

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ARCHER VI, LLLP,	:
	:
Plaintiff,	:
	:
v	: Civil Action
	: No. 11237-CB
ARCHER ON NORTH, LLC,	:
Defendant/Counterclaim and Third	:
Party Complaint Plaintiff/Third	:
Party Counterclaim Defendant,	:
	:
SCM ATHENS INVESTORS, LLC,	:
Defendant/Counterclaim and Third	:
Party Complaint Plaintiff,	:
	:
and AON II, LLC,	:
Defendant,	:
	:
v	:
	:
ARCHER PROPERTIES, LLLP,	:
	:
Third-Party Defendant/Third-Party	:
Counterclaim Plaintiff.	:

- - -
Chancery Court Chambers
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Monday, May 2, 2016
2:05 p.m.
- - -

BEFORE: HON. ANDRE G. BOUCHARD, Chancellor

- - -
TELEPHONIC ORAL ARGUMENT ON DEFENDANTS' MOTION TO
COMPEL 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: (Via teleconference)

2 DANIEL A. GRIFFITH, ESQ.
Whiteford, Taylor & Preston LLP

3 -and-

4 JAMES C. CIFELLI, ESQ.
of the Georgia Bar
Lamberth, Cifelli, Ellis & Nason, P.A.
5 for Plaintiff and Third-Party Defendant

6 JOHN L. WILLIAMS, ESQ.
BRIAN C. CRAWFORD, ESQ.
7 The Williams Law Firm, P.A.

-and-

8 RYAN T. PUMPIAN, ESQ.
of the Georgia Bar
9 Bloom Sugarman, LLP
for Defendants

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1 THE COURT: Good afternoon, Counsel.
2 This is the Chancellor on the line. May I please have
3 appearances for the record, beginning with counsel for
4 plaintiffs.

5 MR. GRIFFITH: Yes, Your Honor. Good
6 afternoon. This is Dan Griffith from the Whiteford
7 Taylor & Preston law firm. And with me, admitted pro
8 hac vice, is Jim Cifelli from the Lamberth Cifelli law
9 firm in Atlanta.

10 Mr. Cifelli flew up this morning
11 anticipating it would be an in-person hearing, but he
12 is in my office now, across the street from the
13 courthouse.

14 THE COURT: I'll address that --

15 MR. CIFELLI: Good afternoon,
16 Chancellor Bouchard.

17 THE COURT: Yeah, good afternoon. And
18 I'll address that in a second.

19 And who do we have on the line for the
20 defendants?

21 MR. WILLIAMS: Good afternoon, Your
22 Honor. This is John Williams, and we also have Brian
23 Crawford from the Williams Law Firm on the line. And
24 in addition to that, pro hac vice we have Ryan

1 Pumpian, who will be presenting today, from Bloom
2 Sugarman. And our clients are also on the phone, Jake
3 Farver and Eric Gittleman.

4 THE COURT: All right. Good
5 afternoon.

6 Before I get to the motion that's the
7 cause of the call, let me say at the outset, I
8 apologize if there was some confusion about the
9 scheduling of this hearing. To be honest, I did want
10 to have this in person initially. I think we made an
11 accommodation when we heard from one side about doing
12 it over the phone, and there appears to have been some
13 miscommunication. So I apologize, Mr. Cifelli, if
14 you've been inconvenienced.

15 So you know, going forward I'm going
16 to expect, unless good cause is shown otherwise, for
17 future hearings in this case to be in person in my
18 courtroom. I have a concern that this case is a bit
19 adrift, and it needs to obtain a level of seriousness.
20 Now, I hope you'll disabuse me of that, but that's my
21 perception from looking through the state of the
22 docket and where things are in discovery relative to
23 the scheduling order that's in place in this case.

24 So I'm going to turn it over, first of

1 all, to defendants. It's your motion to compel. But
2 I would also like some broader context about where
3 discovery stands overall and where the case stands
4 overall from your perspective, and I'm going to want
5 to get the same kind of perspective from the other
6 side with the plaintiffs.

7 Who will be speaking for defendants?

8 MR. PUMPIAN: I will, Your Honor.

9 This is Ryan Pumpian.

10 THE COURT: All right, Mr. Pumpian.
11 The floor is yours.

12 MR. PUMPIAN: Thank you very much.
13 And I appreciate the accommodation and being able to
14 appear on the telephone, and I am sorry, as well, if
15 we contributed to the confusion.

16 You asked for overall context in the
17 case, and discovery is done. But for whatever the
18 Court may order as part of this motion to compel,
19 discovery is closed. Dispositive motions are due in
20 about two weeks. So the case is proceeding. We have
21 taken -- our side took three depositions, the other
22 side took one or two. So our discovery is complete in
23 the case.

24 THE COURT: And tell me about the

1 document discovery. Did the parties agree on search
2 terms? Did they exchange search terms? Work out a
3 protocol? Were custodians selected for running
4 eDiscovery? What happened in that regard?

5 MR. PUMPIAN: We did not engage -- or
6 discuss a detailed search protocol. We didn't think
7 that was necessary. We did -- Mr. Cifelli and I
8 talked about that in the beginning, and we didn't
9 think we would need to do a lot of electronic
10 searching. These companies are not big companies.
11 There's a few principals involved. The custodians are
12 pretty obvious, I thought.

13 So I didn't think we would need a
14 full-blown eDiscovery protocol. And I still don't. I
15 still believe that -- I think there's some missing
16 e-mail, and that sort of thing, but I don't think a
17 full-blown protocol was necessary. I think they just
18 didn't look in certain places that they needed to
19 look.

20 THE COURT: Well, as I'm sure your
21 Delaware counsel informed you, we do have pretty
22 strong expectations, especially when it comes to
23 eDiscovery, that people do exchange search protocols
24 right at the outset of the case to avoid the very kind

1 of problems that apparently you're having now, in
2 thinking that certain things should exist that haven't
3 been produced. But let me let you get to the
4 specifics that form the basis for your motion.

5 One other thing I am curious about is,
6 from your perspective, what remains of your claims,
7 what the essence of them are, and vice versa from the
8 other side for the plaintiffs. Because there
9 obviously have been some developments since this case
10 started last July.

11 MR. PUMPIAN: Sure. So Your Honor
12 asked for us to summarize the remaining issues in a
13 letter, in a joint letter, and the parties did that.
14 From our perspective, we identified four issues, but
15 they're really just two issues.

