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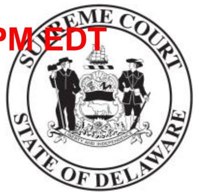

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY HORBAL and HERC MANAGEMENT SERVICES, LLC, derivatively on behalf of SEEGRID CORPORATION,

Plaintiffs-Below, Appellants,

v.

DANIEL SHAPIRA, PHILLIP OLIVERI, HANS MORAVEC, GIANT EAGLE, INC., and GIANT EAGLE OF DELAWARE, INC.,

and

SEEGRID CORPORATION,

Defendants-Below, Appellees.

No. 389, 2015

Court Below, Chancery Court of the State of Delaware, C.A. 10023-VCL

APPELLANTS' AMENDED OPENING BRIEF

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Dated: September 17, 2015

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NATURE OF PROCEEDINGS

Anthony Horbal and HERC Management Services, LLC (together, "Plaintiffs") appeal from the Order (the "Order") of the Court of Chancery, Vice Chancellor Laster presiding (the "Trial Court"), dismissing with prejudice their Verified Derivative Complaint (the "Complaint"). In the Complaint, Plaintiffs asserted breach of fiduciary duty claims against the defendant directors (*i.e.*, defendants Daniel Shapira, Philip Oliveri, and Hans Moravec – collectively, the "Directors") and the largest shareholder and creditor (*i.e.*, defendants Giant Eagle, Inc. and Giant Eagle of Delaware, Inc. – together, "Giant Eagle") (the Directors and Giant Eagle are collectively referred to herein as "Defendants") of Seegrid Corporation n/k/a Seegrid Holding Corporation ("Old Seegrid").

Pursuant to Court of Chancery Rule 25(c), nominal defendant Old Seegrid moved to substitute Seegrid Corporation f/k/a Seegrid Operating Company ("New Seegrid") as the sole plaintiff in this action (the "Motion"). At a hearing held on the Motion on July 14, 2015, the Trial Court dismissed the Complaint with prejudice concluding that: (i) "Plaintiffs lack standing to pursue the claims asserted in the Complaint" (although the Trial Court expressly made no determination whether Plaintiffs possess double derivative standing to file a new action in the event of remand by this Court); and (ii) Plaintiffs were collaterally estopped "from asserting the factual claims set forth in the Complaint, including on a double derivative basis." Plaintiffs then timely filed their notice of appeal.

SUMMARY OF ARGUMENTS

1. The Trial Court committed reversible error in dismissing the Complaint with prejudice because: (i) Rule 25(c) is merely a rule of procedure that does not provide for the dismissal of a complaint; (ii) Old Seegrid did not request the dismissal of the Complaint in the Motion – its only requested relief was the substitution of New Seegrid as the sole plaintiff in this action; and (iii) the dismissal of the Complaint was procedurally defective in light of the Trial Court's failure to comply with the requirements of Court of Chancery Rules 12(b)(6), 15(a), 15(aaa), and 56.

2. The Trial Court committed reversible error when it dismissed the Complaint based on collateral estoppel because Old Seegrid did not satisfy its burden of demonstrating at least three of the mandatory requirements for the application of collateral estoppel to the Complaint. First, Old Seegrid did not establish that certain findings made in a prior federal judgment were "essential" to the entry of that judgment and, therefore, entitled to preclusive effect in this action. Second, Old Seegrid did not establish that certain rulings made in that prior federal judgment were "identical" to the issues raised by the Complaint and, therefore, entitled to preclusive effect in this action. Third, Old Seegrid did not establish that Plaintiffs had a "full and fair opportunity" to litigate all the issues in the prior action that are the basis for the application of collateral estoppel in this action.

3. The Trial Court also committed reversible error when it dismissed the Complaint based on Plaintiffs' purported lack of standing to pursue their claims. Rule 25(c) does not support the Trial Court's dismissal of the Complaint. Instead, challenges to standing must be raised by a motion to dismiss for failure to state a claim under Rule 12(b)(6), which the Motion was not. In any event, the Trial Court committed reversible error because the Trial Court failed to provide Plaintiffs with an opportunity to amend the Complaint to allege their standing – in this case, their double derivative standing.

STATEMENT OF FACTS

On August 8, 2014, Plaintiffs filed the Complaint against Defendants derivatively on behalf of Old Seegrid. *See* Appendix to Appellants' Opening Brief ("App.") at 16. Plaintiffs are minority shareholders of Old Seegrid. *See id.* at 34. Plaintiffs alleged that Giant Eagle, Old Seegrid's largest stockholder and creditor, breached its fiduciary duties to Old Seegrid by manufacturing a "cash-flow emergency" and forcing the company to the brink of insolvency in order to obtain Old Seegrid's assets at less than fair value and dilute all other stockholders. *See id.* at 64-66. Plaintiffs further alleged that the Directors were beholden to Giant Eagle and breached their fiduciary duties by allowing Giant Eagle to carry out its scheme through at least the following misconduct: (i) not engaging an independent financial advisor to solicit and obtain competing offers to Giant Eagle's financing proposal; (ii) not considering alternative financing opportunities; (iii) choosing the interests of Giant Eagle over the best interests of the company and its non-controlling stockholders; and (iv) forcing the company into financial distress in an effort to further Giant Eagle's interests at the expense of Plaintiffs and others. *See id.* at 62-64.

On September 8, 2014, Giant Eagle and the Directors (including on behalf of Old Seegrid) filed separate motions to dismiss the Complaint for failure to state a claim pursuant to Court of Chancery Rule 12(b)(6). *See id.* at 69, 71. The Directors also moved to dismiss the Complaint pursuant to Court of Chancery Rule

23.1. *See id.* at 69. No grounds were stated in either of those motions to dismiss, and no briefs in support of those motions were ever filed. *See id.* at 1-15, 69, 71. Defendants did not answer the Complaint or assert any affirmative defenses. *See id.* at 1-15.

On October 21, 2014, Old Seegrid filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the "Petition") in the United States Bankruptcy Court for the District of Delaware, the Honorable Brendan L. Shannon presiding (the "Bankruptcy Court"). *See id.* at 73-242. On October 23, 2014, Old Seegrid filed a Notice of Bankruptcy Petition and Automatic Stay in the Trial Court. *See id.* at 243-44. Based on the automatic stay of section 362(a)(1) of the Bankruptcy Code, the prosecution of this action came to a halt. *See id.*

Old Seegrid sought the Bankruptcy Court's approval of a Prepackaged Plan of Reorganization (the "Plan"), pursuant to which Old Seegrid would create a subsidiary (New Seegrid) and convey to it all of Old Seegrid's operating assets (including its name), post-filing operating liabilities, and employees. *See id.* at 176. In exchange, Old Seegrid would receive 11.25 million shares of New Seegrid common stock, or approximately 45% of the company. *See id.* Plaintiffs objected to the Plan.

On January 20, 2015, following a three-day evidentiary hearing that culminated in a ruling from the bench on January 15, 2015 (the "Bench Ruling"),

see id. at 319, the Bankruptcy Court confirmed the Plan, as supplemented and amended (the "Confirmation Order"), *see id.* at 363-406.

In paragraph 15 of the Confirmation Order, the Bankruptcy Court determined, among other things, that the Plan was proposed in good faith by Old Seegrid, as required by section 1129(a)(3) of the Bankruptcy Code, 11 U.S.C. § 1129(a)(3). *See id.* at 374-75.

In paragraph 35 of the Confirmation Order, the Bankruptcy Court allowed Giant Eagle's claims against Old Seegrid, which were based on its pre-petition loans to Old Seegrid in the total amount of approximately $34 million. *See id.* at 380.

Paragraph 81 of the Confirmation Order provided for the preservation and transfer of Old Seegrid's claims, as follows:

> [P]ursuant to section 1123(b)(3)(B) of the Bankruptcy Code, any action, cause of action, liability, obligation, right, suit, debt, sum of money, damage, judgment, claim and demand whatsoever, whether known or unknown, at law, in equity or otherwise (collectively, "Causes of Action") accruing to the Debtor shall become assets of [New Seegrid], and [New Seegrid] shall have the authority to commence and prosecute such Causes of Action for the benefit of the Estate of the Debtor. . . . [New Seegrid] shall have the authority to compromise and settle, otherwise resolve, discontinue, abandon or dismiss all such Causes of Action without approval of the Bankruptcy Court. *See id.* at 398-99.

On April 8, 2015, Old Seegrid filed the Motion pursuant to Rule 25(c). *See id.* at 407-14. Old Seegrid attached the Plan, as supplemented and amended, as

Exhibit A to the Motion, and attached the Confirmation Order as Exhibit B to the Motion. *See id.* at 409 n.4. The sole grounds for the Motion were that, based on paragraph 81 of the Confirmation Order, Plaintiffs have "no standing to pursue the claims asserted in this action" and New Seegrid "is the only party with standing to assert the derivative claims alleged in the Complaint." *See id.* at 413. The only relief sought by Old Seegrid was the substitution of New Seegrid as the sole plaintiff. *See id.* at 414. The Motion did not reference the doctrine of collateral estoppel or otherwise assert that the Confirmation Order required the dismissal of the Complaint based on collateral estoppel. *See id.* at 407-14.

