EFiled: Feb 02 2016 03:42PM EST
Transaction ID 58511057
Case No. 6547-VCN

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February 2, 2016

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Re: *Hamilton Partners, L.P. v. Highland Capital Management, L.P.*
C.A. No. 6547-VCN
Date Submitted: October 19, 2015

Dear Counsel:

This discovery dispute implicates nine related motions. Plaintiff Hamilton Partners, L.P. filed seven Motions for Issuance of a Commission (the "Motions for Commission") asking this Court to enter orders authorizing the issuance of commissions for out-of-state subpoenas *duces tecum* and *ad testificandum* to Joseph F. Furlong, III, Stephen L. Clanton, Robert Fringer, Henry T. Blackstock, William C. O'Neil, Donald R. Millard, and R. Riley Sweat (collectively, the "Non-

Parties").[1] Defendant Highland Capital Management, L.P. ("Highland") objected to each Motion for Commission and thereafter filed a Motion for Protective Order Pursuant to Chancery Rule 26(c) to avoid compliance with certain items in Plaintiff's Third Request for Production of Documents (the "Third Request"). Plaintiff then filed a Motion to Compel Completion of Document Production. This procedural morass perhaps exaggerates the extent of the parties' core controversy, which boils down to what categories of information Plaintiff is entitled to receive in discovery. Highland objects to Plaintiff's various discovery requests on grounds of privilege, relevance, overbreadth, and that certain requests are inappropriately duplicative. For reasons that follow, Highland's arguments, with one exception, fail.[2]

[1] This Letter Opinion refers to each of these individuals by their last names. Each Motion for Commission is cited using the subpoenaed individual's last name and the word "Motion"—*ex.*, "Furlong Motion," "Sweat Motion."

[2] The Court briefly addressed the issue of privilege during a hearing on the motions, but did not resolve that issue in its entirety. *See Hamilton P'rs v. Highland Capital Mgmt., L.P.*, C.A. No. 6547–VCN, at 39–40 (Del. Ch. Oct. 19, 2015) (TRANSCRIPT).

I. BACKGROUND

A prior opinion (the "May Opinion") provides the underlying dispute's factual background.[3] Capitalized terms in this Letter Opinion have meanings specified in the May Opinion.

Some amount of discovery occurred absent countering motions before this controversy arose. Plaintiff filed the Complaint in this stockholder class action on June 6, 2011 against two Defendants: Highland and Furlong. Before the May Opinion dismissed claims against Furlong, Plaintiff had served two requests for production. Highland and Furlong provided responses to both. Plaintiff's First Request for Production of Documents (the "First Request") was served on June 5, 2012 and Plaintiff's Second Request for Production of Documents (the "Second Request") was served on January 3, 2013.

The May Opinion narrowed the universe of discoverable information to some disputed extent by, *inter alia*, dismissing all claims asserted against Furlong. Count I of the Complaint, which claimed Highland breached its fiduciary duties as

[3] *See Hamilton P'rs, L.P. v. Highland Capital Mgmt., L.P.*, 2014 WL 1813340 (Del. Ch. May 7, 2014).

a controlling stockholder for actions taken surrounding the Merger, survived Highland's motion to dismiss. The Court reasoned that the Complaint supported reasonable inferences that Highland was a controlling shareholder, that the $0.67 per share price offered in the Merger was unfair, and that Highland "exercised its control over AHP to facilitate the Restructuring Agreement on unfair terms."[4] The Court was unable to conclude, however, that Count II stated claims that Furlong breached his fiduciary duties or aided and abetted those of Highland.[5] Notable for present purposes are the Court's holdings that (1) the business judgment standard of review applied to the challenged decisions of AHP's and New AHP's respective boards and (2) the Court could not reasonably infer that any challenged decision was irrational.[6]

Plaintiff filed the discovery papers now subject to dispute after the May Opinion was issued—the Third Request was served on February 16, 2015 and the Motions for Commission were filed on June 29, 2015. Relevant details of each are discussed as needed through the course of subsequent analysis.

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[4] *Id.* at *12–14.
[5] *Id.* at *15–20.
[6] *Id.*

II. ANALYSIS

Highland raises four challenges to Plaintiff's discovery effort: (1) that the Motions for Commission inappropriately purport to waive privilege; (2) that deficiencies in the Complaint render certain topics irrelevant and related document requests thereby inappropriate; (3) that part of Plaintiff's discovery is duplicative; and (4) that Plaintiff's inquiry into financial information is, to some extent, irrelevant and overbroad. After describing the applicable standard of review, the Court addresses each in turn.

