly, Lead Plaintiff did not challenge

[1] On September 7, 2017, the Court of Chancery appointed plaintiff Fireman's Retirement System of St. Louis as Lead Plaintiff. B3485-486. The motions directed at the SLC that are the subject of this appeal were filed by Lead Plaintiff. Accordingly, where appropriate, and consistent with related opinions from the trial court, this brief refers to Lead Plaintiff (rather than Plaintiffs) when addressing the proceedings in the trial court.

the SLC's decision, and Lead Plaintiff was then permitted to pursue broad discovery in support of the claims. Therefore, unlike cases such as *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981), in which the court was required to evaluate a decision by a special litigation committee to terminate pending derivative claims, there was no need for any discovery relating to the SLC's investigation or its evaluation of the derivative claims.

Ignoring this reality, Lead Plaintiff sought broad discovery from the SLC and its counsel, including virtually all their privileged communications and work product. In a carefully reasoned opinion, on December 4, 2019 (Notice of Appeal Ex. A (the "12/4/19 Op.")), the trial court denied Lead Plaintiff's attempt to obtain the SLC's work product, including the Interview Memoranda. The trial court, however, required the SLC to produce all non-privileged documents it had reviewed and relied upon in reaching its conclusions that the litigation should proceed with Lead Plaintiff. Pursuant to the trial court's ruling, the SLC promptly produced approximately 600 documents to Lead Plaintiff, as well as a privilege log identifying documents withheld on privilege or work product grounds. The SLC had also previously disclosed to Lead Plaintiff the names of all persons and entities from which it had sought documents, the document requests and the specific search protocols the SLC had used, and the names of each person the SLC had interviewed as part of its investigation.

Despite this significant head start, Lead Plaintiff did not initially commence party or other discovery. Instead, Lead Plaintiff continued to focus its attention on the SLC and again sought to compel production of the SLC's work product, including the Interview Memoranda. Following briefing and argument, in its July 9, 2020 Memorandum Opinion (Notice of Appeal Ex. B (the "7/9/20 Op.")), the trial court again rejected Lead Plaintiff's attempt to obtain the Interview Memoranda, finding, *inter alia*, that Lead Plaintiff failed to meet its burden under Court of Chancery Rule 26(b)(3) to overcome the SLC's work product protection. Among other things, the trial court explained:

> The Lead Plaintiff will have the opportunity to depose almost all of the SLC's interview subjects. The Lead Plaintiff does not dispute that it will have this opportunity, nor could it. To boot, these depositions will be under oath, unlike, I presume, the SLC's witness interviews.

7/9/20 Op. at 15-16 (footnote omitted).

In the portion of this appeal relating to the SLC, Plaintiffs challenge the trial court's determination that Lead Plaintiff was not entitled to the Interview Memoranda prepared by the SLC's counsel. Plaintiffs have not appealed the trial court's related rulings, which rejected Lead Plaintiff's attempts to obtain all other SLC work product and privileged communications. This is the SLC's Answering Brief in opposition to Plaintiffs' third attempt to obtain the Interview Memoranda.

SUMMARY OF ARGUMENT

1. Denied. The trial court correctly held that Lead Plaintiff was not entitled to the SLC's work product, including the Interview Memoranda.

a. The trial court correctly held that the enhanced scrutiny applicable to special litigation committee decisions to dismiss or to authorize a settlement of derivative claims under *Zapata* did not apply to the SLC's unchallenged determination to allow the litigation to proceed with Lead Plaintiff. Accordingly, the precedent Plaintiffs rely upon, in which the court has ordered the production of interview memoranda for purposes of *Zapata* review, does not apply.

b. The trial court correctly held that the enhanced scrutiny applicable under *Zapata* did not apply to the SLC's decision not to waive work product protection with respect to its Interview Memoranda, and that the SLC's decision was appropriately left to its business judgment. Plaintiffs also have provided no basis to diverge from the analysis a trial court must typically apply to overcome the protections afforded work product under Court of Chancery Rule 26(b)(3).

c. Consistent with established Delaware law and its strong public policy in favor of mediation, the trial court correctly held that the SLC had not waived work product protection for the Interview Memoranda in

connection with its attempt to mediate a settlement of the claims with Defendants.

d. The trial court correctly held that Lead Plaintiff failed to satisfy its burden under Court of Chancery Rule 26(b)(3), which required Lead Plaintiff to establish both that it had a "substantial need" for the information and that it could not obtain the substantial equivalent without undue hardship. Here, Lead Plaintiff could depose the witnesses under oath and had access to other discovery materials. Plaintiffs' improper attempt to make a new separate argument as to Marc Hurd (who had passed away) should be rejected because it was not fairly presented below and otherwise lacks merit. *See* 7/9/20 Op. at 16 n.61 (explaining that Lead Plaintiff "failed to argue substantial need specifically regarding Hurd's … interview memoranda").

2. This Argument is not directed at the SLC.

3. This argument is not directed at the SLC.

4. This argument is not directed at the SLC.

COUNTER-STATEMENT OF FACTS

BACKGROUND FACTS RELATING TO THE SLC

Although Plaintiffs challenge the trial court's decisions relating to the SLC's work product, the Opening Brief contains very little information concerning the SLC or the trial court's analysis. Below is a brief summary of the relevant facts relating to the SLC and the trial court's opinions rejecting Lead Plaintiff's attempt to obtain the SLC's work product.[2]

A. The Oracle Board Creates The Special Litigation Committee

On March 19, 2018, the trial court denied defendants' motions to dismiss as to Larry Ellison and Safra Catz. Shortly thereafter, the court entered a Stipulation and Order that voluntarily dismissed the claims against all defendants other than Mr. Ellison and Ms. Catz. 12/4/19 Op. 17.

On May 4, 2018, Oracle's Board created the SLC. *Id.* at 18. The Board authorized the SLC to "(i) take all actions necessary to investigate, analyze and evaluate all matters relating to this lawsuit and the claims made in the action, and (ii) take any actions that the SLC deems to be in the best interests of the Company in connection with this lawsuit and any related matters." *Id.* The Board appointed the following three directors to the SLC:

[2] To avoid repetition, certain relevant facts are addressed in the Argument Section. In addition, the SLC refers to the briefs submitted by the other parties for a summary of the underlying claims and related facts.