On June 2, 2015, Plaintiffs filed their response to the Motion. *See id.* at 416-36. Because the Motion did not raise the issue of collateral estoppel, Plaintiffs did not address or discuss it. *See id.*[1]

On June 17, 2015, Old Seegrid filed its reply brief in support of the Motion (the "Reply"). *See id.* at 437-50. Old Seegrid attached the transcript of the Bench Ruling as Exhibit C to the Motion, *see id.* at 439, and for the first time stated that Plaintiffs were "collaterally estopped from asserting the factual allegations in the Complaint" based on paragraph 15 of the Confirmation Order, *see id.* at 446-47. Old Seegrid did not discuss or even mention either the elements of collateral

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[1] Plaintiffs also demonstrated that they had double derivative standing under Delaware law to assert the breach of fiduciary duty claims set forth in the Complaint. *See* App. at 421-23. In the Order, however, the Trial Court expressly refused to decide whether Plaintiffs have double derivative standing to prosecute those claims. *See id.* at 744. Thus, the issue of double derivative standing is not encompassed by this appeal.

estoppel or paragraph 35 of the Confirmation Order. *See id.* at 437-50. Old Seegrid asserted only that "granting the relief requested in the Motion is not inequitable . . . because the present action is precluded by the Confirmation Order." *See id.* at 446. In other words, Old Seegrid did not request any relief based on collateral estoppel other than that New Seegrid be substituted as the sole plaintiff in this action. *See id.*

On July 10, 2015, with Defendants' consent and the Trial Court's approval, Plaintiffs filed their sur-reply to the Motion. *See id.* at 451. Plaintiffs contended that collateral estoppel was improperly asserted for the first time in the Reply and, as an unpleaded affirmative defense, could not be considered at that time. *See id.* at 451-62. Plaintiffs also contended that Old Seegrid failed to demonstrate that collateral estoppel applied to the Complaint because: (i) the only issue the Bankruptcy Court was required to decide in paragraph 15 of the Confirmation Order was that Old Seegrid proposed the Plan in good faith; (ii) that issue was not "identical" to any issue raised by the Complaint (which was filed prior to the filing of the Petition and the Plan); and (iii) it was not "essential" to the Confirmation Order that the Bankruptcy Court make findings concerning Defendants' pre-petition conduct in determining that Old Seegrid proposed the Plan in good faith. *See id.* Because Old Seegrid did not raise paragraph 35 of the Confirmation Order in its Reply, Plaintiffs did not address that ground for application of collateral estoppel in its sur-reply or at the hearing held on the Motion. *See id.*

Plaintiffs also submitted with their sur-reply two different bankruptcy hearing transcripts which demonstrated that they did not have a "full and fair opportunity" to challenge the findings made in paragraph 15 of the Confirmation Order because the Bankruptcy Court declined to hear their valuation evidence and refused to consider whether the Plan was an insider transaction or otherwise subject to the entire fairness standard under Delaware law. *See id.* at 469, 588. Finally, Plaintiffs informed the Trial Court that in an action styled, *Anthony Horbal and HERC Management Services, LLC v. Giant Eagle, Inc. and Giant Eagle of Delaware, Inc.*, No. 6D 14-013654, pending in the Court of Common Pleas of Allegheny County, Pennsylvania, Giant Eagle's attempt to invoke collateral estoppel based on paragraph 15 of the Confirmation Order had previously been denied after extensive briefing and argument. *See id.* at 462. In that action, Plaintiffs are asserting direct claims against only Giant Eagle. *See id.*

On July 14, 2015, the Trial Court held oral argument on the Motion. *See id.* at 666. After arguments of counsel (during which paragraph 35 of the Confirmation Order was not mentioned by the parties or the Trial Court before the Trial Court issued its ruling), *see id.* at 666-733, the Trial Court determined that "the bankruptcy is a sufficiently substantial change that . . . it makes sense that the plaintiff would have to now file a new action and replead," *see id.* at 739-40. The Trial Court also stated that "the logical consequence of New Seegrid's argument is

not that New Seegrid gets to come in as a substitute plaintiff and then dismiss. It's that the action simply has to be dismissed." *See id.* at 740.

The Trial Court also determined that collateral estoppel required the dismissal of the Complaint because it was "fully presented" in light of Plaintiffs' sur-reply. *See id.* The Trial Court stated that it "did read all of [the Bankruptcy Court's] ruling, and . . . looked through the [P]lan," and concluded, based on that review, that the Bankruptcy Court had "considered the idea that the [P]lan was the culmination of these bad acts by Giant Eagle . . . [and] would not have approved the [P]lan had [it] thought that this was all part of a scheme by Giant Eagle culminating in the bad-faith achievement of what they ostensibly had sought all along." *See id.* at 740-41. The Trial Court based its ruling on the Bench Ruling and paragraphs 15 and 35 of the Confirmation Order. *See id.* at 741-44.

In particular, as to paragraph 15, the Trial Court determined that "I don't think that I could reach a contrary conclusion in this case as to everything that happened over the years being a bad-faith breach of fiduciary duty or a self-interested scheme and not reach a result contrary to this finding." *See id.* at 741-42. As to paragraph 35, the Trial Court determined that if it were to "undo some of the debt investments made by Giant Eagle on fiduciary grounds, that would be a finding that would be directly contrary to paragraph 35 . . . ." *See id.* at 473-44.

Thus, the Trial Court held that the "two separate bases" for its ruling – *i.e.*, lack of standing and collateral estoppel – were each "sufficient to result in

dismissal of the current action," and that, in light of its collateral estoppel ruling, Plaintiffs did not have "the ability to go back and refile." *See id.* at 744.

On July 17, 2015, the Trial Court entered the Order, dismissing the Complaint with prejudice because: (i) "Plaintiffs lack standing to pursue the claims asserted in the Complaint" (although the Trial Court made no determination whether Plaintiffs possess double derivative standing to file a new action in the event of remand by this Court); and (ii) Plaintiffs were collaterally estopped, based on both the Bankruptcy Court's Bench Ruling and Confirmation Order, "from asserting the factual claims set forth in the Complaint, including on a double derivative basis." *See id.* at 1-15.

On July 24, 2015, Plaintiffs filed a timely appeal from the Order and the Trial Court's dismissal of the Complaint with prejudice. *See id.* at 748-54.

ARGUMENTS

A. The Trial Court Committed Reversible Error In Dismissing The Complaint With Prejudice.

1. Question presented

Whether the Trial Court committed reversible error in dismissing the Complaint with prejudice because Court of Chancery Rule 25(c) is merely a rule of procedure that permits, but does not require, the substitution of a party when a transfer of interest occurs during the course of an action, Old Seegrid did not request the dismissal of the Complaint in the Motion, and the dismissal of the Complaint was improper based on the Trial Court's failure to comply with the requirements of Court of Chancery Rules 12(b)(6), 15(a), 15(aaa), and 56. *See id.* at 416-36, 451-665, 666-747, 748-54.

2. Standard of review and applicable legal standards

The issue whether the Trial Court erred in dismissing the Complaint with prejudice based on collateral estoppel and Plaintiffs' purported lack of standing is a question of law that this Court reviews *de novo*.[2]

[2] *See Betts v. Townsends, Inc.*, 765 A.2d 531, 533 (Del. 2000) ("Whether the IAB was barred by *res judicata* or collateral estoppel from deciding the issues presented at Betts' second IAB hearing, however, raises a question of law that this Court reviews *de novo.*"); *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1219 (Del. 1991) ("[W]e view the preclusive effect to be given prior judgments as an area of substantive law."); *Lambrecht v. O'Neal*, 3 A.3d 277, 281 (Del. 2010) (double derivative standing question "is one of law which this Court decides *de novo.*"); *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1078 (Del. 2011) ("This Court reviews a trial court's grant of a motion to dismiss [based on a lack of derivative standing] *de novo.*"); *Appriva S'holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 1285-86 (Del. 2007) ("We hold that, where, as here, the issue of standing is so closely related to the merits, a motion to dismiss based on lack of standing is properly considered under Rule 12(b)(6) rather than Rule 12(b)(1)."); *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312,

Rule 25(c) provides that, in the event of a transfer of interest during the course of an action, "the action may be continued by or against the original party, unless the Court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party."[3] "A 'transfer of interest' in the corporate context takes place when one corporation becomes the successor, typically by merger, to the interest the original corporate party had in the proceeding."[4] Rule 25 is a procedural mechanism only; it does not affect substantive rights afforded by state law.[5]

3. Merits of argument

The Trial Court erred in dismissing the Complaint with prejudice. The only relief that Old Seegrid sought pursuant to the Motion was the substitution of New Seegrid as the sole plaintiff in this action; it did not seek the dismissal of the Complaint, let alone with prejudice. *See id.* at 414. Nevertheless, the Trial Court determined that collateral estoppel and Plaintiffs' lack of standing necessitated the dismissal of the Complaint with prejudice. *See id.* at 744. Although Old Seegrid raised paragraph 15 of the Confirmation Order as a basis for the application of collateral estoppel to the Complaint, it did not mention paragraph 35 of the

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318 (Del. 2004) ("This Court reviews *de novo*, for errors of law, the dismissal of a complaint under Court of Chancery Rule 12(b)(6).").