16 THE COURT: All right.

17 MR. PUMPIAN: Because three of them
18 are kind of the same. And what I mean by that is
19 we're looking for communications either between the
20 two Archer entities -- one is the plaintiff, one is
21 the third-party defendant, so Archer VI and Archer
22 Properties -- so communications either internal to
23 each of those entities or between those two entities.
24 So those are the three issues that all go together.

1 And then the second issue is an expense award for
2 having to file the motion. That's what we think are
3 at issue from our perspective.

4 And in the letter, also,
5 plaintiff -- the Archer entities asked for an expense
6 award. So that was the one issue that was on the
7 table from their perspective.

8 THE COURT: All right. Now, in your
9 letter you indicate that the communications you're
10 looking for are regarding the Archer on North
11 apartment project, and I think you say that about the
12 internal communications you're looking for as well.
13 The difficulty I have with that is that is hopelessly
14 broad, and you've got to be more specific for what
15 you're looking for.

16 MR. PUMPIAN: It is potentially broad,
17 but we -- Mr. Cifelli and I did have conversations
18 about how we narrow that. And they've sort of done
19 that. So I think -- you asked where are we now.
20 After we filed the motion, they made three
21 productions. And I think many, many of the
22 outstanding issues that we identified in the motion
23 were addressed in those productions.

24 The e-mail is the one exception. It

1 just looks like not much has been produced in that
2 regard. And despite our depositions, we really
3 haven't learned where they looked and who they looked.
4 And here's what I think is left on that, just to cut
5 to the chase on that point. I think they need to look
6 in two custodians' e-mails; that is, George Connell,
7 who is a principal of both of the Archer entities, and
8 Melissa Hill, who is the property manager of the
9 Archer on North apartment complex.

10 Ms. Hill testified that she e-mailed
11 with Mr. Connell daily; so for about two and a half
12 years. So I just -- I think those two custodians,
13 look in there. What are they talking about, with
14 regard to the management and the operation of the --
15 of the apartment project.

16 It's somewhat difficult to be super
17 specific about what we're looking for, because one of
18 the issues that we're having is we think that they
19 mismanaged the project. And so there's a lot of
20 aspects that go into that. Were they talking about
21 certain of those issues that would have -- would go to
22 the mismanagement, like spending? You know, did they
23 spend the budget that they were supposed to on certain
24 repairs and upkeep? And that sort of thing. We think

1 that was a weakness. There were humidity issues,
2 particularly in the first year, and we wanted to know
3 what they were talking about with regard to that.
4 What were the -- when did they know? What did they do
5 about it? How quickly did they address it? All sorts
6 of those things.

7 There's probably other -- there's
8 potentially other custodians that are relevant, but
9 those are the primary two.

10 THE COURT: What's Mr. Connell's first
11 name again, please?

12 MR. PUMPIAN: George.

13 THE COURT: And what is Ms. Hill's
14 first name again, please?

15 MR. PUMPIAN: Melissa.

16 THE COURT: And what are their
17 positions?

18 MR. PUMPIAN: Melissa Hill was the
19 property manager of the apartment complex; so she was
20 basically the top person on the ground at the project.
21 And then -- and then Mr. Connell is an owner of both
22 Archer VI and Archer Properties. There's effectively
23 two principals of those two entities: George Connell
24 and Charles Menser. And Mr. Menser testified that he

1 does not use e-mail, or he uses it very infrequently.
2 That appears to be the case, based on what we've seen.

3 THE COURT: And who would be the
4 relevant people on your side of the ledger that should
5 be custodians?

6 MR. PUMPIAN: On the defendants' side?

7 THE COURT: Yes.

8 MR. PUMPIAN: Mr. Farver and
9 Mr. Gittleman are the primary.

10 THE COURT: And did you conduct a
11 search of their e-mails as well?

12 MR. PUMPIAN: We did.

13 THE COURT: And did you do it using
14 search terms, or how did you do it?

15 MR. PUMPIAN: Well, this project is --
16 there's a specific entity formed for this project,
17 which is the SCM Athens investors. So to the extent
18 we could pull e-mail associated with that, we did.
19 And both Mr. Farver and Mr. Gittleman searched their
20 e-mail for anything that had to do with the project.
21 They were -- they're the 90-percent investor, but they
22 were not in charge of day-to-day management of the
23 property. So -- up until early 2015.

24 So in other words, they were mostly on

1 the receiving end of communications from the joint
2 venture partner and the managing member of the entity.
3 So in other words, they didn't have as much, or we
4 didn't expect them to have as much. But they did
5 produce some. A lot of it was communications with the
6 other side. So in other words, we produced e-mail
7 between Mr. Farver and Mr. Connell, but we didn't get
8 the same type of e-mail back. So a lot of the e-mail
9 communications between the parties came from our side.

10 THE COURT: All right. So if we
11 had -- do Mr. Farver and Mr. Gittleman have any
12 commercial relationship with Mr. Connell or Ms. Hill
13 outside of the investment that's at issue in this
14 case?

15 MR. PUMPIAN: No.

16 THE COURT: So if they did a search of
17 all communications between each other, would that
18 capture everything you're looking for?

19 MR. PUMPIAN: That -- no, it wouldn't,
20 because that's communications between the two opposing
21 sides.

22 THE COURT: I'm sorry. You're right.
23 I mean, it wouldn't get the internal, but would that
24 cover everything in terms of communications between

1 them that you're looking for?

2 MR. PUMPIAN: Yes.

3 THE COURT: All right.

4 All right. Anything else from your
5 side?

6 MR. PUMPIAN: One additional thing.

7 THE COURT: All right.

8 MR. PUMPIAN: We received the third
9 supplemental production, as Mr. Cifelli and I agreed.
10 Mr. Cifelli agreed to produce certain investor
11 reports, and he produced those last Friday, April 29.
12 And this is -- I think this is a perfect example of
13 them not taking their responsibilities seriously and
14 finally sort of doling these things out slowly.

15 These reports -- there's about seven
16 reports that are produced. I say about seven, because
17 there's one that's being withheld that we got a piece
18 of it, but not the other piece, on privilege grounds.
19 So let me set that aside. But of the seven reports
20 that were produced, they talk -- these are reports
21 prepared by Mr. Connell and Mr. Menser and sent to
22 other investors in their entity.

23 THE COURT: Okay.

24 MR. PUMPIAN: We don't know who they

1 are. There's been no correspondence showing how they
2 were transmitted or when they were transmitted. But
3 so these investor reports talk about issues that are
4 in the case. So they talk about the moisture issue.
5 They talk about refinancing, and that the other side
6 considers the refinancing a success, while there were
7 some complaints in the case about the refinancing not
8 being successful and it being our side's fault. Well,
9 I think these reports contradict that to some degree.

