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Submitted: May 8,2001
Decided: August 3 1,200 1

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Re: Orgel v. Cappelli, et al.
C.A. No. 9902-NC

Dear Counsel:

Defendants have moved, pursuant to Court of Chancery Rule 41(e), for dismissal of this action because of Plaintiffs failure to prosecute.¹ Melville G. Orgel filed this derivative action in 1988. An amended complaint was filed and answered in 1993. Discovery (except for expert discovery) was completed in 1994. In August 1997, an order granting partial summary judgment was entered. Mr. Orgel died in 1998, and the present plaintiff, Jane Orgel, was substituted as Plaintiff through an order dated January 18, 1999. Except for status reports, there were no docket

¹ The parties' written submissions have provided the Court with a full understanding of their contentions, and, thus, oral argument is not needed.

entries between the order substituting Ms. Orgel as Plaintiff and the pending motion to dismiss.² In addition, between August 1997 and the substitution order, only status report entries appear on the docket. Thus, it has been roughly four years since the last docket entry reflecting progress in the prosecution of this action.

Defendants argue that the period of inaction, far in excess of one year,' together with the languid pace of the litigation in the years before Mr. Orgel's death, compels the conclusion that this action should be dismissed for failure to prosecute.

Plaintiff, in response, argues that the delay is largely the result of difficulties in obtaining and retaining experts and that the matter is otherwise ready for trial. Specifically, Plaintiff notes that, in succession, she has had two experts become fully involved in this action and then, because of changes in their employment status, withdraw from her assignment. Plaintiff asserts that a new expert has been retained and that she is prepared to move forward promptly with the trial of this action.

Court of Chancery Rule 41(e) provides in pertinent part:

Subject to the provisions of Rules 23, 23.1 and 23.2 in each cause pending wherein no action has been taken for a period of 1 year, the Court may upon application of any party, or on its own motion, and after reasonable notice, enter an order dismissing such cause unless good reason for the inaction is given. . . .

² No scheduling order is in place.

The decision to dismiss an action for failure to prosecute is one that is committed to the Court's discretion.³ If there has been no activity taken for a period in excess of one year (which in this case, there has not) and if the plaintiff is unable to show good reason for the inaction, the Court may dismiss the action. Difficulties with experts frequently appear as an excuse for litigants' otherwise unexplained (or unexplainable) delays. In this instance, Plaintiff encountered the need to retain three experts in succession over time because of job changes of the retained experts. I am not persuaded that these delays alone constitute "good reason" for the inaction in this matter.

However, I am satisfied that the appropriate approach for management of this case is not dismissal, but instead is to enter and enforce a scheduling order setting a prompt trial date. The death of the initial plaintiff, the string of problems with experts, the absence of claims of prejudice, and a

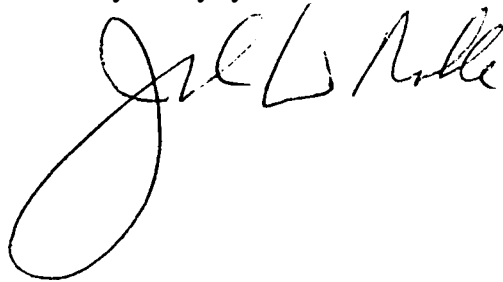
³ *Council 81, AFCSME v. New Castle County*, Del. Ch., C.A. Nos. 8816 & 8817, Jacobs, V.C. (Sept. 16, 1988).

preference for merits-based resolution all coalesce to persuade me that dismissal is not appropriate on these facts.⁴

Accordingly, Defendants' Motion to Dismiss for failure to prosecute is denied. The parties are directed to confer and submit a proposed case scheduling order with an anticipated trial date during February or March, 2002. The schedule shall address the exchange of experts' reports and the experts' depositions. In the event the parties are unable to agree, the Court, on application, will set a schedule.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in black ink, appearing to read "J. L. R. Nolle". The signature is written in a cursive style with a large, looping initial "J".

JWN/cap
oc: Register in Chancery-NC

⁴ Defendants rely upon *Lane v. Cancer Treatment Centers of America, Inc.*, Del. Ch., C.A. No. 12207, Steele, V.C. (Nov. 17, 1999). I note that the Court, based on additional evaluation of the facts, granted plaintiffs motion for reargument in that matter. *Lane v. Cancer Treatment Centers of America, Inc.*, Del. Ch., C.A. No. 12207, Steele, V.C. (Mar. 16, 2000).