[3] *See* DEL. CH. R. 25(c).

[4] *See ClubCorp, Inc. v. Pinehurst, LLC*, No. 5120–VCP, 2011 WL 5554944, at *6 (Del. Ch. Nov. 15, 2011) (citations omitted).

[5] *See id.* (Rule 25 "speaks to procedural matters."); *In re Covington Grain Co.*, 638 F.2d 1357, 1361 (5th Cir. 1981) ("The Rule, however, is procedural only and does not affect the substantive rights of the party which are determined by state law.").

Confirmation Order as an additional ground supporting the application of collateral estoppel to the Complaint. *See id.* at 437-50. In fact, neither the parties nor the Court mentioned paragraph 35 of the Confirmation Order before the Trial Court issued its ruling. *See id.* at 666-751. Thus, the Trial Court erroneously dismissed the Complaint with prejudice.[6]

The Trial Court's dismissal of the Complaint with prejudice was also reversible error even if the Motion could be deemed a motion to dismiss for failure to state a claim under Rule 12(b)(6) (which it was not). Under Delaware law, the resolution of an affirmative defense such as collateral estoppel pursuant to a motion under Rule 12(b)(6) generally is "inappropriate" because "the Court is generally limited to facts appearing on the face of the pleadings" and affirmative defenses "are not ordinarily well-suited for treatment on such a motion . . . [u]nless it is clear from the face of the complaint that an affirmative defense exists and that the plaintiff can prove no set of facts to avoid it."[7] Indeed, a motion to dismiss under Rule 12(b)(6) requires a court to accept all well-pleaded factual allegations in the complaint as true and draw all reasonable inferences in favor of plaintiff.[8]

The basis for the application of collateral estoppel certainly is not clear from the face of the Complaint because Old Seegrid did not file its Petition (on October

[6] Old Seegrid also did not request the dismissal of the Complaint at the hearing on the Motion. *See* App. at 666-751.

[7] *See Reid v. Spazio*, 970 A.2d 176, 183-84 (Del. 2009).

[8] *See Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).

21, 2014) and the Bankruptcy Court did not enter its Confirmation Order (on January 20, 2015) until *after* the filing of the Complaint (on August 8, 2014). *See id.* at 73, 363, 16. Thus, even if the Motion could be deemed a motion under Rule 12(b)(6), the Trial Court erroneously dismissed the Complaint with prejudice based on collateral estoppel.[9]

In addition, the Trial Court committed reversible error by failing to provide Plaintiffs with an opportunity to amend the Complaint to include allegations that were not subject to collateral estoppel and to allege double derivative standing. The Trial Court failed to comply with Rule 15(a), which entitled Plaintiffs to amend the Complaint "as a matter of course" because Defendants had not filed a responsive pleading to the Complaint.[10] Moreover, pursuant to Rule 15(aaa), because the Trial Court dismissed the Complaint with prejudice, Plaintiffs were not afforded adequate notice of their right to avoid the possibility of that dismissal

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[9] *See Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485, 490 (Del. 2000) ("Generally, this Court gives the authorities applying the Federal Rules 'great persuasive weight' in the construction of a parallel Delaware Rule."); *Rycoline Prods., Inc. v. C & W Unltd.*, 109 F.3d 883, 886-87 (3d Cir. 1997) (for any affirmative defense raised as a ground for dismissal for failure to state a claim, that ground must be apparent on the face of the complaint or "the issue could not be resolved via a Rule 12(b)(6) motion.").

[10] *See* DEL. CH. R. 15(a) ("A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . ."); *Mallinckrodt Inc. v. E-Z-EM Inc.*, 671 F. Supp. 2d 563, 567 (D. Del. 2009) ("It is clearly established in the Third Circuit that a motion to dismiss is not a responsive pleading.") (citations omitted); *Phillips v. County of Allegheny*, 515 F.3d 224, 236 (3d Cir. 2008) ("[T]he District Judge erred when he dismissed the complaint without offering Phillips the opportunity to amend her complaint. It does not matter whether or not a plaintiff seeks leave to amend. We have instructed that if a complaint is vulnerable to 12(b)(6) dismissal, a district court must permit a curative amendment, unless an amendment would be inequitable or futile.").

(absent a showing of good cause) by choosing to amend the Complaint rather than respond to the merits of the purported motion to dismiss.[11]

Further, the Trial Court's dismissal of the Complaint with prejudice was procedurally improper even if the Motion could be deemed a Rule 12(b)(6) motion that was converted into a motion for summary judgment under Rule 56(c). Specifically, because the Trial Court considered matters extraneous to the Complaint, Rule 12(b)(6) required that "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."[12]

"Before a motion to dismiss may be converted to one for summary judgment, parties must be given adequate notice and a reasonable opportunity to present pertinent material."[13] The "failure to give adequate notice may only be excused where all parties are aware of the true nature of the proceedings and have

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[11] *See* DEL. CH. R. 15(aaa); *Braddock v. Zimmerman*, 906 A.2d 776, 782-83 (Del. 2006) ("The Court of Chancery correctly concluded that Rule15(aaa) permits it to grant leave to amend after a complaint is dismissed *without prejudice*. . . . Rule 15(aaa) . . . requir[es] plaintiffs, when confronted with a motion to dismiss . . . to elect to either: stand on the complaint and answer the motion; or, to amend or seek leave to amend the complaint before the response to the motion was due. . . . [I]f a plaintiff chooses to file an answering brief in opposition to a motion to dismiss rather than amend the complaint, any subsequent dismissal pursuant to the motion is with prejudice, unless the court finds for good cause that dismissal with prejudice would not be just under all the circumstances.") (emphasis in original); *Phillips*, 515 F.3d at 236.

[12] *See* DEL. CH. R. 12(b); *see also Appriva S'holder Litig. Co., LLC*, 937 A.2d at 1287 ("Rule 12(b) requires that the trial judge comply with the requirements of Rule 56.").

[13] *See Appriva S'holder Litig. Co., LLC*, 937 A.2d at 1288 (holding that parties must receive at least ten days' notice that that trial court intends to convert the motion to dismiss into a motion for summary judgment).

presented all evidence related to dispositive issues."[14] It is reversible error to convert a Rule 12(b)(6) motion into a Rule 56 motion without adequate notice.[15] The lack of adequate notice is harmless only if "there is no set of facts on which plaintiffs could possibly recover."[16] Of course, the entire record must be construed in the light most favorable to the non-movant (*i.e.*, Plaintiffs).[17]

The Trial Court failed to provide any, let alone adequate, notice to the parties that it would consider matters extraneous to the Complaint – namely, the Plan, the Bench Ruling, and the Confirmation Order – in connection with its dismissal of the Complaint with prejudice. *See id.* at 666-747. The Trial Court also failed to notify the parties that paragraph 35 of the Confirmation Order may be an additional ground for its dismissal of the Complaint based on collateral estoppel until it referenced that paragraph during its ruling from the bench on the Motion. *See id.*

Thus, even if the Motion could be deemed a Rule 12(b)(6) motion that was converted into a Rule 56(c) motion (which it was not) rather than a Rule 25(c) motion for substitution (which it was), the Trial Court's dismissal of the Complaint with prejudice should be reversed based on its failure to provide adequate notice of

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[14] *See id.*

[15] *See id.* (reversing and remanding summary judgment based on lack of proper notice); *Furman v. Del. Dep't of Transp.*, 30 A.3d 771, 774-75 (Del. 2011) (same); *Rycoline Prods., Inc.*, 109 F.3d at 887 (same).

[16] *See Appriva S'holder Litig. Co., LLC*, 937 A.2d at 1288 (internal quotations and citation omitted).

[17] *See id.* at 1287.

the conversion to Plaintiffs.[18] Because they lacked notice, Plaintiffs did not present any evidence on, let alone have an opportunity to address, the purported preclusive effect of paragraph 35 of the Confirmation Order. *See id.* at 666-747. The lack of such notice also deprived Plaintiffs of the opportunity to submit additional evidence on the issue of the purported preclusive effect of paragraph 15 of the Confirmation Order. *See id.*

Accordingly, the Trial Court committed reversible error in dismissing the Complaint with prejudice. Neither Rule 25(c) nor Rule 12(b)(6) authorized the Court to dismiss the Complaint, and the *de facto* conversion of the Motion into a Rule 56(c) motion was procedurally improper and not harmless in light of the lack of adequate notice provided to Plaintiffs. For all these reasons, the Order should be reversed and this matter remanded to the Trial Court for further proceedings.

