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OF THE
STATE OF DELAWARE

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Re: Monier, Inc. v. Boral Lifetile, Inc., et al.
C.A. No. 3117-VCN
Date Submitted: February 24, 2010

Dear Counsel:

This letter opinion addresses the question of what to do about a party's failure to produce a relevant document that it knew (or should have known) was a proper subject of discovery.

Plaintiff Monier, Inc. ("Monier") and Defendant Boral Lifetile, Inc. ("Boral") are the two members of Defendant Monier Lifetile LLC ("MLT"). Monier asks the Court to order MLT to pay out 100% of MLT's Net Income (a defined term in MLT's Operating Agreement) based on a decision reflected in the minutes of the February 2000 meeting of MLT's Management Committee that "[f]rom the year 2000, a

dividend will be paid annually equal to the audited net profits of the Company."[1] This was a departure from the Operating Agreement which provides that "fifty percent (50%) of the Net Income of the Company . . . generated during a calendar year will be distributed"[2] at least on an annual basis, "unless the Management Committee approves greater or lesser distributions without dissenting vote."[3] Boral resists by disputing the effect of the February 2000 decision and by returning to MLT's Operating Agreement and its default dividend payout rate at 50% of Net Income.[4]

In 2006, Monier's ultimate parent company, Lafarge, S.A., was considering the sale of its roofing business, which included both Monier and its interest in MLT. To inform potential acquirers, Lafarge developed the Management Presentation, a document some 200 pages in length with information about numerous business units.[5]

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[1] Compl. Ex. B § 12.4. Boral and Monier each have three members on MLT's Management Committee.
[2] Compl. Ex. A § 7.1.
[3] Compl. Ex. A § 2.7.
[4] Thus, the focus of this litigation is on what was accomplished—and for how long—by MLT's Management Committee in February 2000 as reflected by the minutes of its meeting. For a more detailed description of this dispute, see *Monier, Inc. v. Boral Lifetile, Inc.*, 2008 WL 2168334 (Del. Ch. May 13, 2008).
[5] App. to Mem. of Law and Supp. of Def. Boral Lifetile, Inc.'s Mot. for Sanctions, Ex. F.

It included what the parties have referred to as the "PowerPoint Slide," a one-page summary of MLT's structure that included reference to its dividend policy.[6] The PowerPoint Slide within its bullet points sets forth the following:

- JV Contract [the Operating Agreement] stipulates that 50% of distributable income has to be at least distributed unless the Management board decides otherwise.
- In the past 100% was distributed.

The parties dispute the significance of this description of MLT's dividend payout policy, and, of course, the Court expresses no views as to the PowerPoint Slide's substantive significance. Boral, in brief, would ask the Court to conclude that the PowerPoint Slide demonstrates the 2006 understanding of Monier representatives that the 100% dividend policy was a thing of the past and that the Operating Agreement's 50% payout rate was in effect as the contractual default. It is not so much the words on the PowerPoint Slide that suggest such an understanding, but the absence of any reference to current and future payouts at the 100% level. On the other hand, the PowerPoint Slide may be read literally as an accurate recital of the terms of MLT's Operating Agreement and the recent history of MLT's dividend

[6] *Id.* Ex. G.

payments. Because nothing is expressly stated about future intent, any support to be derived by Boral from the PowerPoint Slide—it seems at this point—will be a matter of inference. In short, Boral may be right, the PowerPoint Slide may be important evidence of Monier's understanding at the time of the Slide's creation. It does not now, however, appear to be that outcome determinative, proverbial "smoking gun." Nonetheless, the PowerPoint Slide is clearly relevant to the pending dispute.[7]

A representative of Boral had obtained a copy of the PowerPoint slide but not the balance of the Management Presentation before this litigation began. Boral, at that time, was interested in acquiring Monier's interest in MLT, but not the rest of Lafarge's other roofing business assets. For that reason, its representative was given only the single page.[8] Thus, the key piece of the Management Presentation has been in Boral's possession for some extended period of time.

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[7] More to the point, the PowerPoint Slide is "reasonably calculated to lead to the discovery of admissible evidence." Ct. Ch. R. 26(b)(1).

[8] Although in essence joint venturers in MLT, Monier and Boral (or their affiliates) are worldwide competitors in the roofing materials business.

Shortly after this action began, Boral propounded discovery requests to Monier that fairly encapsulated the Management Presentation and, thus, the PowerPoint Slide. Yet it was Boral, in June 2008, which eventually first produced the one-page slide. When Monier received the PowerPoint Slide, it responded by demanding that Boral provide the entire Management Presentation, even though Boral only had one page of it, and Monier—it would eventually be learned—had the entire document.