A. *Standard of Review*

The scope of permissible discovery under Court of Chancery Rule 26(b)(1) is "broad and far-reaching."[7] That rule provides, in relevant part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking

[7] *Pfizer Inc. v. Warner-Lambert Co.*, 1999 WL 33236240, at *1 (Del. Ch. Dec. 8, 1999) ("[A]bsent injustice or privilege, [Rule 26(b)] instructs the Court to grant discovery liberally."); *Boxer v. Husky Oil Co.*, 1981 WL 15479, at *2 (Del. Ch. Nov. 9, 1981) ("[D]iscovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought can have no possible bearing upon the subject matter of the action." (quoting *La Chemise La Coste v. Alligator Co., Inc.*, 60 F.R.D. 164, 170–71 (D. Del. 1973))).

> discovery or to the claim or defense of any other party . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[8]

Litigants may thus seek irrelevant information that is reasonably likely to uncover relevant information. This liberal standard furthers discovery's purpose of "advanc[ing] issue formulation . . . assist[ing] in fact revelation, and . . . reduc[ing] the element of surprise at trial."[9]

Several limitations constrain the otherwise expansive scope of discovery defined in Rule 26(b). In particular, Rule 26(b)(1) provides that the Court shall limit discovery upon determining that "(i) the discovery sought is unreasonably cumulative or duplicative . . . ; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the

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[8] Ct. Ch. R. 26(b).

[9] *In re Quest Software Inc. S'holders Litig.*, 2013 WL 3356034, at *2 (Del. Ch. July 3, 2013) (quoting *IQ Hldgs., Inc. v. Am. Commercial Lines Inc.*, 2012 WL 3877790, at *1 (Del. Ch. Aug. 30, 2012)); *see also Boxer*, 1981 WL 15479, at *2 ("[T]he spirit of Rule 26(b) calls for all relevant information, however remote, to be brought out for inspection not only by the opposing party but also for the benefit of the Court which in due course can either eliminate the information or give it just such weight as the information is entitled when determining the ultimate issues at trial." (quoting *La Chemise La Coste.*, 60 F.R.D. at 171)).

discovery is unduly burdensome or expensive . . . ."[10] Further, "the scope of allowable discovery . . . is tied to the issues presented in the litigation."[11] Accordingly, information relating to non-colorable claims or topics barred by claim or issue preclusion has, in the past, been deemed outside the scope of discovery.[12] Drawing the bounds of discovery pursuant to these parameters is a matter left to this Court's sound discretion.[13]

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[10] Ct. Ch. R. 26(b)(1).

[11] *Reid v. Siniscalchi, L.L.C.*, 2011 WL 378795, at *4 (Del. Ch. Jan. 31, 2011).

[12] *See Lorenzetti v. Farrell*, 2013 WL 3671743, at *1 (Del. Ch. July 15, 2013) (limiting discovery to "claims [the Court] determined [were] colorable" and "topics [the Court] determined [were] likely not barred by claim or issue preclusion"); *Read v. Wilm. Senior Ctr., Inc.*, 1992 WL 296870, at *1 (Del. Ch. Sept. 16, 1992) ("A party's entitlement to discovery presupposes that the discovery being sought is in aid of a legally cognizable claim." (citing *McLaughlin v. Copeland*, 455 F. Supp 749, 753 (D. Del. 1978))); *Boxer*, 1981 WL 15479, at *2 ("It is well settled that the scope of relevance is limited by the allegations of the complaint." (citing *Dann v. Chrysler Corp.*, 166 A.2d 431 (Del. Ch. 1960))).

[13] *In re Tyson Foods Inc.*, 2007 WL 2685011, at *3 (Del. Ch. Sept. 11, 2007) ("[T]he scope of discovery is broad, but not limitless, and this Court may exercise its sound discretion in delineating the appropriate scope of discovery."); *Fitzgerald v. Cantor*, 1998 WL 780129, at *1 (Del. Ch. Oct. 23, 1998) ("The proper scope of . . . discovery . . . is within this Court's discretion.").

