

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

MORGAN T. ZURN
MASTER IN CHANCERY

LEONARD L. WILLIAMS JUSTICE CENTER
500 NORTH KING STREET, SUITE 11400
WILMINGTON, DE 19801-3734

Final Report: January 18, 2018
Date Submitted: December 21, 2017

Michael W. Arrington, Esquire
Michael Teichman, Esquire
Parkowski, Guerke & Swayze, P.A.
1105 North Market Street, 19th Floor
Wilmington, DE 19801

Mr. Jeffrey Cohen *FSX & 1st Class Mail*
58021-037
P.O. Box 5000
Bruceton Mills, WV 26525

Re: Indemnity Insurance Corporation, RRG v. Jeffrey Cohen,
C.A. No. 8985-CB

Dear Counsel and Litigant:

This letter serves as a final report pursuant to Chancellor Bouchard's December 6, 2017, Order appointing me as a special master in these cases. I write for Petitioner Indemnity Insurance Corporation, RRG ("Indemnity"), Respondent Jeffrey B. Cohen ("Cohen"), and the Chancellor, who are familiar with the underlying facts as alleged. This letter addresses some disputes under advisement that I believe can be handled without further conferring, and establishes a framework for conferring on the remaining disputes.

I. Cohen's Motion for Judicial Notice

On October 31, 2017, Cohen filed a *pro se* Motion for Judicial Notice, requesting the Court take judicial notice of numerous filings in related civil and criminal cases, documents filed with state and federal insurance authorities, and actuarial reports.¹ Cohen wishes to use the requested material to attempt to demonstrate Indemnity was capitalized and profitable prior to liquidation, as admitted by Indemnity, its counsel, the Department of Insurance, and others. Indemnity responded on November 29, 2017.²

Delaware Rule of Evidence 201 governs judicial notice of adjudicative facts, or the facts of the particular case, and provides that a “judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” If the accuracy of the subject document’s contents is disputed, the Court may take judicial notice to discern when the document was created, what was said therein, or what notice was provided thereby, but may not take judicial notice to establish the truth of its contents and accept those contents as adjudicative

¹ Docket Item (“D.I.”) 156.

² D.I. 166. Cohen asserts he did not receive a copy of Indemnity’s Opposition, as well as several other documents. *See* D.I. 185, 186. Indemnity shall mail Cohen another copy of the requested filings within three days.

facts.³ This Court also considers the entire document, not just the portion relied upon by a party.⁴

Delaware Rule of Evidence 202 governs the different issue of judicial notice of law. This Rule is intended to expand and encourage the admissibility of evidence of applicable law.⁵ To further the goal of ensuring this Court can take judicial notice of applicable law, Rule 202(d)(1)(B) permits judicial notice of “records of the court in which the action is pending and of any other court of this State or federal court sitting in or for this State.” Specifically, this Court may take judicial notice of court filings “for certain limited purposes, such as to understand the nature and grounds for rulings” made by the court in which the documents were filed.⁶ Rule 202 does not permit this Court to take judicial notice of such filings for the truth of their contents.⁷

Recommendations follow for categories of items for which Cohen seeks judicial notice.

³ *In re Rural Metro Corp. S’holders Litig.*, 2013 WL 6634009, at *7-8 (Del. Ch. Dec. 17, 2013) (citing *In re Santa Fe Pacific Corp. S’holder Litig.*, 669 A.2d 59 (Del. 1995); *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320, n.28 (Del. 2004).

⁴ *Santa Fe*, 669 A.2d at 69.

⁵ *Rural Metro*, 2013 WL 6634009 at *8.

⁶ *Id.* at *9.

⁷ *Id.* (cited by *Pulieri v. Boardwalk Properties, LLC*, 2015 WL 691449, at *4 n.24 (Del. Ch. Feb. 18, 2015) (Bouchard, C.)).

A. Items 1-14: Court Records from Matter of Indem. Ins. Corp., C.A. No. 8601-CB

In Items 1-14,⁸ Cohen asks this Court to take judicial notice of certain statements within certain documents filed in Indemnity's liquidation proceeding (*e.g.*, statements in pleadings, affidavits, and filed accounting reports). Indemnity opposes judicial notice on the grounds that the subject statements contain facts that are disputed both in this action and in the ongoing liquidation proceeding, and that are not capable of accurate and ready determination by resort to sources.