10 There's an admission by Archer
11 Properties that they were charging rent below budgeted
12 amounts. That was an issue, because my folks were
13 concerned about charging a rental -- a monthly rental
14 rate below what was budgeted. And so there was a
15 dispute about -- one side said, well, we got very high
16 occupancy rates, and our side was saying, well, you
17 have high occupancy rates, but you're not charging the
18 rent you're supposed to be charging. That's discussed
19 in these investor reports. There's some references to
20 bad debt, which I think probably is a reference to
21 uncollectible rent, which is a function of due
22 diligence on residents, or potential residents, when
23 they're coming in.

24 So it's those types of things that I

1 think would have been useful at deposition. And that
2 just shows that these reports are relevant. I don't
3 know why they weren't produced before. I think
4 they're just plainly the type of thing that should
5 have been produced.

6 THE COURT: Right. But what are you
7 missing now? I understand that as of the time you
8 made your submission, there were seven or eight that
9 you hadn't received. It sounds like you've received
10 most of them. How many, if any, are missing now, at
11 this point?

12 MR. PUMPIAN: Mr. Cifelli's
13 represented that these eight reports are all that
14 exist.

15 THE COURT: Okay.

16 MR. PUMPIAN: But we didn't know they
17 existed at all until we started having -- until you
18 set the hearing. And then Mr. Cifelli and I conferred
19 again and it was disclosed that these reports exist,
20 and then we talked about how to have an agreement
21 about their production.

22 So I think we have all the reports but
23 for the one. And what I'd ask with regard to the one
24 is that there's three pages that they've withheld.

1 I'd ask for an in-camera review of that to assess the
2 asserted privilege.

3 THE COURT: Did you get a log, some
4 redaction log or privilege log explaining the basis
5 for the privilege asserted in those three pages?

6 MR. PUMPIAN: Mr. Cifelli did send me
7 an e-mail that I take as the equivalent of a log for
8 this document, explaining his claim that they are
9 privileged.

10 My concern about that is -- his
11 explanation was that the report, while prepared by
12 Mr. Connell, contained certain legal advice that was
13 discussed at a meeting. That may be so. It's hard
14 for me to imagine that all three pages are all legal
15 advice. I think it probably should be redacted, as
16 opposed to a wholesale withholding.

17 THE COURT: All right. Anything else
18 on the discovery issue from your standpoint?

19 MR. PUMPIAN: Sorry. I'm just
20 checking my notes.

21 THE COURT: That's fine.

22 MR. PUMPIAN: I think that's what I
23 had. Oh, I'm sorry. One more, Your Honor. One more
24 example. The test for an expense award is whether the

1 withholding was substantially justified. I've told
2 you about -- or I had two examples of why I think
3 they're not justified. One is this: In my motion, I
4 raised an issue about this -- one of the very few
5 e-mails we got from the other side is communication
6 between Mr. Connell and Ms. Hill. There is a line, or
7 several words, redacted from this e-mail. I raised
8 that in my discovery deficiency letter. I got no
9 response. I raised the concern in my motion, "Why is
10 this redacted? It doesn't seem to make any sense. It
11 doesn't appear to contain any legal advice." No
12 response. I asked Mr. Connell at deposition what it
13 said, and he said he redacted it, but he didn't
14 remember what it said or why he redacted it.

15 Finally deposed Ms. Hill and asked for
16 documents. She produced this e-mail, and it's
17 nothing. It's totally innocuous. It just asked them
18 a question about another property. You know, "How are
19 you doing in this other property?" It's just
20 innocuous. It was a total waste of time, but I spun
21 my wheels on it and did all this stuff when they just
22 could have told me that it's nothing. It shouldn't
23 have been redacted in the first place, but it should
24 have been addressed very quickly. I think that's an

1 example of just wastefulness.

2 The other example is what I raised in
3 my motion. There was an objection to our request for
4 communications with one of the contractors in the
5 renovation, Graddy Construction. Their objection was
6 they withheld everything because they had worked on
7 projects with Graddy Construction in addition to this
8 one. We didn't know that. But the objection should
9 have been we're not going to produce other stuff.
10 We'll produce this stuff. But instead, they withheld
11 everything and we had to fight about it. And then,
12 after we filed the motion, we got it.

13 So those are examples where I think --
14 that justify an expense award.

15 That's what I have, Your Honor. Thank
16 you.

17 THE COURT: All right. And I'm going
18 to turn this over to Mr. Cifelli in a minute, but,
19 Mr. Pumpian, a couple of questions for you more
20 broadly about this case.

21 First of all, do you contemplate
22 you're going to have a dispositive motion you're going
23 to be filing?

24 MR. PUMPIAN: Yes. I contemplate --

1 THE COURT: What's it going to look
2 like?

3 MR. PUMPIAN: What I contemplate is
4 having two, Your Honor, because I think it will be
5 more clear that way. I'm not interested in writing
6 more paper or having you read more paper, but we have
7 affirmative claims in this case, counterclaims.

8 THE COURT: All right.

9 MR. PUMPIAN: And then we have a
10 defense to their claims, to the plaintiff's claims.
11 So I do expect to have a dispositive motion on our
12 counterclaims focused on breach of fiduciary duty and
13 breach of contract. And do you want me to explain
14 more?

15 THE COURT: Yeah, I do.

16 MR. PUMPIAN: Or --

17 THE COURT: I haven't really had a lot
18 of contact with this case substantively since the
19 outset, when it was really just the initial claims,
20 not your counterclaim, that were at issue.

21 MR. PUMPIAN: Right. Right. So let
22 me step back. In terms of the defense's motion for
23 summary judgment on the affirmative plaintiff's claim,
24 I just don't think they're there anymore. They came

1 into court and said, you know, on an emergency basis,
2 they were worried that their investment -- that
3 certain properties were being transferred to another
4 company that they didn't own any interest in. They
5 were worried about losing their investment. I think
6 we satisfied their concern that we were not doing
7 that. We were never trying to deprive them of the 10
8 percent ownership in this other company.

9 We have now -- the parties have signed
10 papers now, operating agreements, formalizing that.
11 So I think their affirmative case is over, and the
12 only question is was their lawsuit appropriately
13 filed. Did they really need to file a lawsuit in
14 order to get the protection that they were seeking?
15 And we don't think so, and we don't think they're
16 entitled to any attorneys' fees for doing so. That's
17 the plaintiff's affirmative case and what we would
18 move for summary judgment on. Whether that's mootness
19 or waiver, that's where that piece comes from.