> **William G. Parrett (Chairman).** Mr. Parrett served as the CEO of Deloitte Touche Tohmatsu from 2003 until 2007. He joined Deloitte in 1967 and served in a series of roles of increasing responsibility until his retirement in 2007. At the time of his appointment to the SLC, Mr. Parrett served as director of The Blackstone Group L.P., the Eastman Kodak Company, and Conduent.
>
> **Leon Panetta.** At the time of his appointment to the SLC, Secretary Panetta was the co-founder and Chairman of the Panetta Institute for Public Policy and served as moderator of the Leon Panetta Lecture Series, a program he created. Secretary Panetta served as United States Secretary of Defense from 2011 to 2013 and as Director of the Central Intelligence Agency from 2009 to 2011. Prior to that time, Secretary Panetta was a member of the United States House of Representatives from 1977 to 1993, served as Director of the Office of Management and Budget from 1993 to 1994, and served as former President Clinton's Chief of Staff from 1994 to 1997.
>
> **Charles W. Moorman.** At the time of his appointment to the SLC, Mr. Moorman was a senior advisor to Amtrak, where he served as president and CEO from August 2016 until January 2018. Prior to that time and until 2015, Mr. Moorman was CEO (from 2005) and Chair (from 2006) of Norfolk Southern Corporation. From 1975 to 2005, Mr. Moorman held various positions in operations, information technology, and human resources at Norfolk Southern Corporation.

B3491-493. No challenge was ever made to the independence or qualifications of the three SLC members.

Promptly following its creation, the SLC retained the law firms Kramer Levin Naftalis & Frankel LLP ("Kramer Levin") and Potter Anderson & Corroon LLP ("PAC") as its counsel. 12/4/19 Op. 18. The SLC subsequently retained a financial advisor. *Id.* at 22.

B. The SLC Conducts An Investigation And Attempts To Settle The Litigation

The SLC worked diligently to investigate and evaluate the claims raised in the Action. As reported to the trial court, among other things, the SLC collected more than one million documents from fourteen Oracle and NetSuite custodians, and also received and reviewed documents from Oracle Board members and five non-parties. B3504. In addition to reviewing documents, the SLC conducted 39 interviews. *Id.*

As the SLC was finishing its investigation, it sought to settle the claims in the Action. Therefore, on May 6, 2019, the SLC moved to extend the litigation stay to allow itself time to pursue settlement negotiations. *Id.* The trial court granted that motion, and the SLC and defendants subsequently participated in a mediation in an attempt to resolve the litigation.

C. The SLC Elects To Allow Lead Plaintiff To Litigate The Claims In The Action

By letter dated August 15, 2019 (the "SLC Letter"), the SLC's counsel advised the trial court that the mediation had not been successful and that "it appear[ed] unlikely that a settlement can be reached in the near future." 12/4/19 Op. 25-26; A1916. As the SLC Letter explained, it was "the SLC's view that the critical legal issue of whether the challenged NetSuite acquisition will be reviewed under the entire fairness standard would not likely be resolved prior to trial, thereby posing risks

to both plaintiff and defendants." A1917. In its subsequent post-trial opinion, the trial court described the SLC's reasoning as "prescient." Notice of Appeal Ex. C at 47.

The SLC Letter further stated as follows:

> After carefully considering the issues, the SLC concluded that it would not be in Oracle's best interests to seek to dismiss the derivative claims. The SLC therefore faced the choice of either pursuing the litigation itself or allowing Lead Plaintiff to proceed on behalf of the Company. After giving the matter careful consideration, the SLC determined it was in the Company's best interests to allow Lead Plaintiff (rather than the SLC) to proceed with the litigation on behalf of Oracle. The SLC, however, continues to believe that a settlement of the claims would be the best result for Oracle.

A1917. The SLC thus allowed Lead Plaintiff to proceed with the litigation on behalf of Oracle.

As the SLC subsequently explained to the trial court, following its failed efforts to negotiate a resolution:

> The SLC … had a plaintiff who expressed a view that the claims were great and it was able to litigate. It had defendants who argued with equal vigor that the claims were entirely meritless. It determined that the best option then available to the company was to allow plaintiff to litigate, defendants to defend, and the Court could decide on a full discovery record.

B3612. Lead Plaintiff raised no objection or challenge to the SLC's decision.

On October 17, 2019, Oracle's Board executed a written consent withdrawing the power and authority of the SLC to "take any actions to investigate, analyze, or evaluate matters relating to [this litigation] and the claims made in [this litigation] or (ii) take other action on behalf of [Oracle] in connection with [this litigation] or

related matters." 12/4/19 Op. 30 (alterations in original). The written consent, however, empowered the SLC to continue to address any issues concerning its attorney-client privilege or work product. *Id.*

D. Lead Plaintiff Seeks Broad Discovery From The SLC And Its Counsel

After taking over the case, Lead Plaintiff issued subpoenas to the SLC and PAC (the "Subpoenas") seeking virtually every document concerning the SLC's investigation, including the SLC's work product and privileged communications. 12/4/19 Op. 28. The Subpoenas requested, *inter alia*, "[a]ll documents and communications produced to, or obtained, reviewed, considered, created or prepared by or for the Special Litigation Committee, and all documents and communications concerning this Action or the Special Litigation Committee." *Id.* at 28-29.

Both the SLC and PAC served responses and objections to the Subpoenas in which they explained that, because the SLC permitted Lead Plaintiff to proceed with the litigation, there is "no need for either the Court or the parties to address or evaluate the SLC's independence, investigation, or determination" and thus "discovery of the SLC in this context is inappropriate and unnecessary." *Id.* at 29-30; B3513-514; B3524-525. The responses also raised the issue of privilege, asserting that the Subpoenas "improperly seek the production of privileged material, including but not limited to communications between the SLC and its counsel, work product, and mediation submissions." B3514; B3525. In addition, the SLC

explained that it was not authorized to produce to Lead Plaintiff the documents that had been produced to the SLC during its investigation, but that the Lead Plaintiff was "able to obtain the documents directly from those parties and third-parties, who in turn will have the opportunity to raise any objections or assert any privileges they may believe to be appropriate." *Id.*

E. The Court Of Chancery's December 4, 2019 Memorandum Opinion

On October 7, 2019, Lead Plaintiff filed a motion to enforce the Subpoenas against the SLC and PAC. 6/4/19 Op. 31. Again, Lead Plaintiff demanded that the SLC and PAC produce virtually every document they possessed relating to the SLC investigation (including privileged communications and attorney work product), as well as every document that was produced to the SLC regardless of any claim of privilege or relevance by the producing party. The SLC and PAC opposed Lead Plaintiff's motion.