At this time, questions regarding case scheduling and the need to take parent discovery under the Hague Convention also arose. Boral sought discovery from Monier's parent entities in France; one topic for discovery was the Management Presentation. Monier contended that the PowerPoint Slide was not its document and that it was not developed by its ultimate parent—Lafarge; instead, it had been developed by Lafarge Roofing, which, in 2006, was an entity between Monier and Lafarge.[9] Monier even suggested that the PowerPoint Slide was not in its

[9] The corporate structure, of course, has evolved. The Court's description is oversimplified, but it captures the relationship of Monier and its affiliates.

The confusion and inefficiency that resulted from Monier's apparent failure to search its records reasonably and to inquire properly of its executives with knowledge of these matters may partly be attributable to the likelihood of changes to its business. As will be seen, the cause of the difficulty is Monier. The harder question involves Monier's motives, which could range from carelessness to a wanton or intentional avoidance of its obligations under our discovery rules.

possession.[10] That proved to be inaccurate because Monier had several (slightly and not materially) different copies of the Management Presentation in its possession, custody, and control. The Court, in early 2009, after a timeout for unsuccessful settlement discussions, approved Boral's request under the Hague Convention for the discovery of Monier's parent entities. Then, Monier came forward and sought letters under the Hague Convention to take discovery also from its parent entities—which had refused to cooperate with it in discovery. Even Monier appeared to seek access to the Management Presentation through the Hague Convention.

[10] Counsel for Monier posited at oral argument that Monier had never represented that it did not have the Management Presentation, but, instead, knew at least shortly after the Slide was produced by Boral that it had it but believed that only the PowerPoint Slide was relevant, a copy of which Boral already had. Thus, the full presentation did not need to be produced. Monier's request for Boral to produce the entire Management Presentation was explained as an attempt to discern how Boral obtained a copy of this highly confidential information, and its Hague Convention application was simply an attempt to receive whatever Boral had, since its parent company was not cooperating with it with respect to document production. Tr. 36-44. This explanation is somewhat difficult to square with Monier's communications with Boral and the Court in late June, where counsel noted that the PowerPoint Slide "appears to be part of a larger document that apparently was not included in [Boral's] production" and that "we do not know how many pages the full document contains – and asked Boral to send us the entire document." Letter to the Court from counsel for Monier, June 23, 2008, at 2, Ex. A. Although it may be true that Monier never expressly represented that it did not have the Management Presentation, that is the inference most reasonably drawn from its actions.

Finally, in late 2009, during (or shortly before) depositions of Monier's senior management and its in-house counsel, all taken overseas, it became clear that Monier had, and had all along, had possession, custody, and control of the Management Presentation. It also became clear that key personnel of Monier had been involved with the Management Presentation—whether in its preparation or in its use in the efforts to sell the business. With that, Monier finally provided the Management Presentation, including the PowerPoint Slide, to Boral.

Boral has moved for sanctions and seeks dismissal of this action for what it characterizes as Monier's "deliberately concealing relevant documents that are bad for its case."[11] Although dismissal of an action (or issue preclusion or entry of a merits-based judgment) for discovery transgressions is a remedy to be used sparingly, and only in extraordinary circumstances,[12] a deliberate concealment of relevant

[11] Mem. of Law and Supp. of Def. Boral Lifetile, Inc.'s Mot. for Sanctions at 1.

[12] *See Lehman Capital v. Lofland*, 906 A.2d 122, 131 (Del. 2006) ("We have held that entering judgment against a party as a sanction for discovery violations is an extreme remedy and generally requires some element of *willfulness or conscious disregard* of a court order before the trial judge can impose such a severe sanction. Therefore, 'when other less punitive sanctions [are] available . . . [a] default judgment [or a dismissal with prejudice] is the *ultimate sanction* for discovery violations and *should be used sparingly*.'") (citations omitted) (emphasis in original).

documents that are bad for a party's case could be conduct necessitating the draconian remedy of dismissal.[13]

Monier fumbles its way through a multiple choice of problematic justifications for its failure to provide the Management Presentation in a timely manner. Its initial efforts to capture the document in proper response to Boral's discovery requests are said to have employed search terms that did not hunt well. Maybe the document was found and the reviewer did not appreciate its "relevance." That may be difficult to accept, but discovery searches are, unfortunately, not totally effective, and, so far, it is conceivable that this was just one of those instances where good faith efforts did not work.[14]

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[13] *See, e.g.*, *Midland Interiors, Inc. v. Burleigh*, 2006 WL 279137, at *2 (Del. Ch. Jan. 27, 2006) ("Where a conscious and willful action goes beyond mere delay of the discovery process into obstruction of discovery and therefore justice, however, the extreme sanction of default judgment is appropriate.").