20 Now, on the counterclaims, those are
21 different. Those -- the breach of contract is
22 between -- is focused on the management agreement
23 between Archer Properties -- and Archer Properties,
24 their business is managing various apartment

1 complexes. So the management agreement was between
2 Archer Properties and AON, the actual apartment
3 complex, the joint venture. So we believe that Archer
4 Properties breached that management agreement in a
5 number of ways, but most clearly by paying itself
6 certain fees that it was not entitled to under the
7 management agreement.

8 And in a related way, Archer VI, also
9 controlled by Mr. Connell and Mr. Menser, was the
10 managing member of the AON entity. Archer VI was
11 supposed to be in charge of Archer Properties. They
12 were the managing member of the entity and supposed to
13 be in control of Archer Properties. But instead of
14 putting a stop to the payment of the improper fees,
15 Archer VI just looked the other way while Archer
16 Properties did that. And they did it on January 8,
17 basically on the way out the door, as my client was
18 coming in and replacing them on the property.

19 So it's pretty easy to see, with
20 Mr. Connell and Mr. Menser in control, managing and
21 owning both Archer VI and Archer Properties, that they
22 were basically just self-dealing. And I think as our
23 motion will demonstrate, I believe there is just no
24 genuine issue that they didn't breach the management

1 agreement, and then basically, based on the same
2 conduct, also breached their fiduciary duty.

3 THE COURT: All right. So let me turn
4 it over to Mr. Cifelli. And you can respond first on
5 the discovery issues, and then I want to ask you some
6 questions about the case more generally as well. I
7 assume it's Mr. Cifelli that's going to address these
8 points?

9 MR. CIFELLI: Your Honor, yes, sir.
10 And if it's agreeable or permissible, Your Honor, I'd
11 like to provide a little bit of context for the
12 discovery dispute, with an outline that will also
13 discuss our claims and help update the Court and
14 refamiliarize Your Honor with what we're seeking here,
15 the relief we're seeking.

16 THE COURT: All right.

17 MR. CIFELLI: My clients are
18 essentially a two-man operation, a 75, 76-year-old
19 man, Mr. Menser, and his 40-year-old stepson. They
20 created a limited liability partnership, Archer VI,
21 which took a 10 percent ownership interest in this
22 real estate project. Now, Archer VI was also the
23 former managing member of Archer on North, LLC. It's
24 a 150-unit student housing project in Athens, Georgia,

1 where the university is located.

2 That LLC, 90 percent owned by the
3 defendant and 10 percent by Archer VI in a limited
4 liability company membership interest, purchased
5 essentially a slum property and renovated it in 2012
6 based on an approved scope of work and a budget
7 approved by both members; placed back into operation
8 in 2012 -- again, under our management, Archer VI,
9 which was the managing member at the time -- and
10 Archer VI employed Archer Properties to provide the
11 on-site management. They are an affiliate and the
12 third-party defendant here.

13 While this project was under our
14 management, its occupancy regularly exceeded 90
15 percent, sometimes 95 percent. It generated positive
16 cash flow for both LLC members. And it was awarded,
17 in 2013, by the Student Housing Business Magazine, the
18 best student housing renovation of the year.

19 Sometime in 2014, the defendants'
20 attitude changed. They decided to oust Archer VI as
21 the managing member. Among the economic consequences
22 of that decision, if successfully implemented, was the
23 elimination of Archer VI to promote opportunity, which
24 is essentially, I believe, a kicker upon the eventual

1 sale of the property. But that would be extinguished
2 in the event of a change in the managing member.

3 In fact, that's what happened. And in
4 early 2015, the parties entered into an amendment to
5 the operating agreement that provided for the change
6 in managing membership and also discussed future
7 development of some parcels in the project.

8 Immediately after execution of that
9 amendment to the LLC operating agreement, the
10 defendants began to take unauthorized actions. They
11 transferred real estate out of Archer on North without
12 the contractually required written consent or our
13 knowledge. They transferred that real estate into a
14 non-existing entity that they later created, and one
15 we had neither knowledge of nor any interest in at the
16 time of the transfer; not offered any LLC operating
17 agreement for that new entity.

18 Additionally, the transfer of that
19 property, which in part collateralized the AON, LLC's
20 mortgage loan, violated the loan covenants. It also
21 appears they made an unauthorized loan from AON, which
22 of course we had a 10 percent interest in, to the new
23 entity that we had no interest in, to acquire
24 additional property for the new entity. That also was

1 a covenant breach under the mortgage loan that we were
2 a party to.

3 When we found out about all this, we
4 attempted to get them to essentially cure these
5 problems, comply with the existing LLC agreement as
6 amended, and enter into a new LLC operating agreement
7 that was required by the amendment to the original LLC
8 operating agreement.

9 The drafts they prepared completely
10 eliminated a page and a half of duties owed by the
11 managing member to the nonmanaging member. Now,
12 they'd become the managing member when they ousted us.
13 They were required by the amendment to the LLC
14 operating agreement to prepare new operating
15 agreements for the new entity in the same form, in the
16 same content as the old. Nevertheless, without any
17 explanation, they eliminated all of their obligations
18 to us in the drafts.

19 When we asked about that, they
20 directed their counsel to have no further
21 communications with us. This was in early June 2015.
22 So at that point we filed the lawsuit.

23 THE COURT: Right.

24 MR. CIFELLI: We claimed -- we sought

1 injunctive relief to protect our investment. We
2 sought attorneys' fees for having to file the action.
3 We charged them with a relatively insignificant late
4 fee for late provision of certain operating reports in
5 early 2015, and we charged them with breach of
6 fiduciary duty.

7 Now, here's the context of the
8 discovery dispute. And I apologize for going on so
9 long, Your Honor, but I've had a long day to think
10 about all this on the plane coming up here.

11 We issued focused discovery. It was
12 aimed at determining when and how they created the new
13 entity without our knowledge or participation in what
14 they were discussing between each other about these
15 actions. We wanted to know when and how they conveyed
16 what's called the future development parcel out of
17 Archer on North I and what they were discussing
18 between themselves at the time of this, and why we
19 weren't informed.