In addition, certain defendants (including nominal defendant Oracle) filed motions for protective orders with respect to documents they had produced to the SLC and PAC. *Id.* The SLC advised the trial court that, subject to the trial court's resolution of those motions, it would promptly produce the documents previously produced to it, and that it would make the "same information available to all parties." 11/7/19 Tr. at 65-66.

On numerous grounds, the SLC opposed Lead Plaintiff's attempt to obtain its own privileged information and work product. On a practical level, the SLC noted as follows:

> [F]or good reasons, the SLC determined that its analysis is not relevant, it's not admissible and it's not going to share with defendants, is not going to share with plaintiffs. This case is not going to be about what the SLC thought. … Plaintiff asserted they had the expertise and ability to litigate the case, and that is what they should do.

Id. at 64-65.

In its December 4, 2019 Memorandum Opinion, the Court of Chancery addressed the numerous pending motions relating to Lead Plaintiff's attempt to obtain documents from the SLC and its counsel. In a carefully reasoned analysis, the trial court recognized that:

> Allowing complete discovery of ***all*** documents provided to or created by a special litigation committee in situations such as these, as requested by the Subpoenas, could chill candor and access and limit the effectiveness of special litigation committees going forward.

12/4/19 Op. 46 (emphasis in original). The trial court nevertheless concluded that the "SLC enhanced the value of the derivative claims through its evaluation and investigations of the claims," which supported a more limited production of documents in this circumstance. *Id.* at 42-45. After balancing the competing interests and relevant law, the trial court ruled as follows:

> … the SLC itself necessarily, through counsel, separated, presumably, the ore of relevance from the overburden of available but irrelevant material. Those documents so screened, or created therefrom, form a handy proxy

> for identifying relevant documents. I find that the Lead Plaintiff is presumptively entitled to the production of all documents and communications actually reviewed and relied upon by the SLC or its counsel in forming its conclusions that (i) it would not be in Oracle's best interests to seek to dismiss the derivative claims and (ii) it was in Oracle's best interests to allow the Lead Plaintiff (rather than the SLC) to proceed with the litigation on behalf of Oracle. The SLC and its counsel are in the best position to identify which documents and communications fit this criteria and must therefore identify and produce such documents to the Lead Plaintiff. This universe of documents to which the Lead Plaintiff is presumptively entitled is subject to [the SLC's privilege objections].

Id. at 47-48.

With regard to the SLC's privilege objections, the trial court recognized that the "SLC is the holder of the attorney-client privilege, and controls the work product protection, of its own documents and communications." *Id.* at 59. After considering Lead Plaintiff's unusual challenges to the SLC's privilege claims (*e.g.*, the common-interest doctrine and a purported "efficiency exception"), the trial court ruled that Lead Plaintiff "lacks a legally cognizable basis to compel production of the SLC's documents and communications subject to privilege and work product protection at this time." *Id.* at 61. The Court required that the SLC produce a privilege log in connection with its production of the documents referenced above. *Id.*

Finally, the trial court also rejected Lead Plaintiff's demand that the SLC produce mediation materials. 12/4/19 Op. 61-62.

F. The Court Of Chancery's July 9, 2020 Memorandum Opinion

As required by the December 4, 2019 Memorandum Opinion, the SLC produced approximately 600 documents that it had reviewed and relied upon in connection with its investigation and evaluation of the claims asserted in the Action. B3683. Specifically, the SLC produced:

> (i) all documents produced to the SLC and cited in any draft SLC report reviewed by the Committee (other than documents concerning the independence of the SLC members themselves), (ii) all documents shown to witnesses during SLC interviews (other than during the interviews of the SLC members concerning their qualifications to serve on the SLC), (iii) all documents produced to the SLC and cited in any PowerPoint presentations to the SLC by either the SLC's counsel or the SLC's financial adviser, and (iv) all documents produced to the SLC that the SLC had exchanged with Defendants in mediation.

A363-64. Lead Plaintiff did not dispute that the SLC's production fully complied with the trial court's instructions. The SLC had also previously disclosed to Lead Plaintiff the names of all persons and entities from which it had sought documents, its document requests and the specific search protocols it had used, and the names of each person it had interviewed as part of its investigation. B3551-558.

Along with its production, the SLC provided a log listing 57 documents withheld from production on privilege or work product grounds (the "Privilege Log"). A364; B3655-662. The Privilege Log listed among other documents: (i) the Interview Memoranda prepared by counsel from their notes and reflecting counsel's impressions and recollections; (ii) a draft report prepared by SLC counsel and

provided to SLC members; (iii) PowerPoint presentations prepared by the SLC's counsel or financial expert at counsel's direction; and (iv) damages models prepared by the expert, also at counsel's direction. *Id.* On February 27, 2020, after receiving the documents and the SLC's privilege log, Lead Plaintiff deposed SLC Chair William Parrett. A364-65.

On April 2, 2020, Lead Plaintiff filed a motion to compel the production of forty-two of the fifty-seven items on the Privilege Log. 7/9/20 Op. 9-10. Relevant for the purposes of this appeal, Lead Plaintiff sought to compel the production of all Interview Memoranda prepared by the SLC's counsel and listed on the Privilege Log. *Id.* With regard to the Interview Memoranda, the SLC had submitted an affidavit from a lawyer at Kramer Levin stating, in relevant part, as follows:

> My colleagues and I showed documents to interviewees during the course of those interviews. In addition, we documented in memoranda our findings, thoughts, and impressions from these interviews. Our interview memoranda reflect the information that my colleagues and I determined to record, and our selection of documents to show to witnesses likewise reflected our thought processes.

B3556-557.

In its July 9, 2020 Opinion, the Court of Chancery held that the "SLC has properly asserted work product protection; accordingly, the Motion to Compel is denied." 7/9/20 Op. 2. As more fully explained in the Argument Section, as to the Interview Memoranda (the only documents at issue in this appeal), the trial court

held that the contents of the Interview Memoranda "easily fit within the recognized bounds of work product." *Id.* at 15. The trial court further stated:

> … [T]he Lead Plaintiff has not made the required showing under Rule 26(b)(3) to obtain the Interview Memoranda because it has failed to show that it is unable without undue hardship to obtain the substantial equivalent of the Interview Memoranda by other means. The Lead Plaintiff will have the opportunity to depose almost all of the SLC's interview subjects. The Lead Plaintiff does not dispute that it will have this opportunity, nor could it. To boot, these depositions will be under oath, unlike, I presume, the SLC's witness interviews.

Id. at 15-16 (footnote omitted).