B. *Privilege*

Highland's first challenge to Plaintiff's discovery effort concerns a paragraph addressing privilege that appears in each Motion for Commission. The challenged paragraph (the "Privilege Clause") reads as follows:

> The documents, information and testimony sought are not privileged (and, to the extent any such documents were privileged at any time, that privilege has been waived) . . . .[14]

Highland argues that this language inappropriately attempts to create "waiver where none already exists" and, accordingly, should not appear as currently phrased in any commission this Court ultimately issues. Plaintiff responds that such modification is unnecessary because other passages in each Motion for Commission clarify that the Privilege Clause does not give rise to the "blanket waiver" that animates Highland's apprehension. In particular, Plaintiff points to the fact that each Motion directs the subpoenaed individual to "produce the documents set forth in Schedule A,"[15] which in turn provides a process for

[14] *E.g.*, Furlong Motion ¶ 6. An identical clause appears in each Motion for Commission. The Privilege Clause appears as paragraph 7 to the Sweat Motion.
[15] *E.g.*, *id.* at 1.

withholding documents on the basis of privilege.[16] That process essentially entails providing a privilege log.

Although this Court addressed the issue of privilege during the October 19, 2015 Oral Argument on these motions,[17] limited additional guidance is in order. At Oral Argument, the Court held that the privilege issue should be framed through the standard practice of creating and exchanging privilege logs.[18] Subpoenaed individuals shall not be deemed to have waived privilege by virtue of language in the Motions for Commission submitted to the Court that are now in dispute. Plaintiff shall modify each Motion for Commission to clarify that this standard practice shall govern treatment of privilege and waiver.

C. *Relevance*

Highland's second challenge attacks the Motions for Commission and Third Request to the extent that each seeks facts that this Court's May Opinion allegedly exposed as irrelevant. This argument has two components worth distinguishing.

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[16] *E.g.*, *id.* sched. A at 6–7 ¶ 5. Identical instructions on privilege appear in schedules appended to each Motion for Commission. These instructions appear in Schedule A to the Sweat Motion at page 7, paragraph 5.
[17] Tr. Oral Arg. ("Tr.") 39–40.
[18] *Id.*

First, Highland argues that information addressing the fairness of the process through which the Merger took form is irrelevant and thus not discoverable because, by Highland's reading of the May Opinion, Plaintiff failed to allege the process was unfair and may not seek discovery to substantiate unmade allegations. Highland points to a number of the May Opinion's passages in support of this contention, including:

> - [R]egardless of whether Furlong was interested in the Restructuring Agreement, there is no allegation that 'raise[s] a reasonable doubt that [the Special Committee] could not exercise [its] independent business judgment in approving the transaction' because of Furlong's undue influence or failure to disclose any material interest. The AHP board's decision to agree to the Merger as part of the Restructuring Agreement must be reviewed under the business judgment standard . . . .[19]
> - [T]here is no basis on which the Court could conclude that the business judgment standard of review has been rebutted as to [New AHP directors besides Furlong] . . . . The decisions by the New AHP board are entitled to deference under the business judgment standard of review . . . .[20]

These and other holdings, we are told, show that "Plaintiff can never establish that the ***process*** surrounding [the transaction that resulted in Highland owning AHP]

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[19] *Hamilton P'rs*, 2014 WL 1813340, at *17 (footnote omitted).
[20] *Id.* at *19.

was unfair."[21] Accordingly, Highland argues that the May Opinion effectively trimmed this case's discoverable issues down to one—whether the $0.67 per share price offered in the sixth-step Merger was unfair—by exposing critical factual gaps in the Complaint.[22]

Second, Highland argues that applicable Delaware and Nevada law limit its liability to some extent. Highland invokes *Schandler v. DLJ Merchant Banking, Inc.*[23] and *Abraham v. Emerson Radio Corp.*[24] for the idea that "absent some liability on the part of the Board, Highland cannot be liable to the Plaintiff even if Plaintiff had bothered to allege that Highland dominated the Board."[25] Similarly, argues Highland, Nevada law dictates that "if Plaintiff cannot establish any breach on the part of the board of New AHP for failure to obtain a drop-down fairness

[21] Mem. of Law in Supp. of Mot. of Highland Capital Mgmt., L.P. for Protective Order Pursuant to Chancery Rule 26(c) ("Supp. Mot. Protective Order") 2 (emphasis in original).
[22] Plaintiff relies on a broad range of language in the May Opinion, as well as omissions in the Complaint, in support of this argument. This paragraph provides a summary of Plaintiff's argument instead of a comprehensive reconstruction.
[23] 2010 WL 2929654 (Del. Ch. July 26, 2010).
[24] 901 A.2d 751 (Del. Ch. 2006).
[25] Supp. Mot. Protective Order 14–15.