20 And we also asked how and why they
21 refused to comply with the operating agreement
22 amendment that required that the new entity governing
23 documents be identical in form and substance, and why
24 they attempted to eliminate all the managing member's

1 duties under the new documents, which were essentially
2 presented to us, Your Honor, as a take-it-or-leave-it
3 proposition. When we questioned it, they cut off all
4 communication.

5 And what did we get in response to
6 that discovery? We got nothing. We got absolutely
7 nothing; not one intercompany communication between
8 Mr. Farver, Mr. Gittleman, or Mr. Brown, the three
9 individuals at the defendant who are responsible for
10 this project. And by the way, Mr. Brown is in
11 California. Mr. Farver and Mr. Gittleman, as I
12 understand it, are in Washington, D.C.

13 My clients occupy adjoining offices in
14 Atlanta. No, they don't -- this 77-year-old man
15 doesn't use e-mail. When they have something to
16 discuss, they shout around the corner of their office.
17 But as far as the defendants, they did not produce one
18 communication, internal communication.

19 We did receive over 3500 pages of
20 production eventually. 40 percent of it consists of
21 their management company's monthly property reports,
22 which are completely nonresponsive and were never
23 requested. Six percent of what they produced were
24 balance sheets, P&Ls and general ledgers. Again, we

1 didn't request them, under any fair reading of our
2 document request. They were nonresponsive. Six
3 percent alone is the Archer on North I operating
4 agreement, over 220 pages of a document which is
5 attached to our complaint as Exhibit A. We didn't
6 request it, and it's entirely nonresponsive. And
7 three percent were organizational documents for the
8 plaintiffs. We didn't request them. They're
9 nonresponsive. In addition to that, there were other
10 nonresponsive documents. But to repeat, Your Honor,
11 not one internal communication between defendants'
12 personnel.

13 Additionally, despite repeated
14 requests, the defendants have never labeled or
15 categorized their production to correlate documents
16 produced and the specific requests they purportedly
17 were responsive to. In my experience, that is more
18 than mere common courtesy. It's part of good-faith
19 discovery to require such a designation. I'm not
20 surprised, however, since they produced so little that
21 was responsive to any of our requests, that they
22 wouldn't want to separately categorize and label their
23 documents.

24 So, Chancellor Bouchard, that's the

1 context for their discovery. And I think it's
2 important, because under the rules that apply here,
3 this Court has discretion and could consider
4 proportionality and, I would suggest, context when
5 considering a discovery dispute such as this.

6 THE COURT: Before you go --

7 MR. CIFELLI: They're incredulous
8 of -- yes, sir.

9 THE COURT: Excuse me, if I could,
10 Mr. Cifelli. Before you go on and discuss the
11 particulars of the requests that are at issue on this
12 motion, I do want to ask a couple of questions
13 pertaining to the background that you've already
14 mentioned. So when this case first hit my docket, my
15 recollection was that the key dispute was, as you put
16 it, the future parcel was hived off and put into a
17 second entity without you having ownership rights or
18 worked out an arrangement to have an interest in that
19 entity.

20 Since then, at least it's represented
21 in the papers, is it the case that your clients have
22 now entered an agreement with respect to the second
23 entity and have documented your 10 percent interest in
24 the entity that now holds what was the future parcel?

1 I mean, is that basically done and over?

2 MR. CIFELLI: Yes, it is, Your Honor.

3 In November or early December of 2015, with the
4 participation of Mr. Pumpian and myself and other
5 counsel --

6 THE COURT: Right.

7 MR. CIFELLI: -- a new limited
8 liability company agreement and amendment, conforming
9 to the requirements of the earlier amendment -- which
10 required the same form, the same content, the same
11 parties, the same percentages, and which they refused
12 to do in May 2015 -- was executed by the parties.

13 THE COURT: Okay. Now, the next
14 question is --

15 MR. CIFELLI: For the most part --

16 THE COURT: I'm sorry. Go ahead.

17 MR. CIFELLI: I apologize. I was
18 going to say, for the most part -- certainly that was
19 the most significant claim in the case from the
20 plaintiff's standpoint, and what remains with respect
21 to those issues are the recovery of the attorneys'
22 fees. We also have the breach of fiduciary obligation
23 and the failure to timely report claim, which is just
24 contract claims. The failure to timely report is a

1 contract claim.

2 THE COURT: Okay. And does that new
3 agreement that you now have also address -- I'm
4 looking back at my notes from our very first session
5 or two together -- the Wynter Court?

6 MR. CIFELLI: It does.

7 THE COURT: Okay. So it's also
8 addressed. All right. So basically the nub of what
9 you have in your case is for fees and the other couple
10 of issues that remain in your case; is that it?

11 MR. CIFELLI: Yes, sir.

12 THE COURT: All right. So why don't
13 you address the nub of the discovery motion that's on
14 the table.

15 MR. CIFELLI: Okay. So in their
16 issued document request, they sought virtually every
17 communication related to any aspect of our
18 participation in this real estate project. And I
19 don't need to tell Your Honor that. That was one of
20 the first things you mentioned this afternoon.
21 Notwithstanding the limited nature of the complaint we
22 filed, which covers a time period of about five
23 months, they have sought every piece of paper, every
24 communication that relates to any aspect --

1 renovation, reconstruction, leasing, ownership,
2 management -- anything having to do with the project.
3 And that's -- that's in their Requests 3, 11, and 12.
4 And then we look at the joint letter. And if Your
5 Honor looks at the joint letter, identified three
6 areas, and they're totally without any limitation or
7 any focus.

8 On its face, this is unreasonable,
9 burdensome, and it's disproportionate. And we have,
10 over the course of time, tried to get clarity -- I
11 don't think we've ever gotten clarity from the
12 defendants, but we have produced more and more
13 documents. But my clients, you know, this two-man
14 shop isn't in a position to turn the keys over to
15 Mr. Pumpian, but needs -- but always wanted some focus
16 from them on what they were interested in.

17 Now, Rule 26 permits Your Honor to
18 take into account the needs of the case, the amount in
19 controversy, limitations on resources, and the
20 importance of the issues. That's 26(b)(1)(iii). So I
21 think every one of those factors militates against the
22 defendants' motion here.

23 They have justified their requests --
24 and I think you heard it earlier this afternoon -- by

1 pointing to their counterclaims. They made
2 counterclaims for mismanagement, because they claim
3 there was a noise complaint on the premises, or that
4 someone who was supposed to -- a tenant who was
5 supposed to transfer the electric power from the
6 project's name into his or her personal name failed to
7 do it timely or failed to do it at all, and that there
8 were some -- you've heard Mr. Pumpian talk about some
9 moisture problems.

