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OF THE
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Re: *In re Speedway Motor-sports, Inc. Derivative Litig.*
Consol. Civil Action No. 18245

Dear Counsel:

This is my decision on defendants' motion to compel. Defendants ask that this Court compel plaintiff Crandon Capital Partners, LLP to produce more complete responses to defendants' interrogatories. Specifically, defendants seek to learn the identity of one of the plaintiffs' expert witnesses, a "real estate professional" who calculated plaintiffs' alleged damages, as well as any facts or opinions formulated by that witness. Defendants insist that our cases and rules require plaintiffs to have a factual basis for each allegation in their complaint and to provide such a factual basis when answering interrogatories regarding those allegations.

Defendants correctly state the general rule that plaintiffs must provide the factual basis for their allegations in interrogatory requests. Plaintiffs, however, point out that Court of Chancery Rule 26(b)(4)(B) shields non-testifying (sometimes referred to as "consultative") experts from such discovery. Rule 26(b)(4)(B) states that

> [a] party may discover facts known or opinions held by an expert who has been retained or

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> specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Most courts follow a rule either identical or substantially similar to Court of Chancery Rule 26(b)(4)(B). Although these courts agree that, by the terms of the Rule, the *facts or opinions* formulated by non-testifying experts cannot be discovered, a split of opinion exists over whether their *identity* is also undiscoverable absent a showing of exceptional circumstances. Some courts have held that a non-testifying expert's identity may only be discoverable under exceptional circumstances. Other courts have held that the party seeking to learn the identity of such an expert need not show exceptional circumstances. This Court has not ruled on this issue, but it was confronted by the Delaware Superior Court *Pfizer v. Advanced Monobloc Corp. and Piedmont Laboratories, Inc.'*

The *Pfizer* Court followed what it considered the "prevailing view" of the federal courts, typified by *In re Pizza Time Theatre Securities Litigation*[2] and *Ager v. Jane C. Stormont Hospital and Training School for Nurses*,[3] which both held that a party seeking the identity of a non-testifying except must satisfy the same "exceptional circumstances" standard applicable to such expert's "facts known or opinions held."[4] Defendants offer no contrary authority.

I agree with the Superior Court's holding in *Pfizer*. Plaintiffs represent to this Court that they have not yet decided to have their unidentified "real estate professional" testify at trial. He remains a non-testifying expert and, thus, pursuant to Rule 26(b)(4)(B), defendants may discover his identity or any facts or opinions held by him "only as provided

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[1] Del. Super., No. 97C-04-037-WTQ, Quillen, J. (Sept. 20, 1999).
[2] 113 F.R.D. 94, 97-98 (D. Ca. 1986).
[3] *622* F.2d 49(10th ir. 1980).
[4] *Pfizer,* at 2.

in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." Rule 35(b) applies only to examinations made by agreement of the parties, which is not the case here. There are also no "exceptional circumstances" because defendants remain free to hire their own "real estate professional" to calculate damages which, in this case, simply involves determining the fair market value of the Las Vegas property that Speedway Motorsports, Inc., sold to its CEO and controlling shareholder at an allegedly unfair and below-market price.

I deny defendants' motion to compel. Nevertheless, in the interest of facilitating the discovery process and reducing the costs, both public and private, associated with litigation, I have *sua sponte* entered a Scheduling Order that will govern all future proceedings in this action. A copy of the Scheduling Order is attached to this letter decision.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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Attachment

oc: Register in Chancery