opinion, Highland cannot have breached its fiduciary duties to the shareholders of New AHP for the ***same alleged conduct***."[26]

Explaining the substance of Plaintiff's allegations, this Court's prior holdings, and applicable legal standards will help illuminate the information relevant to this case's adjudication. Plaintiff's theory of the case, as colorfully summarized by Plaintiff's counsel, is that "Highland Capital stood on the throat of [AHP] until it got what it wanted"[27]—and "what it wanted," presumably, was a merger on terms favorable to Highland. This Court held in the May Opinion that Plaintiff has stated a claim that Highland breached its fiduciary duties as a controlling shareholder by exercising its control over AHP to facilitate a transaction (the Merger) that was not entirely fair.[28] The Court's intermediate conclusion that Highland was a controlling shareholder despite owning 48% of

[26] Reply in Supp. of Mot. of Highland Capital Mgmt., L.P. for Protective Order Pursuant to Chancery Rule 26(c) ("Reply. Supp. Protective Order") 9 (emphasis in original).
[27] Tr. 18.
[28] *Hamilton P'rs*, 2014 WL 1813340, at *14.

AHP's stock[29] was based, *inter alia*, on allegations that Highland owned 82% of AHP's debt, leveraged that debt position to force AHP to agree to a transaction at a deal price below the stock's contemporaneous trading price, and timed its strategic movements around the expiration of Section 203's three-year waiting period.[30] Accordingly, the entire fairness standard of review applied.[31] The Court was unable to conclude, however, that the Special Committee was sufficiently "well-functioning" to shift the burden of proof to the Plaintiff under *Kahn v. Lynch Communication Systems, Inc*.[32]

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[29] Two criteria might qualify a stockholder as a "controlling stockholder" under Delaware law: "where the stockholder (1) owns more than 50% of the voting power of a corporation or (2) owns less than 50% of the voting power of the corporation but '*exercises control* over the business affairs of the corporation.'" *In re KKR Fin. Hldgs. LLC S'holder Litig.*, 101 A.3d 980, 991 (Del. Ch. 2014) (emphasis in original) (quoting *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113–14 (Del. 1994)).

[30] *Hamilton P'rs*, 2014 WL 1813340, at *13–14; s*ee also* 8 *Del. C.* § 203.

[31] When a stockholder challenges the fairness of a merger between a corporation and its controlling stockholder, the Court reviews this type of parent-subsidiary transaction under the entire fairness standard of review. *Lynch*, 638 A.2d at 1115; *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1239 (Del. 2012).

[32] *Hamilton P'rs*, 2014 WL 1813340, at *14; *see also Lynch*, 638 A.2d at 1117. At this juncture, it is useful to highlight the somewhat mundane proposition that holdings at the motion to dismiss stage concerning the applicable standard of review do not necessarily bind the Court at subsequent stages of litigation. *Frank*

When the entire fairness standard applies, the burden initially lies on the defendant(s) to establish that the challenged transaction was entirely fair, an inquiry with two well-known components: fair dealing and fair price.[33] The entire fairness analysis, however, "is not a bifurcated one as between fair dealing and fair price. All aspects of the issue must be examined as a whole since the question is one of entire fairness."[34] Further, fair process and fair price are not always neatly distinguishable.[35] As the Delaware Supreme Court noted in *Americas Mining*

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v. Elgamal, 2014 WL 957550, at *17 (Del. Ch. Mar. 10, 2014). Under different procedural postures, different sets of governing facts might justify applying a standard other than the one applicable in the plaintiff-friendly Rule 12(b)(6) environment in which the Court must accept as true all non-conclusory facts and inferences one might reasonably infer from the complaint. The same logic applies to burden-shifting under *Lynch*. *But cf. Americas Mining Corp.*, 51 A.3d at 1243 ("[W]hich party bears the burden of proof must be determined, if possible, before the trial begins."); *id.* ("[I]f the record does not permit a pretrial determination that the defendants are entitled to a burden shift, the burden of persuasion will remain with the defendants throughout the trial to demonstrate the entire fairness of the interested transaction.").

[33] *Americas Mining Corp.*, 51 A.3d at 1239.

[34] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).