10 Now, we have tried to get discovery
11 from them on those issues, and what we have finally
12 gotten is one spreadsheet and five invoices,
13 representing approximately \$25,000 in mold remediation
14 expense and for the replacement or the installation of
15 dehumidifiers, and \$10,000 in claimed damages arising
16 out of electricity paid for tenants who failed to
17 comply with their leases by switching the utilities
18 into their own names.

19 \$35,000 in counterclaim damages.
20 That's it. And -- and, Your Honor, we certainly
21 contest our liability. The project needs the
22 installation of dehumidifiers. That's a project
23 expense. If it needs mold remediation, that's a
24 project expense. It's not the former managing

1 member's responsibility.

2 But in any event, take it at face
3 value, \$35,000. That's the amount in controversy. I
4 dare say the parties have spent far more than \$35,000
5 on this discovery motion alone. So in terms of the
6 amount in controversy, it's relatively de minimis. We
7 have produced -- now, Mr. Pumpian has a free-floating
8 anxiety or concern that he hasn't gotten every
9 internal document. We've produced thousands of pages
10 of documents. There aren't many internal
11 communications. There is testimony that in a small
12 shop like ours, we communicated among ourselves
13 verbally, two men sitting in adjoining offices.

14 Now, Melissa Hill was the on-site
15 manager who worked for Archer Properties. She was
16 engaged at the time of the management transition by
17 the defendants' management company, RAM, for some
18 period of time. Was it three weeks? Six weeks? Two
19 months? I'm not sure.

20 When she left, she left every property
21 record at the project; every lease record, every
22 expense, every repair record, and every -- and her
23 e-mail. So they're complaining about they don't have
24 e-mail communications, they want every single one of

1 them without limitation, without focus, and yet they
2 already have access to all of that information.

3 THE COURT: So let me just make sure I
4 understand what you're talking about there. So
5 Ms. Hill was with Archer Properties; right?

6 MR. CIFELLI: Yes, sir.

7 THE COURT: And that was under your
8 watch. When Archer VI was the managing member, Archer
9 Properties was the property manager; right?

10 MR. CIFELLI: Yes. She was an
11 employee of Archer Properties.

12 THE COURT: For about a three-year
13 period?

14 MR. CIFELLI: I think it was from when
15 it went into service, so that's probably two and a
16 half years, I believe.

17 THE COURT: So the documents --

18 MR. CIFELLI: 2012, and this was
19 January of 2015.

20 THE COURT: So the documents that
21 pertain to that period of time --

22 MR. CIFELLI: As I read their request,
23 they want every communication.

24 THE COURT: No, no. I understand.

1 But what I'm trying to understand is the documents
2 that pertain to that period of time when she was at
3 Archer Properties. I'm just trying to have you
4 connect the dots for me as to whether or not they were
5 in the possession of an entity under the defendants'
6 control, and if so, how? I understand RAM Properties
7 became -- or RAM whatever it is -- became the new
8 property manager, and I guess you're telling me she
9 went there for a period of time; right?

10 MR. CIFELLI: Well, she -- if I said
11 "went there" -- she remained there for some period of
12 time.

13 THE COURT: Okay.

14 MR. CIFELLI: I guess this was their
15 idea of how to transition management from someone who
16 was knowledgeable and had experience. But we didn't
17 remove -- neither Archer Properties nor Archer VI
18 removed any records from the leasing office on the
19 premises where Ms. Hill spent, you know, 40 hours a
20 week, or whatever. All of those records remained
21 there. And that's where she communicated through
22 e-mail.

23 THE COURT: Who controls --

24 MR. CIFELLI: That's still --

1 THE COURT: Who controls the leasing
2 office?

3 MR. CIFELLI: I would contend that RAM
4 controls that. And that's the agent of the
5 defendants.

6 THE COURT: All right. Anything else?

7 MR. CIFELLI: Your Honor, I think that
8 we're -- we're here at some expense, and under the
9 circumstances -- you know, a couple of minor points.
10 This motion originally was filed the day after I
11 communicated to Mr. Pumpian that I would shortly be
12 making a supplemental production in response to one of
13 his -- to his meet-and-confer letter. So, you know,
14 we haven't merely been reactive here. I think the --
15 what, really, I'm hearing from Mr. Pumpian, and I've
16 heard it for months now, is he doesn't believe
17 Mr. Connell when he says he didn't retain e-mail.
18 They didn't use e-mail to communicate. I don't know
19 how to solve that problem.

20 On the subject of the reports, I did
21 want to touch on this. In mid-2015, Archer VI issued
22 a report to its investors that discussed various
23 litigation options and the situation. Those are the
24 three pages that Mr. Pumpian referred to as having

1 been withheld. I explained that it was drafted by
2 Mr. Connell following meetings with me and with their
3 real estate lawyer, Brad Dennison, and Mr. Menser.
4 And I am quite confident that it contains
5 attorney/client privileged materials, and perhaps,
6 also, is prepared in contemplation of litigation.

7 I don't have an objection to an
8 in-camera inspection of it. I don't think that's
9 necessary. I think this is more evidence of the kind
10 of bullying that has gone on in this entire case.
11 This discovery dispute is raised for tactical
12 purposes, to gain leverage, and the supposed basis of
13 it, trying to establish mismanagement to support
14 counterclaims is belied by the fact that after months
15 of discovery, we have virtually no evidence from the
16 defendants as to how they've been damaged.

17 THE COURT: Are you contemplating a
18 dispositive motion?

19 MR. CIFELLI: Your Honor, I don't
20 currently contemplate it, but I wouldn't want to be
21 held to that.

22 THE COURT: All right. You represent
23 Archer Properties as well as Archer VI; is that right?

24 MR. CIFELLI: Yes, as the third-party

1 defendant.

2 THE COURT: All right. So insofar as
3 they have documents, do you have somebody there you
4 can deal with to retrieve them? I gather Ms. Hill is
5 not there anymore; right?

6 MR. CIFELLI: Mr. Connell is still a
7 principal of Archer Properties. That's exactly part
8 of the point here. Because this was a -- you know, a
9 mom-and-pop shop, essentially.

10 THE COURT: Right.

11 MR. CIFELLI: They were Archer VI.
12 Connell and Menser were Archer VI. They were also
13 Archer Properties. So yes, Mr. Connell and Mr. Menser
14 are still available, and they're still involved with
15 Archer Properties.