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[18] *See Appriva S'holder Litig. Co., LLC*, 937 A.2d at 1288; *Furman*, 30 A.3d at 774-75; *Rycoline Prods., Inc.*, 109 F.3d at 887.

B. The Trial Court Committed Reversible Error In Dismissing The Complaint With Prejudice Based On The Doctrine Of Collateral Estoppel.

1. Question presented

Whether the Trial Court erroneously dismissed the Complaint with prejudice based on collateral estoppel because Old Seegrid failed to satisfy its burden of demonstrating at least three mandatory requirements for the application of collateral estoppel to the Complaint. *See id.* at 451, 666, 748.

2. Standard of review and applicable legal standards

The issue whether the Trial Court erred in dismissing the Complaint with prejudice based on collateral estoppel is a question of law that this Court reviews *de novo*.[19] The Court applies federal common law in determining whether collateral estoppel based on a prior federal judgment bars Plaintiffs' claims.[20] Collateral estoppel applies only when the identical issue was actually litigated and resolved in a prior action, the resolution of that issue was essential to the prior judgment, and the party against which collateral estoppel is sought to be applied had a full and fair opportunity to litigate that issue in the prior action.[21] Old

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[19] *See Betts*, 765 A.2d at 533; *Columbia Cas. Co.*, 584 A.2d at 1219.

[20] *See Taylor v. Sturgell*, 553 U.S. 880, 891 (2008) ("The preclusive effect of a federal-court judgment is determined by federal common law. For judgments in federal-question cases . . . federal courts participate in developing 'uniform federal rule[s]' of res judicata, which this Court has ultimate authority to determine and declare.").

[21] *See id.* at 892 ("Issue preclusion . . . bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim.") (internal quotations omitted); *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 249 (3d Cir. 2006).

Seegrid has the burden of proof on its affirmative defense of collateral estoppel.[22] If any doubt exists whether the requirements for collateral estoppel have been satisfied, it should *not* be applied.[23]

3. Merits of argument

The Trial Court erroneously determined that Old Seegrid satisfied its burden of showing that collateral estoppel applies to, and warrants the dismissal with prejudice of, the Complaint.[24]

a. The Trial Court erred in concluding that Old Seegrid satisfied its burden of demonstrating that paragraph 15 of the Confirmation Order includes "essential" determinations that are entitled to preclusive effect.

The Trial Court erroneously concluded that collateral estoppel required the dismissal of the Complaint with prejudice based on paragraph 15 of the Confirmation Order. The judgment of the Trial Court should be reversed because

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[22] *See Taylor*, 553 U.S. at 907 ("Claim preclusion, like issue preclusion, is an affirmative defense. Ordinarily, it is incumbent on the defendant to plead and prove such a defense and we have never recognized claim preclusion as an exception to that general rule.") (internal citations omitted); DEL. CH. R. 8(c) (same); *Proctor v. State*, 2007 WL 2229013, at *1 (Del. Aug. 2, 2007) ("The party asserting collateral estoppel has the burden of showing that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding.").

[23] *See Gregory v. Chehi*, 843 F.2d 111, 121 (3d Cir. 1988) ("[R]easonable doubt as to what was decided by a prior judgment should be resolved against using it as an estoppel[.]"); *Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 729 (2d Cir. 1981) (same); *In re Castaneda*, 81 B.R. 470, 472-73 (Bankr. N.D. Ill. 1988) (same); *see also* 18-132 Moore's Federal Practice – Civil § 132.03 at (2)(c) ("In determining whether a particular issue was actually litigated, it is of course useful if the court in the previous action specifies that a particular issue was not considered. . . . When a court cannot ascertain what was litigated and decided, issue preclusion cannot operate.").

[24] In the parallel action styled *Anthony Horbal and HERC Management Services, LLC v. Giant Eagle, Inc. and Giant Eagle of Delaware, Inc.*, No. 6D 14-013654, the Court of Common Pleas of Allegheny County, Pennsylvania, after extensive briefing and argument, denied Giant Eagle's request to invoke collateral estoppel based on paragraph 15 of the Confirmation Order. *See* App. at 462.

Old Seegrid failed to, and cannot, demonstrate that the Bankruptcy Court's factual findings concerning Defendants' pre-petition conduct were "essential" to the entry of the Confirmation Order. Old Seegrid was required to show that the prior "final judgment hinges on" the determination made (*i.e.*, that the determination was "critical" to the prior court's decision) but failed to do so.[25]

To determine whether a finding is "essential," the Court should identify the legal elements that governed the claim or defense in the prior action and then apply those legal standards to the findings in question. A finding is "essential" only if it had to be made to address one of the necessary elements of the claims or defenses at issue in the prior action.[26]

Section 1129 of the Bankruptcy Code contains the mandatory requirements for confirmation of a plan.[27] Any findings not based on those mandatory

[25] *See Bobby v. Bies*, 556 U.S. 825, 835 (2009) ("A determination ranks as necessary or essential only when the final outcome hinges on it."); *see also* Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 248 (3d Cir. 2010) ("[I]n determining whether the issue was essential to the judgment, we must look to whether the issue was critical to the judgment or merely dicta."); RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. h (1982).

[26] *See Senthinathan v. Attorney Gen. of the United States*, 514 F. App'x 237, 240-41 (3d Cir. 2013) (finding collateral estoppel did not apply because the issue of whether petitioner provided material support to a terrorist organization was never an issue at stake in the prior litigation); *Wickham Contracting Co. v. Bd. of Educ.*, 715 F.2d 21, 28 (2d Cir. 1983) (holding that collateral estoppel did not apply to the finding that "Local 3 sought to exclude all non-Local 3 subcontractors, not just the joint venture [because], while critical to the antitrust claim, [this determination] was neither necessary or essential to the unfair labor practice findings and Local 3 had no reason to litigate that precise issue.").

[27] *See In re Aleris Int'l. Inc.*, No. 09-10478 (BLS), 2010 Bankr. LEXIS 2997, at *40 (Bankr. D. Del. May 3, 2010) (Shannon, J.).

requirements cannot be subject to collateral estoppel because they were not "essential" to confirmation under section 1129.[28]

Paragraph 15 of the Confirmation Order addresses the requirement under section 1129(a)(3) of the Bankruptcy Code that the Plan must be proposed *by the Plan proponent* (*i.e.*, Old Seegrid) in good faith.[29] The only finding "essential" under section 1129(a)(3) is that the plan proponent (Old Seegrid) proposed the plan in good faith.[30] This is made clear not only by the language of section 1129(a)(3) and decisions rendered by the United States Court of Appeals for the Third Circuit[31] and the Bankruptcy Court,[32] but also from the Bankruptcy Court's statements made during Old Seegrid's chapter 11 case, *see id.* at 346-48. The Third Circuit has stated that the "touchtone" of the good faith inquiry under section 1129(a)(3) is "the plan itself and whether it will achieve a result consistent with the objectives and purposes of the Bankruptcy Code."[33] Moreover, the Bankruptcy Court stated that:

> I turn first to good faith. The burden rests with the debtor. And I note it is the debtor, not Giant Eagle, to demonstrate that the debtor has proposed the plan in good faith. When evaluating good faith, the Third Circuit has

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[28] *See e.g.*, *Jean Alexander Cosmetics, Inc.*, 458 F.3d at 250; *Wickham Contracting Co.*, 715 F.2d at 28.

[29] *See* 11 U.S.C. § 1129(a)(3).

[30] *See id.*

[31] *See In re Am. Cap. Equip., LLC*, 688 F.3d 145, 156-161 (3d Cir. 2012).

[32] *See In re Aleris Int'l, Inc.*, 2010 Bankr. LEXIS 2997, at *70-71 (Shannon, J.).

[33] *See In re PWS Holding Corp.*, 228 F.3d 224, 242 (3d Cir. 2000) (internal quotations and citation omitted).

> instructed in the W.R. Grace case that the important point of inquiry is the plan itself and whether such plan will fairly achieve a result consistent with the objectives and purposes of the bankruptcy code. The Court finds that debtor has carried its burden in this regard. *See id.* at 548-49.