The court acknowledged Lead Plaintiff had noted that "two interview subjects—Hurd and former Oracle director Hector Garcia-Molina—have since died. However, the Lead Plaintiff has failed to argue substantial need and undue hardship specifically regarding Hurd's and Garcia-Molina's interview memoranda." *Id.* at 16 n.61. In fact, Lead Plaintiff's decision not to make a separate argument regarding the deceased witnesses was directly addressed by the trial court at the hearing on the motion:

> THE COURT: Mr. Shannon, what do you make of the distinction between those witnesses who are available to the plaintiff and those witnesses who would be poor deposition subjects because they're dead?
>
> MR. SHANNON: … There arguably is a distinction between those. And the cases make clear that the mere fact that the witness has passed away is not enough that you automatically get that witness' prior statement. You still have to satisfy Rule 26(b)(3). ***What's important here, Your Honor, is they have not made a separate argument as to those witnesses.*** They have not said, "Here's a reason why we have a substantial need as to Mr. Hurd's deposition. Here's the information

> he had that others did not have. Here's the information he had that we would not be able to get by other means."
>
> ***So, Your Honor, there very well may be a better argument that could be made for those witnesses. They have not made it. … Again, plaintiff could make that argument. But it has not.***

B3687-688 (emphasis added). Following that exchange between the court and the SLC's counsel, when Lead Plaintiff's counsel was provided the opportunity to respond to the SLC's arguments, he did not dispute that Plaintiff made no separate argument regarding Mr. Hurd, and further refrained from making any such separate argument. B3698-706.

After the issuance of the July 9, 2020 Memorandum Opinion, the SLC had no further substantive involvement in the Action.

The SLC takes no position with respect to the merits of the claims in the Action or, therefore, Plaintiffs' appeal of the Court of Chancery's May 12, 2023 Memorandum Order and March 5, 2024 Order and Final Judgment.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT LEAD PLAINTIFF WAS NOT ENTITLED TO THE SLC'S WORK PRODUCT, INCLUDING THE INTERVIEW MEMORANDA

A. QUESTION PRESENTED

Whether the trial court correctly determined that Lead Plaintiff was not entitled to Interview Memoranda prepared by the SLC's counsel? 12/4/19 Op. at 59-62; 7/9/20 Op. at 10-18.

B. SCOPE OF REVIEW

This Court reviews a trial court's discovery rulings for abuse of discretion. *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 419 (Del. 2010) (citing *Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1106 (Del. 2006)); *Swanson v. Davis*, 69 A.3d 372, 2013 WL 3155827, at *4 (Del. 2013) (TABLE) ("We review a trial court's application of discovery rules for abuse of discretion.") (citing *Hopkins v. State*, 893 A.2d 922, 927 n.5 (Del. 2006)). The Court will "review[] a trial court's application of the attorney-client privilege and work product immunity doctrine *de novo*, insofar as they involve questions of law." *Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365, 371 (Del. 2011) (citing *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 258 (Del. 1995); *King v. VeriFone Hldgs, Inc.*, 12 A.3d 1140, 1145 (Del. 2011)).

C. MERITS OF THE ARGUMENT

1. *Zapata* Discovery Was Not Required Because The SLC Did Not Seek To Dismiss The Derivative Claims

Citing several cases in which the Court of Chancery, applying *Zapata*, has ordered the production of a special litigation committee's interview notes when evaluating the committee's decision to dismiss or settle derivative claims, Plaintiffs argue that such precedent warrants the same result here. Appellants' Opening Br. ("OB") at 27-31 (citing cases). But, as the trial court rightly held, Plaintiffs' reliance on *Zapata*—and, therefore, the various similar cases they cite—is misplaced. 12/4/19 Op. at 37; 7/9/20 Op. at 25-26.

The reasoning in *Zapata* and its progeny is framed by the question the court in those cases was tasked with answering—whether a special litigation committee's ultimate decision with respect to pending derivative claims (in each of those cases, to terminate the claims either by motion to dismiss or settlement) should be respected.[3] To answer that question—and in a limited judicial abrogation of the authority granted a board and, by extension, its committee under 8 *Del. C.* § 141—

[3] *See* 7/9/20 Op. 25 ("*Zatapa's* exception from business judgment rule review applies only within its context: 'demand-excused derivative cases in which the board sets up a[] [special litigation committee] that investigates whether a derivative suit should proceed *and recommends dismissal after its investigation*.'") (quoting *London v. Tyrrell*, 2010 WL 877528, at *11 (Del. Ch. Mar. 11, 2010), with added emphasis, and also citing *Spiegel v. Buntrock*, 1988 WL 124324, at *3 (Del. Ch. Nov. 17, 1988)).

limited discovery is permitted to inquire into "the independence and good faith of the committee and the bases supporting its conclusions." *Zapata*, 430 A.2d at 788; *Kindt v. Lund*, 2001 WL 1671438, at *1-2 (Del. Ch. Dec. 14, 2001).

The logical foundation for the *Zapata* inquiry is well established. As the trial court noted in its December 4, 2019 opinion:

> In [the] typical case, the special litigation committee has considered a cause of action that a stockholder-plaintiff has proposed to pursue derivatively, and has decided—purportedly in its business judgment—that the litigation is contrary to the corporate interest. Special litigation committees, nominally independent of the conflicted board, as a practical matter may face influences that make such a determination unworthy of unreflective application of the business judgment rule. The putative derivative plaintiff, therefore, is entitled to discovery of material sufficient to test whether the special litigation committee has applied its business judgment in the best interest of the entity.

12/4/19 Op. 36-37 (*citing Zapata*, 430 A.2d at 788); *see also* 7/9/20 Op. 25 ("In such a case, the potential for divided loyalties and cryptic self-interest are plain …. [E]quity requires that a derivative plaintiff (and the court) be allowed to test whether business judgment was in fact employed ….").

The independence and good faith of the committee are therefore at issue as they bear on the deference that should be afforded the committee's decision to terminate the claims through dismissal or settlement. 12/4/19 Op. 36-37; *Zapata*, 430 A.2d at 788-89. Discovery under *Zapata* is thus targeted to address the committee's independence and good faith in reaching its decision. *Kindt*, 2001 WL 1671438, at *1 (discovery "must be focused in light of its purpose, *i.e.*, verification

of the independence and good faith of the committee" in determining to seek to dismiss the claims); *Kaplan v. Wyatt*, 484 A.2d 501, 511 (Del. Ch. 1984) (*Zapata's* "mandate contemplates only such discovery as fits the occasion"), *aff'd*, 499 A.2d 1184 (Del. 1995). Within that framework—*i.e.*, the "typical" case in which the parties must develop a record sufficient to examine the independence, good faith, and reasonableness of the committee's ultimate decision with respect to the claims—the court has held that a plaintiff's burden under Rule 26(b)(3) has been met and required the limited production of certain privileged or work product material.