Indemnity points out that the liquidation proceeding is still ongoing, and in fact began as a rehabilitation proceeding but shifted to liquidation as the case progressed. In Items 2, 4, 7, and 12, Cohen asks the Court to take judicial notice of certain characteristics of documents filed in the liquidation proceedings (*e.g.*, that they were not withdrawn, or that verifications are qualified upon information and belief).

Items 1, 3, 5-6, 8-11, and 13-14 are excerpts of documents filed in the liquidation proceeding. Their existence and content are capable of accurate and ready determination by viewing the liquidation proceeding's docket. But, as explained in *Rural Metro*, where a filing's contents are subject to reasonable

⁸ Cohen requested judicial notice of two Items numbered 14. They are both statements by the Insurance Commissioner in the liquidation proceeding. I refer to them collectively as Item 14.

dispute, include views and opinions, or could be contested with the aid of discovery, the court cannot take judicial notice under Rule 201 for the purpose of accepting the statements as adjudicative fact.⁹ The truth of the matter asserted in these Items is subject to reasonable dispute, and their accuracy or truth is not generally known and is not capable of ready determination. And Rule 202 does not permit this Court to take judicial notice of court records for the truth of their contents.¹⁰

Therefore, under Rule 201, I recommend the Court take judicial notice of the fact that Items 1, 3, 5-6, 9-11, and 13-14 were filed and of their contents in their entirety. But I recommend judicial notice stop short of accepting the contents of these Items for the truth asserted. I recommend the Court decline to take judicial notice of Items 2, 4, 7, and 12. The filings' legal import, *e.g.*, whether a verification is effective or whether Indemnity has taken any remedial measures to correct or withdraw assertions in the liquidation proceeding, is neither generally known nor capable of being readily determined.

Item 8 is a finding of fact made by a Vice Chancellor in a memorandum opinion after numerous evidentiary hearings. Delaware Rule of Evidence 202(a) compels this Court to take judicial notice of the case law of this State. I

⁹ 2013 WL 6634009 at *8-9.

¹⁰ *Id.* at *9.

recommend the Court take judicial notice of the memorandum opinion in its entirety.¹¹

B. Items 15-17 and 29: Indemnity filings with the Delaware Department of Insurance.

Cohen asks the Court to take judicial notice of certain statements within certain documents regarding Indemnity that were publicly filed with the Delaware Department of Insurance. Cohen also asks the Court to take judicial notice of the fact that some of the documents were not withdrawn or amended. Indemnity argues that the Court may take judicial notice of the existence and filing of these documents, but not to establish the truth of the statements therein.

Indemnity is correct. “Applying Rule 201, Delaware courts have taken judicial notice of publicly available documents that are ‘required by law to be filed, and actually are filed, with federal or state officials.’”¹² But courts cannot take judicial notice of those documents to establish the truth of their contents where there is no ready means of assessing accuracy.¹³ Here, the accuracy of statements and data in Indemnity’s Department of Insurance filings is not generally known or capable of being readily determined. I recommend the Court take judicial notice of

¹¹ See *In the Matter of the Rehab. of Indemnity Ins. Co.*, 2014 WL 31710 (Del. Ch. Jan. 2, 2014).

¹² *Rural Metro*, 2013 WL 6634009, at *7 (quoting *In re Tyson Foods, Inc. Consol. S’holder Litig.*, 919 A.2d 563, 584 (Del. Ch. 2007)).

¹³ *Id.* at *8.

the existence and content of Items 15-17 and 29 in their entirety, but not for the truth of the matter asserted. I also recommend the Court decline to take judicial notice as to whether any item or statement in those Items was withdrawn or amended, as such status is neither generally known nor capable of being readily determined.

C. Items 18, 19, 28, 31, 32, 33, and 34: Documents related to Cohen's criminal trial and sentencing.

Cohen asks the Court to take judicial notice of certain statements drawn from sources related to his criminal trial and sentencing. Cohen asserts Item 18 is two lines from the trial transcript; Item 19 is a few lines from the factual stipulation in his plea agreement; Items 28, 31, 32 and 34 are excerpts from exhibits in the criminal trial; and Item 33 is a few lines from a declaration filed in the criminal case.