Based on the plain language of section 1129(a)(3) and the foregoing authorities, a number of courts have concluded that the plan proponent's conduct before filing for bankruptcy is not a relevant inquiry under section 1129(a)(3).[34] In addition, most of the courts that set forth a different formulation state only that the plan proponent's conduct before filing bankruptcy *may* be considered and do not state that such conduct *must* be considered.[35]

Based on these established standards, the Bankruptcy Court's statements concerning conduct committed by Defendants prior to the filing of the Petition were not "essential" to its determination under section 1129(a)(3) because Defendants' pre-petition conduct was irrelevant to its analysis. In paragraph 15, the Bankruptcy Court stated that the Plan was "the only viable option to continue

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[34] *See In re Gaines,* No. 5:13-AP-07096, 2014 WL 7011134, at *1 (Bankr. W.D. Ark. Mar. 11, 2014) ("[A] finding of good faith under § 1129(a)(3) relates to the debtors' act of proposing a plan. The finding of good faith does not extend outside this context to include alleged pre-petition actions of the debtors."); *In re Machne Menachem, Inc.,* 371 B.R. 63, 69 (Bankr. M.D. Pa. 2006) (same); *In re Tex. Star Refreshments, LLC,* 494 B.R. 684, 694 (N.D. Tex. 2013) (same); *In re Geissel*, 480 B.R. 238, 255 (N.D. Tex. 2012) (same); *In re Valley View Shopping Ctr., L.P.*, 260 B.R. 10, 38 (Bankr. D. Kan. 2001) (same); *In re Gen. Homes Corp.*, 134 B.R. 853, 862 (Bankr. S.D. Tex. 1991) (same); *In re Cellular Info. Sys., Inc.*, 171 B.R. 926, 945 (Bankr. S.D.N.Y. 1994) (same); *In re Fiesta Homes of Ga., Inc.,* 125 B.R. 321, 325 (Bankr. S.D. Ga. 1990) (same); *In re Tex. Extrusion Corp.*, 68 B.R. 712, 723 (N.D. Tex. 1986); *In re Cyr Meat Packing, Inc.,* 2 B.R. 620, 626 n. 24 (Bankr. D.Me. 1980) (same).

[35] *See In re Resorts Int'l, Inc.,* 145 B.R. 412, 469 (Bankr. D.N.J. 1990); *In re Elsinore Assoc.*, 91 B.R. 238, 260 (Bankr. D.N.J. 1988); *In re Leslie Fay Co., Inc.,* 207 B.R. 764, 781 (Bankr. S.D.N.Y. 1987); *In re Toy & Sports Warehouse, Inc.,* 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984).

[Old Seegrid's] business" and was "the product of good faith, arm's length negotiations" between Old Seegrid and Giant Eagle. *See id.* at 374-75. The Bankruptcy Court, therefore, made no, let alone any "essential," determinations concerning Defendants' *pre-petition conduct* on which the claims in the Complaint are based. *See id.* at 16-68. Moreover, any determinations concerning pre-petition conduct could not support the application of collateral estoppel because they were not "essential" to confirmation of the Plan based on all the authorities cited above.

Nevertheless, at the Hearing on the Motion, the Trial Court erroneously relied on those irrelevant determinations made by the Bankruptcy Court. In particular, the Trial Court stated that:

> I think that Judge Shannon would not have approved the plan had he thought that this was all part of a scheme by Giant Eagle culminating in the bad faith achievement of what they ostensibly had sought all along. *See id.* at 741.

That speculation by the Trial Court constitutes reversible error because if there is any doubt whether collateral estoppel should be applied, it should be rejected.[36]

The Trial Court then stated that:

> It seemed to me that one of the key arguments that Mr. Horbal made in objecting to the plan was that the plan had been prepared in bad faith, essentially because as the culmination of the scheme that he had outlined in the complaint in front of me. *See id.* at 740-41.

That mistaken determination also constitutes reversible error because pre-petition conduct is irrelevant to the determination of good faith under section

[36] *See supra* note 23 and accompanying text.

1129(a)(3) and, therefore, Giant Eagle's pre-petition misconduct was not "essential" to paragraph 15 of the Confirmation Order.[37] Indeed, Plaintiffs did not litigate that pre-petition misconduct in the Bankruptcy Court, as Plaintiffs' counsel made clear:

> Mr. Neligan: Your Honor, first, we withdrew any objection to – or claim against Giant Eagle for exercising improper control, but – or you know, bad faith. We did not want that as part of the confirmation hearing. *See id.* at 347.

The Bankruptcy Court also made that clear:

> The Court: Right. So the sentence that begins "Giant Eagle did not exercise control," I'm going to strike that. And I want to be clear that my striking it is not a suggestion that I found that Giant Eagle exercised control. But that's necessarily a typical finding that I would make in the context of a plan confirmation. I don't believe the debtor needs it. And again, I'm aware of the shadow of separate litigation, and it's not my intention to affect that, one way or the other. *See id.* at 348.

Finally, in dismissing the Complaint with prejudice based on collateral estoppel or issue preclusion, the Trial Court erroneously determined that the Confirmation Order addresses all the issues raised by the Complaint. *See id.* at 28-33, 38-62, 740-45. The Trial Court did not analyze each of the factual bases for Plaintiffs' breach of fiduciary duty claims and determine how the Confirmation Order's "essential" findings purportedly preclude the litigation of Plaintiffs' allegations in this action. *See id.* In essence, the Trial Court committed reversible

[37] *See supra* notes 27-36 and accompanying text.

error because it applied an analysis that may be suitable to claim preclusion but not issue preclusion.[38]

Accordingly, the Trial Court erred in ruling that Old Seegrid satisfied its burden of demonstrating that, based on paragraph 15 of the Confirmation Order, collateral estoppel applied to the Complaint and warranted its dismissal with prejudice.

b. **The Trial Court erred in concluding that paragraph 35 of the Confirmation Order includes "identical" determinations that are entitled to preclusive effect.**

The Trial Court erroneously concluded that collateral estoppel required the dismissal of the Complaint with prejudice based on paragraph 35 of the Confirmation Order because Old Seegrid failed to, and cannot, prove that the Bankruptcy Court's allowance of Giant Eagle's claims against Old Seegrid is an "identical" issue to those raised by the Complaint. As stated above, neither the parties nor the Court even mentioned paragraph 35 before the Trial Court issued its decision. *See id.* at 437, 451, 666. Instead, the Trial Court raised this issue *sua sponte*. *See id.* at 666-751. Collateral estoppel, however, is an affirmative defense

[38] *See Brown v. Felsen*, 442 U.S. 127, 138 n.10 (1979) ("Whereas res judicata forecloses all which might have been litigated previously, collateral estoppel treats as final only those questions actually and necessarily decided in a prior suit.").

that may be waived if not raised.[39] The Trial Court committed reversible error by raising this issue *sua sponte* without giving Plaintiffs an opportunity to address it.[40]

Moreover, collateral estoppel is confined to situations "where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged."[41] The Third Circuit has held that whether an issue is "identical" is established by showing that the same legal rules govern both cases and that the facts of both cases are indistinguishable.[42]

Paragraph 35 concerns the allowance of Giant Eagle's claims against Old Seegrid based on its pre-petition loans to Old Seegrid. *See id.* at 380-81. The Bankruptcy Court's allowance of Giant Eagle's claims based on Old Seegrid's contractual obligation to repay those loans is not "identical" to the issues raised by the Complaint because the confirmation of the Plan and the resolution of the breach of fiduciary duty claims set forth in the Complaint are not governed by the same legal rules and do not involve all the same facts. The allowance of Giant Eagle's claims against Old Seegrid was governed by Pennsylvania law, *see id.* at 73, 363, whereas Plaintiffs' breach of fiduciary duty claims are governed by

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[39] *See* DEL. CH. R. 8(c); *James v. Glazer*, 570 A.2d 1150, 1153 (Del. 1990); *Iseley v. Beard*, 200 F. App'x 137, 142 (3d Cir. 2006).

[40] *See Williams v. Midwest Employers Cas. Co.*, 2002 U.S. App. LEXIS 28965, at *20-21 (5th Cir. 2002).

[41] *See Veterinary Surgical Consultants, P.C.*, 90 F. App'x at 670 (citing *C.I.R.*, 333 U.S. at 599-600); *see also Jim Beam Brands Co. v. Beamish & Crawford Ltd.*, 937 F.2d 729, 734-36 (2d Cir. 1991).

[42] *See Suppan*, 203 F.3d at 233.

Delaware law, *see id.* at 16-68. In addition, Giant Eagle's claims against Old Seegrid were based on the fact that Giant Eagle had made, and Old Seegrid had agreed to repay, certain loans, *see id.* at 73, 363, whereas the Complaint is based, in part, not on the fact of those loans, but on the manner, timing, and sufficiency of all the efforts or lack thereof to locate additional pre-petition financing for Old Seegrid, *see id.* at 16-68. In particular, Plaintiffs allege in the Complaint that the Directors breached their fiduciary duties to Old Seegrid by not engaging an independent financial advisor to solicit and obtain competing offers to Giant Eagle's financing proposal, and by choosing the interests of Giant Eagle over the best interests of the company and its non-controlling stockholders. *See id.* at 41-60, 63.

In the Complaint, Plaintiffs do not ask the Trial Court to invalidate the loans. *See id.* at 16-68. In addition, Plaintiffs did not challenge the validity of the loans in the Bankruptcy Court. Plaintiffs did file an adversary proceeding in the Bankruptcy Court seeking to equitably subordinate Giant Eagle's loans, but the Bankruptcy Court later granted Plaintiffs' motion to voluntarily dismiss without prejudice that adversary proceeding. *See id.* at 565-66. Plaintiffs also withdrew their objections to the motion for debtor in possession financing from Giant Eagle. *See id.* at 544. And, as previously discussed, Plaintiffs' counsel withdrew the issue of Giant Eagle's alleged control over Old Seegrid from consideration by the

Bankruptcy Court.[43] Accordingly, the Trial Court erred in ruling that based on paragraph 35 of the Confirmation Order, collateral estoppel applied to the Complaint and warranted its dismissal with prejudice.