[35] *See, e.g., In re Loral Space & Commc'ns Inc.*, 2008 WL 4293781, at *22 (Del. Ch. Sept. 19, 2008) ("[T]he relationship between process and price in coming to the ultimate fairness determination is fraught with some imprecision . . . ."); *In re Cycive, Inc. S'holders Litig.*, 836 A.2d 531, 548 n.22 (Del. Ch. 2003) ("In reality,

Corp. v. Theriault, "[a] fair process usually results in a fair price" and "[e]vidence of fair dealing has significant probative value to demonstrate the fairness of the price obtained."[36]

Highland's suggestion that Plaintiff cannot seek information on fair process because Plaintiff categorically failed to call process into question falls short for a number of reasons. First, and most importantly, Plaintiff has called aspects of process into question. Fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to directors, and how the approvals of the directors and stockholders were obtained."[37] Plaintiff alleges that the negotiations took place when Highland wanted them to (following the Section 203 expiration date) out of pressure Highland exerted as a major creditor—facts that implicate the timing, initiation, and perhaps negotiations surrounding the Merger. Discovery on the directors' reactions to circumstances Highland put in place might inform the integrity of the process even if those

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the economic merits rarely are altogether severable from the process by which the transactional price was developed . . . .").

[36] 51 A.3d at 1244.

[37] *Weinberger*, 457 A.2d at 711.

directors had "the best of intentions."[38] Thus, although the Court held that the business judgment rule was not rebutted for a majority of the members on the Special Committee and New AHP's board, the Complaint is not devoid of allegations that, when examined through the course of discovery, are reasonably likely to uncover admissible evidence pertaining to the issue of fair process.

Second, and relatedly, Highland's position is in tension with the principle that fair process and fair price are not always strictly separable inquiries.[39] Designating process-related information as out-of-bounds might inappropriately exclude evidence on a topic Highland concedes as relevant: fair price. Further, sanctioning Highland's request that the Court categorize various document requests as relevant to either price or process risks injecting an unnecessary degree of confusion (and irony) to a process designed in part to "advance issue formulation."[40]

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[38] *Americas Mining Corp.*, 51 A.3d at 1245.
[39] Evidence on process might affect the Court's confidence in the price ultimately established. *See supra* note 36 and accompanying text.
[40] *Quest Software Inc.*, 2013 WL 3356034, at *2.

Finally, Highland's invocation of *Schandler*, *Abraham*, and Nevada law to avoid liability is a thinly-veiled attempt at dispositive motions practice that the Court declines to address in the context of this discovery dispute.[41]

For all of these reasons, Highland's first challenge to Plaintiff's discovery effort fails.

D. *Duplicative Discovery*

Next, Highland challenges the Motions for Commission and Third Request to the extent that each seeks duplicative information. Highland asserts that because the Motions for Commission seek largely the same information from each Non-Party and the Third Request and the Motions seek information already sought in the First and Second Requests, Plaintiff's discovery effort has become unnecessarily cumulative and "oppressive."[42]

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[41] *See U.S. Die Casting & Dev. Co. v. Sec. First Corp.*, 1995 WL 301414, at *3 (Del. Ch. Apr. 28, 1995) (declining to address a substantive legal issue that was "properly resolved on a motion to dismiss or at trial" in the course of resolving a discovery issue).

[42] Omnibus Objection of Highland Capital Mgmt., L.P. to Mots. For Commissions Filed by Plaintiff ("Omnibus Objection")15–16; Supp. Mot. Protective Order 21.

As noted, Rule 26(b) provides that the Court shall limit discovery that is "unreasonably cumulative or duplicative."[43] Objections to discovery on this basis are usually denied, however, unless "the discovery request is *fully* duplicative and meant to harass the producing party."[44]

The discovery sought from the Non-Parties in the Motions for Commission is neither fully duplicative nor oppressive. The risk that Non-Parties responding to the same discovery requests will produce the same documents as each other and Highland is outweighed by two competing considerations. First, Plaintiff (very reasonably) suspects that different individuals will produce different documents responsive to the same requests for production, a reality that defeats any fear of fulsome overlap.[45] Second, submitting the same requests to different individuals