16 THE COURT: All right. Anything else
17 you had to add, Mr. Cifelli?

18 MR. CIFELLI: No, sir. Thank you for
19 your time.

20 THE COURT: Mr. Pumpian, did you want
21 to add anything else?

22 MR. PUMPIAN: Yes, Your Honor. One
23 thing in particular. I think you were on it, and you
24 understood it correctly, but Mr. Cifelli did not

1 really answer your question. When Ms. Hill was an
2 employee of Archer Properties, she used an Archer
3 Properties e-mail address. And those e-mails, to the
4 extent that they exist and were retained, are owned by
5 Archer Properties. No one on my side, including RAM,
6 the new property manager, ever had access to those
7 documents, to those e-mails, that e-mail address. So
8 that is something that Archer Properties has control
9 of.

10 THE COURT: All right. Anything else?

11 MR. PUMPIAN: No, sir.

12 THE COURT: All right. Here's what
13 I'm going to do. I am rather concerned with the state
14 of this case. First of all, I appreciate the context
15 Mr. Cifelli provided. The only motion in front of me,
16 obviously, is a motion by the defendants. I don't
17 have a motion by the plaintiffs.

18 What causes me great concern here is
19 it's very bizarre to get a motion of this nature after
20 discovery is essentially supposed to be concluded.
21 Depositions have already been taken, and people are
22 still scrounging around for documents. It looked like
23 the motion was filed rather quickly. I'm not sure
24 what real level of meeting and conferring went on,

1 which we expect. And frankly, I'm disturbed by the
2 way all of the discovery was done in this case to
3 begin with.

4 I presume and hope you have, and
5 certainly, if you haven't, you should now take it upon
6 yourself to read the Court of Chancery guidelines and
7 what we say about discovery. This discovery should
8 have been done very differently from the outset. You
9 should have both sat down, identified the relevant
10 custodians to do e-mail searches, then gone through
11 and identified specific search terms that would have
12 narrowed the subject matter. Because to just ask for
13 everything having to do with the operation or the
14 management of a property is overbroad.

15 There presumably are specific
16 categories -- whether they're problems with humidity
17 or the rate of rent charged, whatever it may be --
18 that could have been identified in search terms. And
19 this all should have been done, frankly, at the
20 beginning. Not at the end. So it's very troubling to
21 me that discovery is in this state at this point.

22 In terms of what I'm going to require
23 to be done in response to the motion, it's as follows:
24 I'm going to differentiate between communications

1 between the two sides, if you will, and internal
2 communications for a moment. With respect to
3 communications between Archer VI and Archer
4 Properties, on the one hand, versus I'll just call
5 them "the defendants," on the other hand, I'm going to
6 order that the plaintiffs -- and I'm just grouping
7 together, for purposes of this description, Archer VI
8 and Archer Properties, that they produce all
9 communications, if there are any, electronic
10 communications, e-mail communications, between
11 Mr. Menser -- and I understand there may not be any --
12 and Mr. Connell, on their side, with either Mr. Farver
13 or Mr. Gittleman, and that the defendants do the
14 reverse; they produce all their communications in the
15 other direction. Presumably, each of you should have
16 the other side of these communications, but you never
17 know for sure until you go through that exercise. So
18 insofar as the communications between the two sides
19 are concerned, that's the universe of whose e-mail
20 boxes need to be searched for communications with the
21 specific people on the other side. There's no subject
22 matter limitation on this search.

23 Is everybody clear on what I've just
24 said insofar as that issue is concerned?

1 MR. CIFELLI: Yes, Your Honor.

2 MR. PUMPIAN: Yes, Your Honor.

3 THE COURT: Okay. In terms of
4 internal communications, I can't give you any guidance
5 on the fly. I'm going to order that both of you, if
6 you are going to pursue this, sit down and identify
7 some search terms that Mr. Cifelli can run through the
8 e-mail communications he has within Archer VI and
9 within Archer Properties that speak to the legitimate
10 topics of concern that you have, Mr. Pumpian, about
11 the management of the project. Not everything in the
12 world about the project, but that deal with specific
13 issues that have been presented in this case that
14 concern that.

15 And if Mr. Cifelli wants a reciprocal
16 from you, even though it's technically not in front of
17 me, he is entitled to it. And you'll have to conduct
18 the same searches on your side of the ledger with
19 respect to your clients.

20 I should also add, by the way, that
21 the clients should not be searching their own e-mail
22 boxes. That should be handled by lawyers. And,
23 indeed, we often require certifications that things
24 were done in that manner in these cases, precisely to

1 avoid problems down the road. So it should be the
2 lawyers who are overseeing the searches, and not just
3 handing it off to their clients to conduct in their
4 own e-mail boxes.

5 With respect to the request about the
6 investor reports and the one where some privileged
7 material is withheld, I'm not taking that in camera on
8 the fly on the phone. If you have a legitimate issue
9 with the description of privilege that has been
10 provided to you by Mr. Cifelli, you've got to make a
11 good-faith basis for, first of all, conferring with
12 him about it, and then, second of all, presenting in a
13 careful way, in an appropriate motion, the grounds for
14 believing that privilege was improperly asserted in
15 this case.

16 I think that addresses the discovery
17 motions. I'm not going to order any sanction by way
18 of fees. Frankly, I think both sides here didn't do
19 the discovery the way it should have been done
20 correctly in the first place. I understand some of
21 that may be a function of the fact that what's at
22 stake here, in terms of the dollars, may not be great,
23 but frankly, that's all the more reason there should
24 be some rational conversations about resolving this

1 case, rather than being engaged in the kind of
2 discovery that we're engaged with at the moment.

3 That leads me to the next two points.
4 First, nobody is going to file a motion for summary
5 judgment in this case without seeking permission from
6 me to do so in the first place. And we're going to do
7 that in the form of a five-page-or-less letter that
8 explains what the issue on which either side is
9 seeking summary judgment is, and why you think it is
10 clear as glass there will be no genuine issue of fact
11 that would preclude the granting of summary judgment,
12 before you'll be allowed to file such a motion.

13 I'll tell you right now, if I'm going
14 to allow summary judgment, the trial schedule in the
15 case is going to change, in any event, because there's
16 not an argument built into the scheduling order for
17 summary judgment, and there won't be enough time
18 between that and the current beginning of trial. But
19 that may be an academic issue if I don't allow summary
20 judgment to go forward in any event.