The Trial Court erred in concluding that Old Seegrid satisfied its burden of demonstrating that Plaintiffs had a "full and fair opportunity" to litigate in the Bankruptcy Court all the issues raised in the Complaint.

The Trial Court erroneously concluded that collateral estoppel required the dismissal of the Complaint with prejudice because Old Seegrid failed to, and cannot, prove that Plaintiffs had a "full and fair opportunity" to litigate all the Complaint allegations in the Bankruptcy Court. A party lacks a "full and fair opportunity" to litigate an issue if the legal standard used to determine the issue in the first action is different than the legal standard that controls in the second action.[44] Under federal common law, "[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation."[45]

Plaintiffs did not have an opportunity to present all the evidence in the Bankruptcy Court that supports their Complaint allegations because the Bankruptcy Court not only declined to hear Plaintiffs' valuation evidence, but also

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[43] *See supra* pages 25-26.

[44] *See Mendelovitz v. Adolph Coors Co.*, 693 F.2d 570, 579 (5th Cir. 1982) ("We believe this change in the legal standard precludes the collateral estoppel effect of our earlier decision. To impose this earlier decision on [defendant] would be to deny it a full and fair opportunity to litigate the allegation . . . under the current legal standard.") (internal quotations omitted).

[45] *See Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 (1982).

determined that it would not consider any principles of Delaware law. *See id.* at 589. In particular, the Bankruptcy Court stated: "Because of my ruling today with respect to the provisions of 1129(a), and specifically 1129(a)(3), I need not reach the determination of whether or not this is an insider transaction." *See id.* The Bankruptcy Court also stated: "At bottom, I am not satisfied that the Bankruptcy Code or relevant case law requires me to evaluate the proposed plan under the entire fairness standard." *See id.*

Thus, the confirmation of the Plan – including the Bankruptcy Court's findings and rulings in paragraphs 15 and 35 of the Confirmation Order – involved different legal and factual issues than those raised by Plaintiffs' breach of fiduciary duty claims set forth in the Complaint. Plaintiffs, therefore, did not have a "full and fair opportunity" to litigate all the issues raised by the Complaint in the Bankruptcy Court. Accordingly, the Trial Court erred in ruling that Old Seegrid satisfied its burden of demonstrating that Plaintiffs had a "full and fair opportunity" to litigate all the issues raised by the Complaint in the Bankruptcy Court and that, as a result, dismissal of the Complaint with prejudice was warranted.

C. The Trial Court Committed Reversible Error In Dismissing The Complaint With Prejudice Based On Plaintiffs' Purported Lack Of Standing.

1. Question presented

Whether the Trial Court committed reversible error in dismissing the Complaint with prejudice because Plaintiffs purportedly lacked standing to pursue the claims set forth in the Complaint. *See id.* at 416, 451, 666, 748.

2. Standard of review and applicable legal standards

The issue whether the Trial Court erred in dismissing the Complaint with prejudice based on Plaintiffs' purported lack of standing is a question of law that this Court reviews *de novo*.[46]

3. Merits of argument

The Trial Court erred in not providing Plaintiffs with an opportunity to amend the Complaint to allege their double derivative standing to pursue the claims in the Complaint. As previously discussed, Rule 25(c) is a rule of procedure only; it merely permits, but does not require, the substitution of a party when a transfer of interest occurs during the course of an action.[47] Thus, the Trial Court erred in dismissing the Complaint based on the Motion.

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[46] *See Lambrecht*, 3 A.3d at 281; *Sagarra Inversiones, S.L.*, 34 A.3d at 1078; *Appriva S'holder Litig. Co., LLC*, 937 A.2d at 1285-86; *Wal-Mart Stores, Inc.*, 860 A.2d at 318.

[47] *See* DEL. CH. R. 25(c); *ClubCorp, Inc.*, 2011 WL 5554944, at *6; *In re Covington Grain Co.*, 638 F.2d at 1361.

In addition, this Court has held that challenges to standing are properly brought pursuant to motions under Rule 12(b)(6).[48] Even if the Motion could be deemed such a motion (which it was not), the Trial Court erred by not affording Plaintiffs an opportunity to amend the Complaint to allege double derivative standing pursuant to Rules 15(a) and 15(aaa), as previously discussed.[49]

Although the Trial Court did not decide whether Plaintiffs have double derivative standing under Delaware law to pursue their breach of fiduciary duty claims against Defendants, this Court has recognized the validity of double derivative lawsuits.[50] The Trial Court also suggested that Plaintiffs should have an opportunity to replead in order to assert their double derivative standing to pursue the claims set forth in the Complaint:

> It seems to me that what happened in this bankruptcy proceeding is most akin to . . . what happens in a merger. Taking a page, then, from Lambrecht v. O'Neal, and applying that by analogy, it seems to me that the proper approach is to make the plaintiff at this point replead a double derivative claim. . . . [T]he bankruptcy is a sufficiently substantial change that the same Delaware Supreme Court that decided Lambrecht vs. O'Neal would say that one must file a new derivative action alleging why one now has derivative standing. *See id.* at 738-39.

The Trial Court erred by not affording Plaintiffs the opportunity to amend the Complaint to assert double derivative standing. Accordingly, because the

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[48] *See Appriva S'holder Litig. Co., LLC*, 937 A.2d at 1285-86.

[49] *See* DEL. CH. R. 15(a), 15(aaa); *Mallinckrodt Inc.*, 671 F. Supp. 2d at 567; *Braddock*, 906 A.2d at 782-83; *Phillips*, 515 F.3d at 236.

[50] *See Lambrecht*, 3 A.3d at 288.

concept of double derivative standing exists under Delaware law but the Trial Court did not decide whether Plaintiffs, in fact, have double derivative standing to pursue the claims in the Complaint, the Court should reverse the Order and remand this action to the Trial Court with instructions permitting Plaintiffs to amend the Complaint to assert double derivative standing to pursue their breach of fiduciary duty claims against Defendants. The Trial Court will then have a proper record on which to decide whether Plaintiffs have standing in the event that Defendants actually file and pursue motions to dismiss under Rule 12(b)(6).

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court conclude that the Trial Court committed reversible error in dismissing the Complaint based on collateral estoppel and Plaintiffs' purported lack of standing, remand this action to the Trial Court with instructions permitting Plaintiffs an opportunity to amend the Complaint to assert double derivative standing to pursue their breach of fiduciary duty claims against Defendants, and award Plaintiffs such other and further relief to which they are justly entitled.

RESPECTFULLY SUBMITTED,

WERB & SULLIVAN

Dated: September 17, 2015

By: */s/ Brian A. Sullivan*

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Case No. 10023-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ANTHONY HORBAL and HERC MANAGEMENT SERVICES, LLC, derivatively on behalf of SEEGRID CORPORATION, Plaintiffs, v. DANIEL SHAPIRA, PHILLIP OLIVERI, HANS MORAVEC, GIANT EAGLE, INC., and GIANT EAGLE OF DELAWARE, INC., Defendants, and SEEGRID CORPORATION, Nominal Defendant.	C.A. No. 10023-VCL

[PROPOSED] ORDER

WHEREAS, on August 8, 2014, Plaintiffs Anthony Horbal and HERC Management Services, LLC ("Plaintiffs") commenced this action by filing a Verified Derivative Complaint (the "Complaint") on behalf of Nominal Defendant Seegrid Corporation n/k/a Seegrid Holding Corporation ("Old Seegrid");

WHEREAS, on October 3, 2014, Old Seegrid filed a voluntary petition for bankruptcy relief styled *In re Seegrid Corporation*, Del. Bankr. Case No. 14-12391

(BLS) (the "Bankruptcy Proceeding") and a prepackaged reorganization plan (the "Plan");

WHEREAS, on October 23, 2014, Old Seegrid filed in this action a Notice of Bankruptcy Petition and Automatic Stay. The filing of the bankruptcy petition stayed this action pursuant to Section 362(a)(1) of the Bankruptcy Code;

WHEREAS, Horbal and HERC appeared in the Bankruptcy Proceeding and objected on certain grounds to, among other things, the Plan and the disclosure statement circulated to obtain creditor approval of the Plan;

WHEREAS, the Court in the Bankruptcy Proceeding confirmed the Plan and made certain findings of fact and legal rulings pursuant to an oral ruling issued on January 15, 2015 (the "Oral Ruling") and Findings of Fact, Conclusions of Law and Order (i) Approving the Debtor's (a) Disclosure Statement Pursuant to Sections 1125 and 1126(b) of the Bankruptcy code, (b) Solicitation of Votes and Voting Procedures and (c) Forms of Ballots and (ii) Confirming the Prepackaged Plan of Reorganization of Seegrid Corporation under Chapter 11 of the Bankruptcy Code (the "Confirmation Order");