This, however, is not the "typical" special litigation committee case. The SLC did not decide to terminate the claims or otherwise seek to deprive Lead Plaintiff the opportunity to pursue them on behalf of the Company. Rather, the opposite: the SLC determined to allow Lead Plaintiff to pursue the litigation. Unsurprisingly, Lead Plaintiff did not challenge the SLC's determination. Nor, therefore, did Lead Plaintiff challenge the SLC's independence and good faith in reaching that determination. As a result, the typical inquiry under *Zapata* did not apply, and discovery into the SLC's independence, good faith, and reasonableness was not relevant. 12/4/19 Op. 37 ("The Lead Plaintiff, for obvious reasons, does not challenge the business judgment of the SLC that the Lead Plaintiff should pursue the cause of action here, and *Zapata*-style discovery is unnecessary."); 7/9/20 Op. 25-26 ("*Zapata's* exception from business judgment rule review applies only within its

context …. Because this is not a decision to dismiss the Action, it is not reviewable under *Zapata*, nor is the rationale for *Zapata* scrutiny—potential divided loyalty—applicable."). And unlike the purpose of production of interview memoranda in the *Zapata* context, Lead Plaintiff sought the Interview Memoranda, despite their limited if any evidentiary value, as an aid to prosecute the underlying action. OB 39-41.

The cases Plaintiffs rely upon are thus inapposite. In each case, the committee's determination with respect to the prosecution of claims on behalf of the company was at issue.[4] Accordingly, in each case, the independence, good faith,

[4] *In re Baker Hughes, a GE Co., Deriv. Litig.*, 2023 WL 2967780 (Del. Ch. Apr. 17, 2023) (committee sought dismissal of claims); *Sandys v. Pincus*, C.A. 9512-CB (Del. Ch.) (committee sought approval of settlement of claims); *Kikis v. McRoberts*, C.A. No. 9654-CB (Del. Ch.) (committee sought approval of settlement); *Kindt*, 2001 WL 1671438 (committee sought dismissal of claims); *Electra Inv. Tr. PLC v. Crews*, 1999 WL 135239 (Del. Ch. Feb. 24, 1999) (committee sought approval of settlement); *Carlton Invs. v. TLC Beatrice Int'l Hldgs., Inc.*, 1997 WL 305829 (Del. Ch. May 30, 1997) (committee sought approval of settlement); *Zapata*, 430 A.2d 779 (committee sought dismissal). Plaintiffs also cite *Ryan v. Gifford*, 2007 WL 4259557 (Del. Ch. Nov. 30, 2007). Although the committee in *Ryan* was not technically a *Zapata* committee (because it was not empowered by the board with the authority to assert the derivative claims on behalf of the company), similar to a *Zapata* committee it was charged to investigate and recommend action with respect to the wrongdoing alleged in the derivative claims. *Id.* at *2, *3 n.2. The question before the court was whether to grant the derivative plaintiff access to privileged or work product material relevant to the committee's final recommendation to the board. *Id.* at *2-3. Determining that plaintiff had demonstrated a substantial need and undue hardship sufficient to overcome work product for that purpose, the court ordered production of interview memos, but only to the extent they reflected non-opinion work product. *Id.* at *4. Plaintiffs cite no case in which the court ordered the production of opinion work product, including under *Zapata*.

and reasonableness of the committee's judgment with respect to its decision to terminate the litigation was at issue. The court's decisions regarding discovery in each of those cases, including *Zapata* itself, were therefore premised on the need to examine the committee's decision to terminate pending derivative claims. Again, here the SLC did not decide to terminate or resolve the claims but, rather, left the claims in the hands of Lead Plaintiff, which could pursue discovery.[5]

The question therefore animating the trial court's decision with respect to the SLC's Interview Memoranda was not—as in every special litigation committee case Plaintiffs have cited—whether their production was necessary to evaluate the SLC's decision-making process. Here, the SLC's decision to allow Lead Plaintiff to litigate the claims was unchallenged. Therefore, the question for the court was simply whether Lead Plaintiff could overcome the work product protection attached to the Interview Memoranda. As explained in Section C.2 below, the trial court correctly held that Lead Plaintiff could not meet that burden.

For this reason, Plaintiffs' attempt to invoke *Zapata's* "heightened judicial scrutiny" fails. OB at 32. As Plaintiffs concede, that heightened scrutiny applies to a special litigation committee's "motion to terminate litigation" or determination that

[5] This fact provides another reason why the discovery of the work product information Lead Plaintiff sought was unnecessary: in each of the cases Plaintiffs rely upon, in which the committee sought to terminate derivative claims, there would be no further discovery relating to those claims. Here, in contrast, Plaintiffs could pursue full discovery.

"derivative claims are valuable and meritorious and should be settled for a proposed amount." *Id*. (citing cases). Again, that is not what happened in this case. Lead Plaintiff did not challenge, and the trial court was not required to evaluate, the SLC's decision to allow Lead Plaintiff to proceed with the litigation. Accordingly, enhanced scrutiny under *Zapata* was not implicated.

In this appeal, Plaintiffs challenge the SLC's determination to assert work product protection over the Interview Memoranda prepared by its counsel. Plaintiffs cite no case in which a court has found that the decision to assert privilege (as to documents that are indisputably work product) is itself subject to enhanced scrutiny. Because *Zapata* did not apply, and because Lead Plaintiff could not overcome work product protection by demonstrating the requisite need and hardship, the SLC's decision whether to voluntarily waive work product and produce the Interview Memoranda was a matter the trial court correctly determined must be left to the SLC's own business judgment. 7/9/20 Op. 10, 26.

In challenging the trial court's decision, Plaintiffs ask this Court to create new law and expand the reach of *Zapata*, arguing that *Zapata's* "animating concern … applies to any [special litigation committee] determination that impairs prosecution of a corporate claim, such as burying a trove of evidence or retaining unsuitable litigation counsel." OB at 33. Plaintiffs' reasoning is flawed for at least two reasons. First, there is no basis in the record to assert that the SLC impaired the prosecution

of the claims, including by burying evidence. To the contrary, the court found that the SLC had ***enhanced*** the value of the claims and on that basis ordered the production of the non-privileged documents the SLC relied upon in its investigation and decision to allow the Action to proceed with Lead Plaintiff. 12/4/19 Op. 1, 42-45. In addition, the factual evidence Lead Plaintiff purported to seek from the SLC (and more) was available to it via discovery in the Action.[6] And rather than "retaining unsuitable litigation counsel," the SLC allowed Lead Plaintiff's experienced counsel to pursue the claims on behalf of the Company.