[43] Ct. Ch. R. 26(b)(1).
[44] *Grace Bros., Ltd. v. Siena Hldgs., Inc.*, 2009 WL 1547821, at *1 (Del. Ch. June 2, 2009) (emphasis in original); *see also Van De Walle v. Unimation, Inc.*, 1984 WL 8270, at *2 (Del. Ch. Oct. 15, 1984) ("Courts will usually only forbid such duplication where the objecting party has shown with particularity that the discovery is in fact fully duplicative and is meant merely to harass the interrogated party.").
[45] *Cf. Grunstein v. Silva*, 2010 WL 1531618, at *5 (Del. Ch. Apr. 13, 2010) ("[T]he fact that certain of the [third party] documents will overlap documents to be

might allow Plaintiff "to test the truth, accuracy and completeness" of extant and forthcoming production.[46] Further, nothing in this record substantiates Highland's conclusory characterization of the Motions for Commission as "oppressive"—to the contrary, the Non-Parties have not seen fit to object themselves on that basis.[47] Accordingly, the Motions for Commission are not "unreasonably cumulative or duplicative."[48]

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produced at the same time by Defendants because of Plaintiffs' motion to compel is of no consequence.").

[46] *See Fitzgerald*, 1998 WL 780129, at *1 (identifying the plaintiff's "right to test the truth, accuracy and completeness" of defendant's discovery responses as a counterweight to the risks that non-parties' discovery responses would be duplicative and that discovery would be easier to obtain from the defendant).

[47] *See id.* ("I find [defendant's] claims that the Discovery Requests impose a substantial burden on and constitute harassment of the Non-Parties to be significantly undermined by the fact that none of the Non-Parties themselves have objected to the Discovery Requests or filed a Motion for a Protective Order.").

[48] Highland has also argued that Plaintiff intends inappropriately to depose O'Neil and Millard about the negotiations and terms of the Restructuring Agreement and Merger Agreement—topics that Plaintiff has, broadly speaking, touched upon in prior depositions. *See, e.g.*, Omnibus Objection Ex. 3 (O'Neil Deposition) 30:21–31:23, 54:22–55:7. Plaintiff responds that it seeks testimony on these topics to confirm and expand on facts that may be uncovered in forthcoming document production. Eliciting this sort of new information is appropriate. Plaintiff may not harass O'Neil and Millard by needlessly re-examining facts already asked about, but may pursue new lines of questioning that relate to the umbrella concepts of

Parts of the Third Request can be read as asking for the same sorts of documents already sought in the First and Second Requests. Some items in the Third Request appear more likely to generate duplicative discovery than others. The necessarily speculative nature of those characterizations justifies relief that is in some sense nonspecific but nonetheless offers a comprehensive solution that balances the risk of overlap with Plaintiff's important discovery right. With this in mind, the Court concludes that Highland must produce documents responsive to the Third Request if those documents have not already been produced by Highland.[49]

E. *Financial Information*

Finally, Highland objects to the breadth of financial information Plaintiff seeks in the Motions for Commission and the Third Request. In Motions for Commission issued to every Non-Party but Sweat, Plaintiff requests:

"the negotiation and terms of the Restructuring/Merger Agreement." *E.g.*, O'Neil Motion sched. B ¶¶ (b), (k).

[49] For similar reasons, Furlong must produce documents responsive to requests in the Furlong Motion if he has not already produced those documents.

> All documents and communications that refer or relate to the Company's actual, projected, or forecasted financial performance, financial condition, revenue, incomes, profits, losses, sales, surplus, earnings per share, or charges against earnings. . . . [T]his request applies to documents created on or after January 1, 2008, and includes without limitation, documents prepared by the Company, an accounting firm, an investment banking firm a financial advisor or any other person.[50]

The Motions for Commission further instruct subpoenaed individuals to produce responsive documents "through the date of production."[51] Highland argues that the scope of discoverable historical financial information "should be limited to the information necessary to prepare a valuation of New AHP stock as of October 12, 2010."[52]

Plaintiff seeks identical production from Highland in the Third Request, as well as "[a]ll documents (whether prepared by the defendant, an accounting firm, an investment banking firm, a financial advisor, or any other person) that refer or

[50] *E.g.*, Furlong Motion sched. A, Req. No. 2. The "Company" is AHP and all of its affiliates.
[51] *Id.* at 6 ¶ 2.
[52] Omnibus Objection 18.

relate to the value of the Company or any of its assets."[53] Highland asks the Court to enter an Order limiting its obligation to respond to these requests in a number of ways—namely, by limiting discovery (1) again, to information necessary to prepare a valuation of New AHP stock as of October 12, 2010; (2) to documents not publicly available through the SEC's Edgar database; and (3) to information past October 12, 2009 that was prepared by AHP or at its request and direction, actually completed and disseminated within AHP, and relating to the value of AHP stock and not individual assets.[54]

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[53] Pl.'s Mot. to Compel Completion of Doc. Produc. and Opp'n to Def's Mot. for Protective Order Ex. B (Third Request) at Req. No. 4.

