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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Re: Deloitte LLP v. Flanagan
C.A. No. 4125-VCN
Date Submitted: July 10, 2009

Dear Counsel:

At the close of the hearing on the cross-motions regarding discovery, I reserved decision on the question of whether Mr. Flanagan could pursue discovery as to (i) whether Deloitte had ever sought the "Draconian" relief purportedly authorized by Article 9 of the MOA, (ii) the nature of the conduct which had resulted in the exercise of such rights, and (iii) the nature and number of instances where other "bad" conduct had not resulted in any effort to impose such sanctions.

I expressed reservations about the appropriateness of such discovery. My concerns were several: the desire to avoid a "trial within a trial"; the difficulty in reasonably comparing one set of alleged wrongful conduct with another set; the fact that there is no claim of discrimination as in the more typical employment or equal protection sense; and the fact that any particular sanction was sought or imposed does not necessarily provide any guidance as to whether it may or should be imposed in these circumstances. All of these concerns, especially collectively, counsel against allowing any discovery, or certainly any extensive discovery, along these lines.

On the other hand, given the magnitude of the sanction that Deloitte seeks to impose upon Mr. Flanagan by way of a liquidated damages provision, precluding all discovery into Deloitte's past use of the provision runs the risk of denying Mr. Flanagan the fair opportunity to make appropriate factual arguments against the imposition of such sanction. Perhaps, more importantly, it may amount to a *de facto* resolution of a merits-based argument involving the interpretation and implementation of the liquidated damages provision in the context of a discovery motion, an admittedly unhappy procedural posture for merits-based conclusions.

Court of Chancery Rule 26 affords the Court significant leeway in fixing the proper scope of discovery. It is difficult to conclude at this point that the information sought is not likely to lead to the discovery of admissible evidence. Yet, that likelihood appears a weak one and that conclusion informs the Court's decision as to the proper scope of currently allowable inquiry.

To enable Mr. Flanagan to have access to the basic facts necessary to evaluate whether Deloitte's past use of the liquidated damages provision might aid the Court in understanding his arguments, the Court concludes that limited discovery is appropriate. The guidance now offered by the Court is general and counsel are free, and indeed likely will need, to negotiate more precise terms. In the event that those negotiations are unsuccessful, the Court will make itself available to resolve any remaining issues.

Deloitte shall provide to Mr. Flanagan, for, until further order of the Court, his attorneys' eyes only (and who shall not divulge the information further), the following:

1. Since 2004, how many times has the subject forfeiture provision been invoked?

2. As to each such occurrence, a general description of the conduct and the types of payment (or recoupment) that Deloitte sought and obtained.

3. A general description of conduct by other Deloitte partners likely constituting a violation of regulatory standards and that could readily be seen as carrying the potential for criminal prosecution but for which the forfeiture provisions under the MOA were not invoked.

In setting these parameters, the Court, of course, expresses no views about Mr. Flanagan's potential liability in any forum. Instead, it has sought to find a way to compare the conduct alleged here with other regulatory violations that could be seen as roughly equal to the conduct alleged here (and regulatory misconduct that would fall on "either side" of the conduct alleged here), all in a regulatory/criminal culpability sense.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K