[14] It seems likely that, if Boral had not acquired a copy of the PowerPoint Slide, the Management Presentation would never have surfaced. Monier seeks to minimize its failure by reminding the Court the Boral already had a copy of the PowerPoint Slide. Perhaps that is a plausible rejoinder with respect to documents that an adverse party would be expected to have obtained in the ordinary course. In stark contrast, the PowerPoint Slide was obtained under very specific—and somewhat unusual—circumstances and there simply was no reason for Monier to have expected that Boral would have had a copy. Indeed, the intensity of Monier's response to Boral's production of the PowerPoint Slide—with a not very subtle suggestion that something untoward had facilitated its acquisition—confirms that Monier could not have anticipated that Boral would have had the document in advance.

Monier's position became even more puzzling in June 2008 when it received the PowerPoint Slide as part of Boral's production. It responded by demanding that Boral provide the entire Management Presentation. The record, unfortunately, is not very helpful in providing an understanding as to what Monier's counsel and Monier were doing. With that one piece of paper, was there an effort to find out if Monier had the balance of the Management Presentation? Were the senior executives of Monier contacted? How hard did they search? What did they do to search for the document? Was this simply a failure of communication essentially between attorneys in the United States and client representatives in Europe who may not have been fully familiar with discovery as it is conducted here? What was done to make sure that the representations to the Court about the origins of the Management Presentation were accurate? Did Monier not find out that it had the Management Presentation until after, but not all that long after, June 2008?[15]

[15] Even if Monier had the Management Presentation at that time and decided not to produce it on relevancy grounds, as it now claims, its silence regarding such possession, its demand that Boral produce it, and its insistence that it was not a Monier document created the impression that Monier did not have a copy in its possession. Even if this was not Monier's intent, it helps Monier little. For, if Monier possessed the Management Presentation and its representatives were aware of it, Monier's failure to produce it until nearly eighteen months later is, in itself, clear evidence of a material failure to comply with its discovery obligations.

The Court has not been provided with decent answers to these obvious questions. For whatever reason, Monier failed to follow a rational course to figure out the background and location of the Management Presentation or, more specifically, the PowerPoint Slide. That represented a material failure to meet its responsibilities under the Court's discovery rules.

The better inference, however, is that this failure was not the product of a deliberate cover up. Discovery in this matter—on both sides—has been difficult. The Management Presentation is but one document out of many. Its importance to the outcome of this litigation is subject to fair debate. In short, these are not the grounds for dismissal of this action. Accordingly, Boral's motion for sanctions, to the extent that it seeks dismissal of this action, is denied.[16]

That, however, does not end the inquiry under Court of Chancery Rule 37. The Court is given broad discretion to craft a proper remedy for discovery shortcomings,[17] and Monier's conduct in this matter cannot simply be ignored. Boral resorted to the

[16] This conclusion confirms the guidance the Court provided to counsel at the close of oral argument on Boral's motion for sanctions.

[17] *See, e.g.*, *Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1189 (Del. Ch. 2009) ("The Court has the power to issue sanctions for discovery abuses under its inherent equitable powers, as well as the Court's 'inherent power to manage its own affairs.'") (citation omitted).

Hague Convention in an effort to obtain the Management Presentation—an effort that a more forthcoming Monier would have made unnecessary. Boral, however, also sought other discovery under the Hague Convention and, thus, it is likely that the Hague Convention procedures would have been used in any event. Nevertheless, Monier's failure to provide the Management Presentation was a material contributing factor to Boral's decision to pursue international discovery. Although not buttressed by any mathematical precision, a fair and equitable sanction is to shift to Monier one-third of Boral's expenses incurred in pursuing discovery under the Hague Convention—that is, the discovery sought of Monier's parent entities, in part, in search of the Management Presentation. In addition, Boral is awarded the costs, including its attorneys' fees, incurred in pursuing its motion for sanctions.[18]

Counsel are requested to confer as to a schedule for the submittal and review of documentation supporting the fees and expenses to be awarded under this letter opinion.

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[18] Boral, alternatively, has asked for what amounts to a partial redo of its discovery from Monier by way of an independent, third party review. In light of the extensive depositions that were taken of senior Monier representatives and the lack of any specific grounds—other than arguably Monier's conduct with respect to the Management Presentation—there is no basis for the appointment of an independent third-party expert to review Monier's electronic records.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Richard L. Renck, Esquire
Register in Chancery-K