[54] *See* [Proposed] Order Granting Mot. of Highland Capital Mgmt., L.P. for Protective Order Pursuant to Chancery Rule 26(c). At Oral Argument, Highland further argued that its production of post-merger financial documents dating up to 2015 (and now, 2016) ought to also be limited. Tr. 28. This argument appears nowhere in Highland's briefs and no corresponding restriction appears in Highland's Motion for Protective Order. The argument might therefore be deemed waived. *See Lechliter v. Del. Dept. of Nat. Resources*, 2015 WL 7720277, at *3 & n.29 (Del. Ch. Nov. 30, 2015). Highland's argument that discoverable financial information should only include that relevant to producing a valuation as of October 12, 2010 might be construed as subsuming its argument about post-merger figures. In any event, not all post-merger information is beyond the reach of discovery, but some cut-off is necessary. The parties should first discuss an end date before raising the issue with the Court.

Plaintiff has professed an intent to present expert testimony at trial on the Company's fair value. That testimony, we are told, will include a discounted cash flows analysis, a widely-accepted valuation methodology that relies on cash flow projections as key inputs.[55] Historical financial information can be a relevant factor informing the reliability of a given valuation.[56] Nonetheless, Highland doubts Plaintiff's need for information stretching as far back as 2008 by supposing that Plaintiff's sole attack to the Merger price's fairness is directors' failure to obtain a drop-down fairness opinion between the Self-Tender Offer (which began on July 7, 2010 and closed on September 1, 2010)[57] and the Merger. Plaintiff's argument, however, is not so limited. Plaintiff has also alleged that the Self-

[55] *In re Radiology Assocs., Inc. Litig.*, 611 A.2d 485, 490 (Del. Ch. 1991).
[56] *See, e.g.*, *Le Beau v. M.G. Bancorporation, Inc.*, 1998 WL 44993, at *8–9 (Del. Ch. Jan. 29, 1998) (contrasting two comparative company analyses in part by comparing one valuation's use of historical data stretching back 5 years to the other's use of data going back 2.75 years); *Radiology Assocs.*, 611 A.2d at 490–91 (noting, in assessing the reliability of one side's projected revenues and terminal value, that projections derived from "applying a growth rate to *historical* earnings" (emphasis in original)); *Citron v. E.I. Du Pont de Nemours & Co.*, 584 A.2d 490, 509 (Del. Ch. 1990) (questioning a valuation expert's "assumption that Remington's earnings would grow indefinitely at 8%" in light of historical data during a nine-year period).
[57] *Hamilton P'rs*, 2014 WL 1813340, at *6.

Tender Offer consideration itself was unfair.[58] The Court fails to see any reason to alter Plaintiff's January 1, 2008 bound given Rule 26(b)'s mandate to liberally grant discovery and that information's clear potential to uncover evidence relevant to Plaintiff's theory that the $0.67 per share consideration in both the Self-Tender Offer and the Merger was unfair.

Nor should Plaintiff be limited to discovery of information prepared by AHP, completed or disseminated within AHP, and that "relates to the value of AHP stock and not individual assets." Highland's suggestion that these categories properly constrain discovery to information that is either relevant or reasonably likely to uncover relevant information is unpersuasive; Plaintiff is entitled to Highland's projections and a broad range of financial data. Although that data might only be of minimal relevance, weighing relevant evidence is an issue for the party seeking discovery and this Court—not one for resolution during the litigation's discovery stage.

Limiting discovery to documents not available on the SEC's EDGAR database is reasonable, however, given the accessibility of those documents.

[58] *See id.* at *13–14.

III. CONCLUSION

Plaintiff shall modify the Motions for Commission in the manner specified in Part II.B and re-submit them within twenty days. The Motion to Compel is granted with the caveat noted in Part II.D. The Motion for Protective Order is granted only to the limited extent described in Part II.E. Counsel are requested to submit an implementing order within twenty days. Within that same period, counsel are asked to engage the Court to address how, if at all, the Amended Stipulation and Order Governing Case Schedule ought to be revised.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K