WHEREAS, on April 8, 2015, Old Seegrid filed a Motion to Substitute Plaintiff seeking an Order substituting Seegrid Corporation f/k/a Seegrid Operating Company ("New Seegrid") as plaintiff in this action;

WHEREAS, on June 2, 2015, Plaintiffs filed a Response in Opposition to Nominal Defendant's Motion to Substitute Plaintiff;

WHEREAS, on June 17, 2015, Old Seegrid filed a Reply to Plaintiffs' Response in Opposition to Nominal Defendant's Motion to Substitute Plaintiff;

WHEREAS, on July 10, 2015, Plaintiffs filed (with consent of Defendants and approval of the Court) a Sur-Reply to Nominal Defendant's Motion to Substitute Plaintiff;

WHEREAS, on July 14, 2015, oral argument was heard before the Court on Old Seegrid's Motion to Substitute Plaintiff; and

WHEREAS, following such argument, the Court issued a ruling (the "Transcript Ruling");

IT IS HEREBY ORDERED this ___ day of July, 2015 that this action is DISMISSED WITH PREJUDICE for the following reasons, which are stated in more detail in the Transcript Ruling and incorporated herein:

1. Plaintiffs lack standing to pursue the claims asserted in the Complaint, but the Court makes no determination whether Plaintiffs possess double derivative standing in the event this Order is reversed and remanded on appeal and Plaintiffs file a new action on a double derivative basis.

2. The findings of fact in the Oral Ruling and the Confirmation Order in the Bankruptcy Proceeding collaterally estop Plaintiffs from asserting the factual claims set forth in the Complaint, including on a double derivative basis.

____
Vice Chancellor Laster

9314737

This document constitutes a ruling of the court and should be treated as such.

Court:	DE Court of Chancery Civil Action
Judge:	J Travis Laster
File & Serve Transaction ID:	57569214
Current Date:	Jul 17, 2015
Case Number:	10023-VCL
Case Name:	STAYED Horbal, Anthony vs Daniel Shapira

/s/ Judge Laster, J Travis

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ANTHONY HORBAL and HERC MANAGEMENT SERVICES, LLC, derivatively on behalf of SEEGRID CORPORATION, Plaintiffs, v DANIEL SHAPIRA, PHILLIP OLIVERI, HANS MORAVEC, GIANT EAGLE, INC., and GIANT EAGLE OF DELAWARE, INC., Defendants, and SEEGRID CORPORATION, Nominal Defendant.	Civil Action No. 10023-VCL

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Chancery Courtroom No. 12C
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Tuesday, July 14, 2015
2:00 p.m.

\- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

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ORAL ARGUMENT ON NOMINAL DEFENDANT'S MOTION TO SUBSTITUTE PLAINTIFF and RULINGS OF THE COURT

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0523

1 APPEARANCES:

2 BRIAN A. SULLIVAN, ESQ.
Werb & Sullivan
3 -and-
CHARLES J. BROWN, III, ESQ.
4 Gellert, Scali, Busenkell & Brown
-and-
5 MICHAEL J. COLLINS, ESQ.
of the Texas Bar
6 Brewer, Attorneys & Counselors
for Plaintiffs
7
KENNETH J. NACHBAR, ESQ.
8 MATTHEW R. CLARK, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
9 for Defendants Daniel Shapira, Phillip Oliveri,
Hans Moravec, and Nominal Defendant Seegrid
10 Corporation

11 BRIAN M. ROSTOCKI, ESQ.
Reed Smith LLP
12 for Defendants Giant Eagle, Inc., and Giant
Eagle of Delaware, Inc.
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1 withdrawal -- dismissal without prejudice of the
2 equitable subordination claim and everything else that
3 was going on in the bankruptcy. I didn't draw that
4 distinction. They did. And for them to now come in
5 and say, well, Allegheny County has overruled
6 preliminary objections and that means collateral
7 estoppel doesn't apply, I think it's contrary to their
8 own distinction that they made. And also, I mean,
9 it's only overruling a preliminary objection, so it's
10 not a final adjudication. And we don't even know why
11 the Court denied the preliminary objection. It's just
12 an order with no reasoning.
13 Thank you, Your Honor.
14 THE COURT: All right. Well, I want
15 to thank both of you. I appreciate your arguments.
16 Your presentations were very lucid. I am going to go
17 ahead and give you an answer now. This would be a
18 fascinating thing to write on, but the press of work
19 does not allow me to do that, and I think you-all can
20 benefit from an immediate answer.
21 The technical motion that we have here
22 today is a motion to substitute a plaintiff. New
23 Seegrid, a post-bankruptcy entity, seeks to take over
24 control of the litigation from the current plaintiffs,

1 Anthony Horbal and his affiliate, HERC Management
2 Services, LLC. The litigation originally was filed
3 derivatively on behalf of Seegrid Corporation, whom
4 the parties have referred to as "Old Seegrid." It was
5 the pre-bankruptcy entity.
6 In short, the litigation contends that
7 Giant Eagle and its representatives on the board of
8 Old Seegrid engaged in a number of breaches of
9 fiduciary duty, primarily geared towards keeping Old
10 Seegrid starved for financing. This ultimately
11 allowed Giant Eagle, as alleged in the complaint, to
12 make very onerous proposals to Old Seegrid. When
13 Giant Eagle could not achieve its goals -- at least as
14 alleged, its goals being to take control of Old
15 Seegrid's assets on the cheap by keeping the company
16 in distress and then taking advantage of its
17 distressed condition -- when Giant Eagle was defeated
18 in its efforts to do so outside of bankruptcy, Giant
19 Eagle and Old Seegrid filed the bankruptcy proceeding.
20 Through the plan that was confirmed in the bankruptcy
21 proceeding, they functionally achieved much of what
22 they sought through their prelitigation conduct. The
23 complaint stops just short of the bankruptcy
24 proceeding because the bankruptcy proceeding halted

1 the procession of this action.

2 The bankruptcy proceeding was

3 litigated over a period of three to four months.

4 There was a trial on the confirmation of the plan.

5 Judge Shannon ultimately confirmed the plan and New

6 Seegrid exited from bankruptcy. As part of the

7 bankruptcy plan, all causes of action belonging to Old

8 Seegrid were assigned to New Seegrid. This was part

9 of the assignment of all of the assets of Old Seegrid

10 to New Seegrid. As I discussed with counsel, I think

11 the main point was to assign all of the company's

12 operating claims so, for example, if it had a claim

13 against a supplier or a customer, or something like

14 that, New Seegrid could assert it. Nevertheless, this

15 claim, being a derivative claim, necessarily belonged

16 to Old Seegrid and was part of what was assigned.

17 By virtue of the plan, New Seegrid has

18 now come to this Court saying that it should be able

19 to substitute itself for the original plaintiff

20 because the plan confers the ability to control the

21 disposition of legal claims such as those before me on

22 New Seegrid.

23 This is, in my view, an interesting

24 argument. If given its full effect, I actually don't

1 think you need to substitute anyone at all. In fact,
2 if given its full effect, what it means is that
3 Mr. Horbal and HERC were deprived of standing and this
4 case should be simply dismissed. There's no need for
5 New Seegrid to come in and be substituted and then for
6 New Seegrid to do whatever it wishes with the claims.
7 I think this is an example of an area
8 where our law struggles. Our law is fairly
9 straightforward as to what's supposed to happen with a
10 derivative action when there's no fundamental change
11 in the entity during the course of the litigation. We
12 have a lot of difficulty -- not just Delaware law,
13 corporate law in general -- and have struggled for
14 decades with what to do when there's some type of
15 fundamental change in the entity, be it through a
16 dissolution -- that's how it originally came up.
17 Subsequently, the concepts that surrounded the
18 disposal of these types of claims were raised by
19 mergers. Now it seems like they're being applied to
20 bankruptcies. There's a whole range of situations
21 where one can imagine this type of thing applying.
22 It's clear, I think, that when the
23 bankruptcy was filed, the claims became part of the
24 bankruptcy estate. It's also clear to me at that

1 point that notwithstanding the automatic stay -- the
2 automatic stay obviously blocked the plaintiffs from
3 proceeding, but even if it hadn't -- as long as the
4 property was under the control of the Bankruptcy Court
5 and part of the estate, the plaintiffs could not
6 proceed.
7 Once a plan is confirmed, part of the
8 plan's job is to assign those claims. Those claims
9 could have been assigned to a litigation trust. They
10 could have been assigned to particular parties to
11 pursue them. They could have been simply dismissed
12 and extinguished, as was the case in the Callen
13 litigation that I presided over -- at least the small
14 aspect that was here -- and that was referenced by
15 Mr. Nachbar in his argument.
16 It's because they were assigned to New
17 Seegrid that we have the question of what to do with
18 this action. We have that question because the
19 plaintiffs have an equity interest in New Seegrid
20 indirectly through Old Seegrid that effectively
21 devolved upon them by operation of law by virtue of
22 the Bankruptcy Court proceeding.
23 So what does one do in this situation?
24 One option would be to treat this essentially as we do