21 I am somewhat skeptical about the
22 prospect that I'm going to grant summary judgment in a
23 way that's going to get rid of this whole case, given
24 that it would seem to be inherently factual to figure

1 out whether somebody mismanaged a property, if we're
2 going to get into the weeds of those kinds of
3 disputes.

4 But be that as it may, the protocol
5 we're going to use is to have the opportunity on
6 either side to submit a letter, five pages or less,
7 about what the issue you're seeking summary judgment
8 on is, specifically the claims, and why it's going to
9 be clear to me that there won't be any disputes of
10 fact that will preclude granting it.

11 And if you can't convince me in five
12 pages it's not going to be disputed in a material way,
13 you're not going to convince me in 50 pages. So if I
14 let you proceed, I'll let you know in very short
15 order, and you can proceed, and we'll have a schedule
16 for that. If not, there's not going to be summary
17 judgment and we're going to go right to trial.

18 Which brings up my next point. Have
19 the parties engaged in any form of mediation or
20 efforts to come to some sensible resolution over what
21 would seem to be a matter that some sort of
22 appropriate settlement ought to be worked out in?

23 MR. CIFELLI: There were some --

24 THE COURT: I don't want to know the

1 substance of them, just whether you talked.

2 MR. CIFELLI: Understood, Your Honor.
3 The preliminary discussions didn't go anywhere. And
4 then the issue of mediation was raised by Mr. Pumpian.
5 I said we would be interested, and that's the last I
6 heard of it.

7 MR. PUMPIAN: I disagree. There have
8 been discussions, and I did raise the issue of
9 mediation, in fact, the last time we had a conference
10 call with the Court. But the response from
11 Mr. Cifelli was that they were not interested in doing
12 that, is my understanding.

13 MR. CIFELLI: That's simply not so.

14 MR. PUMPIAN: Your Honor, I --

15 THE COURT: Well, obviously I can't
16 get to the bottom of that right here.

17 Did you want to say something,
18 Mr. Pumpian?

19 MR. PUMPIAN: Yes, sir. I think -- we
20 do have a schedule in this case that the parties
21 submitted to the Court, and I believe the Court signed
22 off on. I understand Your Honor's ruling with regards
23 to seeking permission to file a motion for summary
24 judgment, but I do think there is time built into the

1 schedule before we're set for trial to allow briefing,
2 and I think we did follow Your Honor's recommendation
3 in terms of that time.

4 THE COURT: Yeah. I read the order.
5 And frankly, the flaw in it -- and I'm not pointing
6 fingers, I'm just telling you a fact -- is the last
7 brief you currently have due on summary judgment is
8 July 1. But there will be an argument on summary
9 judgment, which is not scheduled, and I need a minimum
10 of 90 days from the argument to the pretrial
11 conference to deal with a summary judgment motion.
12 And frankly, I'm skeptical summary judgment makes
13 sense in this case, from what I've heard about it.

14 So we're going to change the
15 scheduling order, is what I'm telling you. And I'll
16 leave the trial dates there for the moment, but
17 they're going to move if I'm moving forward with any
18 summary judgment. And if you decide you're not going
19 to seek summary judgment, you just want to go to
20 trial, that's fine. But I want letters seeking
21 permission for summary judgment. And this has been
22 done in this Court many other times, and I'm sure your
23 Delaware counsel can fill you in on the way to do
24 this.

1 I want those letters by May 17. You
2 can do a responsive letter within a week. Again, this
3 is like a five-page letter and a responsive letter,
4 and that's it. Just one side and then the other side,
5 about why you're seeking permission, why the other
6 side thinks there's a material issue of fact. And
7 I'll let you know if I want full briefing on summary
8 judgment. But I'm not going to gin up the whole
9 machinery in a case where, when I'm hearing the
10 disputes are over managing a property in a way you've
11 described, I'm very skeptical that that is going to
12 lend itself easily to summary judgment. So that's the
13 way we're going to proceed on that.

14 Does anybody else have any other
15 questions or need any other guidance?

16 MR. CIFELLI: No, Your Honor.

17 MR. PUMPIAN: No, Your Honor.

18 THE COURT: And as I said, plan in the
19 future that everyone will be in Wilmington for future
20 hearings in this case unless they're entirely
21 ministerial in nature. And if there's anything you'd
22 like me to do to assist trying to facilitate a
23 mediation -- as in making a recommendation for
24 somebody to do it, even potentially to have a member

1 of my court do it; there's a procedure for doing
2 that -- let me know. I can't force you to speak
3 rationally, but I think it's very much necessary in
4 this case.

5 All right. Have a good day, Counsel.

6 MR. PUMPIAN: Your Honor, I'm sorry.
7 This is Ryan Pumpian. I forgot, there's one other
8 issue.

9 THE COURT: All right.

10 MR. PUMPIAN: We've filed a motion
11 seeking permission to supplement our affirmative
12 defenses. Basically, we added two -- we want to add
13 two affirmative defenses based on information we --
14 subsequent events. The signing of the AON II
15 management agreement, we think, moots plaintiff's
16 case. So we wanted to add two affirmative defenses.
17 That motion is pending before the Court. I don't
18 think the plaintiffs have responded yet to it.

19 THE COURT: Well, you have to work out
20 a schedule for them to do that then. And how would it
21 moot the aspect of their case that deals with
22 recovering their fees?

23 MR. PUMPIAN: Well, I think the
24 argument is that they waived that by not preserving it

1 in the document.

2 THE COURT: In what document? The
3 second LLC agreement?

4 MR. PUMPIAN: Correct. Correct. This
5 issue was outstanding. There's some case law in
6 Delaware that says you can't both pursue a case and
7 enter into an agreement effectively resolving your
8 case too. So we think there's mootness or waiver that
9 applies.

10 THE COURT: All right.

11 MR. PUMPIAN: That's why I wanted to
12 add the affirmative defenses. I'm not sure it's
13 necessary as a legal matter, because I think it came
14 up after the suit was filed, but I wanted to be
15 cautious and overplead and put it in the pleadings so
16 there's no claim of prejudice.

17 THE COURT: All right.

18 Well, Mr. Cifelli, you should work
19 together with Mr. Pumpian to promptly put in whatever
20 you want on that motion, and I'll look at it when it's
21 fully briefed.

22 MR. CIFELLI: I will do that, Your
23 Honor.

24 THE COURT: All right. Have a good

1 day.

2 (Hearing concluded at 3:07 p.m.)

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CERTIFICATE

I, JULIANNE LABADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 52 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 40 through 50, which were revised by the Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 10th day of May, 2016.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public