Second, the rationale informing *Zapata* does not support Plaintiffs' argument. The focus of *Zapata* is a committee's ultimate decision to terminate derivative claims and whether that decision was reached independently and in good faith. Allowing discovery (including of work product and privileged communications) into any other committee decision, based on the speculation that the committee may have "impaired" the claims even when it has not sought to terminate them, would effectively give a derivative plaintiff plenary power of review over the committee's process and threaten to set aside any remaining deference to the committee's independent business judgment, in contravention of the "limited" inquiry *Zapata*

[6] As discussed below, Mr. Hurd passed away before the SLC completed its investigation. But Plaintiffs did not argue that his death created a substantial need and undue hardship with respect to the Interview Memoranda relating specifically to him. 7/9/20 Op. 16 n.61; *see infra* at Section C.2(b).

intended. *See, e.g.*, *Kindt*, 2001 WL 1671438, at *1 (describing the "limited" nature of *Zapata* review); *Kaplan*, 484 A.2d at 511 (same); *Spiegel*, 1988 WL 124324, at *3 (*Zapata* is "a narrow exception to the business judgment form of judicial review that ordinarily precludes courts from exercising substantive judgment about the wisdom or fairness of business decisions made advisedly by independent boards in good faith"). As the trial court recognized, allowing broad discovery, including access to the SLC's privileged communications and work product "in situations such as these … ***could chill candor and access and limit the effectiveness of special litigation committees going forward.***" 12/4/19 Op. 46 (emphasis added).[7]

2. Plaintiffs Did Not Meet Their Burden Under Rule 26(b)(3) To Receive The SLC's Work Product

Plaintiffs alternatively assert they were entitled to the Interview Memoranda because they "had a 'substantial need' for non-opinion work product … under Court of Chancery Rule 26(b)(3), and good cause for the same information under *Garner*." OB at 38-39. Plaintiffs' arguments are meritless.

[7] Further, as the trial court stated, "like any fiduciary decision, those of the SLC can be subject to judicial review upon a sufficient pleading." 7/9/20 Op. 26. Lead Plaintiff, however, did not attempt to assert a claim against the SLC for protecting its work product. *Id.* at 27. Accordingly, the trial court had no separate reason to second-guess the SLC's business judgment with respect to its invocation of work product protection. *Id*.

(a) Plaintiffs Did Not Establish Substantial Need Or Undue Hardship

Under Delaware law, there are two types of work product—non-opinion work product and opinion work product—each with its own standard of protection:

> A party may receive non-opinion work product when the party has a *substantial need* for the materials and the party cannot acquire a substantial equivalent of the materials by other means without *undue hardship*. A party may receive opinion work product when it is *directed to the pivotal issue* in the current litigation and the need for the information is *compelling*.

Saito v. McKesson HBOC, Inc., 2002 WL 31657622, at *11 (Del. Ch. Oct. 25, 2002, revised Nov. 13, 2002) (emphasis in original), *aff'd*, 870 A.2d 1192 (Del. 2005). Plaintiffs do not challenge the trial court's determination that the Interview Memoranda are work product. 7/9/20 Op. 11-15. And because the Interview Memoranda include and reflect the "thoughts and impressions" of the SLC's counsel (B3556-557), they constitute "opinion work product." *Saito*, 2002 WL 31657622, at *12 (opinion work product includes the "mental impressions, conclusions, opinions and legal theories of a party's attorney"). Plaintiffs do not even suggest that they can meet the additional burden to receive the SLC's opinion work product.

Moreover, as the trial court found, Lead Plaintiff did not meet the burden applicable to non-opinion work product under Rule 26(b)(3) "because it has failed to show that it is unable without undue hardship to obtain the substantial equivalent

of the Interview Memoranda by other means." 7/9/20 Op. 15-16. The logic underlying that ruling was both obvious and compelling:

> The Lead Plaintiff will have the opportunity to depose almost all of the SLC's interview subjects. The Lead Plaintiff does not dispute that it will have this opportunity, nor could it. To boot, these depositions will be under oath, unlike, I presume, the SLC's witness interviews.

Id.; *cf. Buttonwood Tree Value P'rs, L.P. v. R.L. Polk & Co., Inc.*, 2018 WL 346036, at *6 (Del. Ch. Jan. 10, 2018) (noting "[p]rivileged documents will often be useful to attorneys preparing to depose witnesses, and there is always the concern that some witnesses will be less than truthful during questioning," but allowing such an argument to overcome privilege would be "inimical to the salutary protection the privilege provides").[8]

The trial court's ruling also protects the public policy interests that work product protection generally is intended to safeguard. As the United States Supreme Court explained in its seminal decision on work product, *Hickman v. Taylor*, requiring production of interview memoranda creates unnecessary disputes and potentially:

> forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.

[8] Because Lead Plaintiff failed to make the showing necessary to obtain "non-opinion work product," the trial court held that it "need not determine whether the Interview Memoranda constitute opinion or non-opinion work product." 7/9/20 Op. 18 n.66.

329 U.S. 495, 512-13 (1947). As in *Hickman*, requiring the SLC to produce its Interview Memoranda would potentially transform the SLC's counsel into witnesses required to address unnecessary and irrelevant disputes concerning the accuracy, completeness, and characterization of the information that an attorney elected to include in the Interview Memoranda.

Plaintiffs also cite *Ryan v. Gifford*, 2007 WL 4259557, at *3 (Del. Ch. Nov. 30, 2007), to suggest that they have established "good cause" under *Garner*[9] for production of the Interview Memorandum. OB at 41. The facts presented in *Ryan* were very different than the facts here,[10] and the portion of the *Ryan* opinion Plaintiffs cite involved the waiver of "attorney-client privilege" with regard to certain alleged privileged communications. *Id.* The Court of Chancery separately analyzed whether the plaintiff met its burden to obtain protected work product (*i.e.*, certain interview notes) later in the opinion, and it did so under Rule 26(b)(3)—not *Garner*. *Ryan*, 2007 WL 425955, at *4. Here, the trial court correctly found that Lead Plaintiff failed to meet its burden under Rule 26(b)(3) to obtain the Interview Memoranda, and Plaintiffs cannot now avoid that result by improperly attempting to

[9] *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970).