1 any time there's been a change in board control -- a
2 new board or some other change in the personnel of the
3 board -- during the ongoing litigation. We require
4 the new board to intervene and dispossess the
5 plaintiff of standing. The classic example of that is
6 Zapata. Another potential model would be to treat it
7 as we do in mergers where, under Lambrecht vs. O'Neal,
8 we actually now seem to allow a post-merger complaint
9 to be asserted.
10 It seems to me that what happened in
11 this bankruptcy proceeding is most akin to -- and
12 setting aside the collateral estoppel adjudications,
13 but as to the assignment of the claims -- what happens
14 in a merger. Taking a page, then, from Lambrecht v.
15 O'Neal, and applying that by analogy, it seems to me
16 that the proper approach is to make the plaintiff at
17 this point replead a double derivative claim. I say
18 that because I think there's been a sufficiently
19 substantial change in the entity that one should have
20 to plead as a plaintiff why one gets to proceed. And
21 this dovetails into the nature of the double
22 derivative claim. It doesn't strike me that there's
23 anything necessarily problematic about a
24 minority-minority double derivative claim. I think

1 you just have to be able to plead it. And what I
2 think potentially changes is whether this Court has to
3 have jurisdiction over both the parent and the
4 subsidiary and whether you have to plead demand
5 futility at both the parent level and the sub level.
6 In a 100-percent controlled double
7 derivative claim, we now know, post-Lambrecht vs.
8 O'Neal, that you only have to plead demand futility at
9 the parent level, because the parent is then perceived
10 to be able to work its control on the sub. I have
11 discussed, in a case that tried to apply Lambrecht,
12 whether you need to have jurisdiction over the
13 subsidiary, parent, or both. It seems to me that when
14 you have a minority-minority situation, the most
15 logical answer is probably, at least to my mind, you
16 would have to plead demand futility at both levels,
17 and you would have to have jurisdiction at both
18 levels, because you don't have the situation, as in
19 Lambrecht, where, if you plead demand futility at the
20 parent level, the parent can simply compel the sub to
21 do whatever it wants the sub to do, which was a
22 premise of the Delaware Supreme Court's opinion. So
23 that is a long-winded way of saying that I think that
24 the bankruptcy is a sufficiently substantial change

1 that the same Delaware Supreme Court that decided
2 Lambrecht vs. O'Neal would say that one must file a
3 new derivative action alleging why one now has
4 derivative standing.
5 I do think that the prior action would
6 still have relevance, particularly for things like
7 statute of limitations or laches, but I think it makes
8 sense that the plaintiff would have to now file a new
9 action and replead. Thus, I think that the logical
10 consequence of New Seegrid's argument is not that New
11 Seegrid gets to come in as a substitute plaintiff and
12 then dismiss. It's that the action simply has to be
13 dismissed. So that's one grounds for disposing of the
14 case today.
15 A second grounds for disposing of the
16 case today is collateral estoppel. Now, this is an
17 issue that was raised in reply, but then the
18 plaintiffs filed a sur-reply, such that it was fully
19 presented. The essential argument here is that
20 through the course of the bankruptcy proceeding, there
21 were findings and determinations that have collateral
22 estoppel effect on this Court.
23 I did read all of Judge Shannon's
24 ruling, and I looked through the plan. It seemed to

1 me that one of the key arguments that Mr. Horbal made
2 in objecting to the plan was that the plan had been
3 proposed in bad faith, essentially as the culmination
4 of the scheme that he had outlined in the complaint in
5 front of me.
6 It was my impression from reviewing
7 Judge Shannon's ruling that, during the three-day
8 trial he had -- in which there were seven witnesses,
9 and there was a video deposition of Mr. Horbal that
10 was played live, and I understand from Mr. Nachbar
11 that there were also witnesses presented on the
12 papers, for a total of 12 witnesses -- that Judge
13 Shannon considered the idea that the plan was the
14 culmination of these bad acts by Giant Eagle. He
15 reviewed the background of the effort. He talked
16 about the efforts that were made. He made comments on
17 what was done during the process by the lead director
18 who was left on the board. I think that Judge Shannon
19 would not have approved the plan had he thought that
20 this was all part of a scheme by Giant Eagle
21 culminating in the bad-faith achievement of what they
22 ostensibly had sought all along.
23 I am specifically relying on not just
24 the transcript, but also two paragraphs of the

1 confirmation order. The first one is paragraph 15,
2 which states "Plan Proposed in Good Faith." It
3 recites the following: "The record demonstrates that
4 the Debtor and its board diligently searched for other
5 sources of capital, hiring multiple financial advisors
6 over a period of years and directly approached
7 numerous sources of financing. No viable alternatives
8 to the Plan were found; the Plan is the only viable
9 option to continue its business. The Plan is the
10 product of good faith, arm's length negotiations
11 between the Debtor, by and through its directors,
12 officers and advisors, and Giant Eagle, Inc. and Giant
13 Eagle of Delaware." It then continues.
14 This seems, to me, to be something
15 that was actually litigated and necessary to the plan.
16 I don't think that I could reach a contrary conclusion
17 in this case as to everything that happened over the
18 years being a bad-faith breach of fiduciary duty or a
19 self-interested scheme and not reach a result contrary
20 to this finding.
21 The other paragraph of the plan that
22 I'm relying on is paragraph 35. It occurred to me
23 that one of the things that might have been litigated
24 in the bankruptcy is whether Giant Eagle should

1 actually be entitled to aspects of its claim, such as
2 its debt position. It sounds to me like there was
3 some effort to litigate that, some effort not.
4 Paragraph 35 states, "Giant Eagle is the Debtor's
5 largest shareholder and lender. Giant Eagle owns
6 approximately 31.5% of the Debtor's outstanding shares
7 and has loaned the Debtor approximately $34 million.
8 Substantially all of the loans made to the Debtor by
9 Giant Eagle were open to all investors, including HERC
10 Management Services, Anthony Horbal, Michael Horbal,
11 Apryle Anne Horbal, Donna Anderson Horbal, Screaming
12 Eagle Air, Inc. and Great American Health Plans ... on
13 the same terms as available to Giant Eagle. None of
14 Giant Eagle's claims against, or interests, in the
15 Debtor are subject to any objection,
16 recharacterization or any equitable subordination
17 action. Therefore, Giant Eagle's claims in Classes 1
18 and 2 are Allowed Claims for all purposes under the
19 Plan and this chapter 11 case in the following
20 amounts ...," and then it lists them.
21 If this litigation were to go back now
22 and undo some of the debt investments made by Giant
23 Eagle on fiduciary grounds, that would be a finding
24 that would be directly contrary to paragraph 35 of the

1 confirmation order, which allowed Giant Eagle's
2 claims. It's therefore my view that this action is
3 barred by principles of collateral estoppel.
4 So I've given you two separate bases
5 for my ruling, either one of which is sufficient to
6 result in dismissal of the current action. The first
7 one, as a practical matter, would result in dismissal
8 on standing grounds, and the action could be refiled
9 as a double derivative action. The second one is
10 broader and says that the necessary premises upon
11 which this action rests have already been litigated
12 and decided adversely to the plaintiff. So in light
13 of the second one, I don't think, at present, the
14 plaintiff has the ability to go back and refile.
15 I have no illusions that I am the
16 final word on this, so if you-all go down to Dover and
17 the Delaware Supreme Court tells you, "Laster was
18 wrong on collateral estoppel" -- maybe they'll tell
19 you I was wrong on the first one as well. That's
20 fine. They may very well say I was wrong on both.
21 But at a minimum, if they say I'm wrong on the second
22 one, then conceivably you could come back and file a
23 double derivative action, which I would then analyze
24 for all the interesting issues you-all have put before

1 me, but which I don't think are sufficiently teed up
2 right now for me to deal with.
3 That's my ruling. I would like
4 Mr. Nachbar to submit something short, like a
5 two-paragraph order, one for each basis, so that there
6 will be something on the record from which the
7 plaintiff can potentially appeal. Obviously, present
8 it after giving your friends notice. And we'll go on
9 from there, and you-all will either be back or not.
10 Any questions? Mr. Nachbar, you were
11 the movant. Any questions?
12 MR. NACHBAR: No questions, Your
13 Honor. Thank you.
14 THE COURT: All right.
15 Let's see. Mr. Collins, any questions
16 from you, sir?
17 MR. COLLINS: No, Your Honor. No.
18 THE COURT: Great. Thank you again,
19 Counsel. I really did appreciate your arguments.
20 It's one of these fascinating issues involving the
21 derivative action labyrinth, and I'm sure that this
22 won't be the last time we will have to struggle with
23 those complexities.
24 We stand in recess.

1 MR. NACHBAR: Thank you, Your Honor.
2 MR. SULLIVAN: Thank you, Your Honor.
3 (Court adjusted at 3:47 p.m.)
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