[10] In *Ryan*, the committee had disclosed its findings to the defendants, and the defendants had relied upon those findings in the litigation. *See Ryan v. Gifford*, 2008 WL 43699, at *2-4 (Del. Ch. Jan. 2, 2008).

invoke *Garner*. *See, e.g., Elow v. Express Scripts Hldg. Co.*, 2018 WL 2110946, at *2 (Del. Ch. Apr. 27, 2018) ("just as Plaintiff did not show 'good cause' to apply the *Garner* exception, he has not shown 'substantial need' for the work product documents").[11] In any event, as previously demonstrated, Plaintiffs had the opportunity to take full discovery, and obtained significant benefits from the SLC's investigation—including production of all the documents that the SLC relied upon, culled out from the million-plus documents produced during the SLC investigation—and therefore cannot establish that the information in the Interview Memoranda was either necessary to pursuing the claims or unavailable from other sources. *Garner*, 430 F.2d at 1104.

(b) Plaintiffs' New Argument With Respect To Mr. Hurd Is Barred By Supreme Court Rule 8 And Fails In Any Event

Recognizing they cannot satisfy their Rule 26(b)(3) burden as to witnesses who are available to be deposed, Plaintiffs make a new argument solely applicable to Mr. Hurd, who had passed away before the trial court's rulings on Lead Plaintiff's motions. OB at 39. However, as previously shown (*supra* at 25 n.6), Lead Plaintiff elected not to make a separate argument as to Mr. Hurd in the trial court—presumably because doing so would highlight the weakness of its argument as to the

[11] *See* 7/9/20 Op. 16 n.63 (noting that the *Garner* factors "overlap with the required showing under Rule 26(b)(3) work-product doctrine") (citations omitted).

living witnesses. That strategic election had consequences. "Only questions fairly presented to the trial court may be presented for review ...." Supr. Ct. R. 8. This Court "place[s] great value on the assessment of issues by [the] trial courts" and has acknowledged that it is "unfair and inefficient, to litigants and the development of the law itself, to allow parties to pop up new arguments on appeal they did not fully present below." *DFC Glob. Corp. v. Muirfield Value P'rs, L.P.*, 172 A.3d 346, 363 (Del. 2017).

Allowing Plaintiffs to present a separate argument as to Mr. Hurd for the first time on appeal would be contrary to the interests of justice. Indeed, as noted above, this specific issue was raised by the trial court, and Lead Plaintiff elected not to pursue it for tactical reasons—such that the trial court was not given "the opportunity to make a thoughtful ruling." *Shawe v. Elting*, 157 A.3d 152, 169 (Del. 2017). It would be unfair now to determine that the Court of Chancery committed reversible error based on an argument Lead Plaintiff elected not to make below.

Regardless, even with respect to a witness who has passed away, Plaintiffs acknowledge they still must satisfy Rule 26(b)(3). In a flawed attempt to satisfy that burden, Plaintiffs cite some background facts involving Mr. Hurd. OB at 39. Yet they do not point to any significant factual information allegedly possessed by Mr. Hurd (who was not a defendant) that could not be obtained from the numerous other witnesses deposed in the case—or from Mr. Hurd's documents that were produced.

See Rohm & Haas Co. v. Dow Chem. Co., 2009 WL 537195, at *2, *4 (Del. Ch. Feb. 26, 2009) (denying motion to compel production of work product; "Given the information to which it already has access, Rohm and Haas has not demonstrated a substantial need" for the material).[12] And, even on the background facts they cite, Plaintiffs offer no basis to conclude that Mr. Hurd's testimony would have been helpful or inconsistent with the testimony of other witnesses. Mere speculation regarding information that may be contained in Mr. Hurd's Interview Memoranda is not sufficient to satisfy Rule 26(b)(3), which requires Plaintiffs to establish ***both*** that they had a "substantial need" for the information and that they could not obtain the substantial equivalent without undue hardship.

(c) Plaintiffs' Argument With Respect To Ms. Catz And Mr. Nelson Is Meritless

Plaintiffs also assert that they have a substantial need for the Interview Memoranda relating to Ms. Catz and Mr. Nelson because there is a factual question regarding what they said to each other in January 2016. OB at 40. Lead Plaintiff, however, took their depositions under oath. As the trial court concluded, Lead Plaintiff provided no basis to infer that any witness "would be more forthcoming

[12] Lead Plaintiff's reliance on *United States ex rel. Landis v. Tailwinds Sports Corp.*, 303 F.R.D. 419, 425-26 (D.D.C. 2014), is misplaced. OB at 40. In that case, the court addressed "law enforcement memoranda," which were not prepared by an attorney and contained only "fact" work-product (not any attorney thoughts or impressions). *Id.*

with the SLC than they will be with Lead Plaintiff," much less that they would provide inconsistent statements. 7/9/20 Op. 17-18. Again, mere speculation—*e.g.*, that the Interview Memoranda ***may*** possibly contain "impeachment material"—is not sufficient to overcome work product. If such speculative grounds were sufficient to obtain work product, counsel's interview notes would never be protected. As the trial court explained:

> It is true that any work product interview memorandum may contain assertions that will prove to be inconsistent with future statements of the interviewee; ***if such were the touchstone, little would be left of the protection in that context.***

Id. at 16 (emphasis added).

3. The SLC's Work Product Protection Over The Interview Memoranda Was Not Waived

Plaintiffs also assert that, even if the Interview Memoranda are protected work product (as the trial court correctly found and Plaintiffs do not dispute), the SLC waived any such protection by exchanging mediation statements with defendants in connection with the confidential mediation.[13] But the SLC did not provide the

[13] In its December 4, 2019 Memorandum Opinion (at 61-62), the trial court also rejected Lead Plaintiff's motion to compel production of the mediation statements exchanged by the parties, citing Court of Chancery Rule 174(h) and holding that, "[t]o the extent that any documents or communications would be subject to production under this Memorandum Opinion but are exempt from discovery under Chancery Court Rule 174(h) they are not required to be produced." Plaintiffs do not challenge that ruling on appeal.

Interview Memoranda to defendants in the mediation or otherwise.[14] As a result, Plaintiffs are relegated to speculating that the mediation statements may have "advised Ellison and Catz of the factual basis for the claim against them, including material information from the interview memos." 7/9/20 Op. 20. The trial court appropriately rejected Lead Plaintiff's argument. *Id.* at 20-23.

Even if the trial court had assumed that the mediation statements disclosed some information learned during the witness interviews (and which Plaintiffs could similarly learn during depositions), "[p]roduction of work product protected material on the basis of waiver is rarely ordered in Delaware because of its harsh result." *Id.* at 21 (citations omitted). For example, in *Saito*, 2002 WL 31657622, at *3, the Court of Chancery explained that "a finding of waiver of opinion work product protection should only be made in cases of the most egregious conduct by the holder of the privilege." *See also Rowlands v. Lai*, 1999 WL 462379, at *1 (Del. Super. Apr. 6, 1999) ("[b]ecause work product is accorded such great protection, waiver is rarely

[14] Plaintiffs cite two cases—*Zirn v. VLI Corp.*, 621 A.2d 773, 782 (Del. 1993), and *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622, at *3—for the general proposition that work product protection can be waived when work product (*e.g.*, "an attorney's private files and recorded impressions") is provided to a litigation adversary. OB at 38. But that did not occur in this case. At most, Plaintiffs speculate that the SLC may have disclosed in its mediation submissions factual information learned during an interview. Not only are the facts in *Zirn* and *Saito* starkly different from the facts here, those cases also do not involve the important legal and public policy considerations relating to mediation proceedings implicated in this case.

found except in the most egregious of circumstances"). No such egregious conduct occurred here.

Under Delaware law, "there is no waiver of privileged information to third parties if a disclosing party had a reasonable expectancy of privacy when it made an earlier disclosure." 7/9/20 Op. 21 (citation omitted). To determine whether a party had such a reasonable expectation of privacy, "the Court generally asks two questions: 1) did the disclosing party believe its disclosure was confidential; and 2) will the law sanction that expectation?" *Id.* at 21-22 (citations omitted). Here, the alleged disclosure was made in the context of a confidential mediation, in which the parties were required to sign a Mediation Confidentiality Agreement providing that:

> The parties hereby agree that all statements of the parties, counsel, and mediators, as well as the materials generated solely for purposes of the mediation shall constitute conduct or statements made in compromise negotiations and, shall therefore, not be admissible pursuant to Rule 408 of the Federal Rules of Evidence, and shall not be disseminated or published in any way. In short, no statement made during the course of the mediation or any materials generated for the purpose of the mediation may be offered into evidence, disseminated, published in any way, or otherwise publicly disclosed.

B3557. Thus, the SLC certainly had a reasonable expectation that any information disclosed in connection with the mediation would remain confidential—and that it could not be used in the Action.

Moreover, for good reason, "Delaware has a strong public policy favoring confidentiality in all mediation proceedings." 7/9/20 Op. 22 (citations omitted).

Absent an expectation of privacy, "parties would hesitate to propose compromise solutions out of the concern that they would later be prejudiced by their disclosure." *Id.* (citations omitted). And parties would be far less likely to share information in mediations if, as Plaintiffs now contend, by sharing information the parties could be deemed to have waived privileges and immunities that otherwise apply. *Cf. Princeton Ins. Co. v. Vergano*, 883 A.2d 44, 62 (Del. Ch. 2005) (mediation process "works best when parties speak with complete candor, acknowledge weaknesses, and seek common ground, without fear that, if a settlement is not achieved, their words will be later used against them in the more traditionally adversarial litigation process").

Based on controlling Delaware law and its strong public policy in favor of mediation, the trial court correctly rejected Lead Plaintiff's waiver argument, holding as follows:

> The SLC had a strong expectancy of privacy when it engaged in mediation, and such expectation attached to any materials exchanged during the confidential mediation. Thus, even if the SLC disclosed work product protected materials to Ellison and Catz when they shared their mediation statements, the SLC did not waive its work product protection.

7/9/20 Op. 23. That ruling was correct and should be affirmed.

In its Opening Brief, Plaintiffs largely ignore the specific facts presented here, the trial court's analysis, and the numerous supporting cases cited in the July 9, 2020 Memorandum Opinion. Instead, Plaintiffs rely on the same two inapposite cases

Lead Plaintiff relied upon below—*Ryan v. Gifford*, 2008 WL 43699 (Del. Ch. Jan. 2, 2008), and *Tackett v. State Farm Fire & Casualty Insurance Company*, 653 A.2d 254 (Del. 1995). Neither case addresses waiver based on mere speculation that work product may have been disclosed—much less the important considerations relating to sharing information in connection with a confidential mediation. To the contrary, the *Ryan* opinion Plaintiffs cite addressed the waiver of attorney-client privilege (not work product) in a situation where the committee actually disclosed its findings to the director defendants and "the director defendants explicitly asserted that the findings of the Special Committee were entitled to deference from this Court." 2008 WL 43699, at *5-6. Equally inapposite is Plaintiffs' quote from *Tackett* (OB at 36-37), which addressed the potential waiver of "attorney-client privilege" in the bad faith insurance context.

Finally, with the law squarely against them, Plaintiffs suggest that the trial court's ruling was not "fair" because "the SLC chose to provide Ellison and Catz with investigatory summaries." OB at 38. First, as noted, the SLC did not provide Ellison and Catz with "investigatory summaries." And, second, rather than prejudicing Plaintiffs, the trial court required the production of all documents used at any witness interview, as well as every document referenced by the SLC in its mediation submissions. In addition, the SLC provided Lead Plaintiff with a virtual roadmap for discovery, including identifying (i) every document custodian selected

by the SLC, (ii) the discovery requests the SLC made (and search protocols), and (iii) every witness the SLC interviewed. A363-64. Lead Plaintiff was thus provided with a huge head start as compared to the typical litigant. Having been given a full and fair opportunity to litigate the derivative claims, Plaintiffs should not now get a do-over by seeking yet again the SLC's protected work product.

CONCLUSION

The trial court correctly determined that the SLC was not required to produce the work product prepared by the SLC's counsel, including the Interview Memoranda. That trial court's decisions were consistent with established Delaware law and fully supported by the record. Accordingly, the SLC respectfully requests that the Court of Chancery's decisions protecting the SLC's work product be affirmed.

POTTER ANDERSON & CORROON LLP

By: */s/ Kevin R. Shannon*
Kevin R. Shannon (#3137)
Berton W. Ashman, Jr. (#4681)
1313 North Market Street
Hercules Plaza, 6th Floor
Wilmington, Delaware 19801
(302) 984-6000

Attorneys for Appellee / Non-Party-Below Special Litigation Committee of the Board of Directors of Oracle Corporation

OF COUNSEL:

Arthur H. Aufses III
Jonathan M. Wagner
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-910

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