As with a civil case, the Court may take judicial notice of the existence and docket of a party's criminal case.¹⁴ Indemnity appropriately concedes that the Court may take judicial notice of Items 19 and 33, but objects to limited admission of the lines Cohen selected, and to judicial notice of those lines for the truth of the matter asserted. As with the civil filings addressed above, I recommend the Court

¹⁴ Del. R. Evid. 201(b); Del. R. Evid. 202(d)(1)(B); e.g., *Matter of Law*, 2017 WL 870634, at *1 n.1 (Del. Mar. 13, 2017); *Hayward v. King*, 2015 WL 6941599, *1 n.1 (Del. Nov. 9, 2015).

take judicial notice of the existence and contents of Items 19 and 33 in their entirety, but not for the truth of the matter asserted.

Indemnity appears to challenge Cohen's assertion that Items 31, 32, and 34 were publicly filed as exhibits in his criminal case. Indemnity concludes these Items are not generally known or capable of verification. Indemnity describes Item 28 as "internal" to Indemnity and does not explicitly address its status as an exhibit in the criminal case. These Items, appended as Cohen's Exhibits N, Q, R, and T, contain no exhibit stamp, docket header, or other indication that they were included in the public record of Cohen's criminal trial. Finally, Indemnity objects that Item 18, the transcript statement, is "undesignated" and is not an adjudicative fact for judicial notice. While Cohen cites a federal docket number for the transcript, the page he supplied at Exhibit D contains no filing header to allow me to conclude that the supplied page is in fact in the public record.

I cannot conclude that the existence or content of Items 18, 28, 31, 32, and 34 are generally known or capable of easy verification based solely on Cohen's disputed representation that they were exhibits in or transcribed from his criminal case. I therefore recommend the Court decline to take judicial notice of these items, without prejudice to Cohen's ability to offer these Items as substantive evidence or impeachment material subject to the rules of evidence.

D. Items 20 – 27 and 30: Actuarial Reports

Cohen asks the Court to take judicial notice of portions of actuarial reports for Indemnity from 2009 through 2013. For Items 20-27, Cohen provides no indication that these reports were publicly filed anywhere. For Item 30, Cohen asserts the report “utilizes the audited financial information submitted” to the Delaware Department of Insurance. Indemnity objects on the grounds that the reports are neither generally known nor capable of easy verification. I agree and recommend the Court decline to take judicial notice under Rule 201. The fact that Item 30 “utilized” information that may have been publicly filed with the Department of Insurance does not make it a public filing subject to judicial notice under Rule 201. Cohen may introduce and rely on these reports as substantive or impeachment material pursuant to the Rules of Evidence.

E. Item 35: Excerpt from a Treatise

Cohen asks this Court to take judicial notice of a page from Wolfe & Pittenger’s treatise, *Corporate and Commercial Practice in the Delaware Court of Chancery*. The treatise does not contain any adjudicative facts for judicial notice under Rule 201. It is not the type of case law or statute addressed by Rule 202. I recommend the Court decline to take judicial notice of the treatise. Cohen is free to refer the Court to the treatise by citing it.

II. Document Production and Access to Case Law

The parties agree that Cohen's incarceration is preventing a smooth document production. Indemnity asserts Cohen has failed to execute the authorization necessary to receive mail in more than one-pound increments, while Cohen asserts Indemnity was provided the form for authorization.¹⁵ Cohen also complains that the production contains numerous unnecessary duplicates, is not indexed, and does not identify the discovery request(s) to which documents respond.

In my view, authorization to produce documents to Cohen in increments greater than one pound is in the best interest of both parties. Both parties shall exert their best efforts at securing this authorization, and we will discuss the details in an upcoming conference call. In the meantime, Indemnity shall supply its production in the permitted one-pound increments.

In evaluating Cohen's remaining complaints, I begin by referring to this Court's Guidelines to Help Lawyers Practicing in the Court of Chancery:

The parties also typically agree to provide standard load files (e.g., a data file for metadata and an image file for images), certain metadata (if reasonably available) and text-searchable documents. ...

Eliminating the production of duplicate, substantively identical documents (both within and across custodians) is a standard practice that the Court encourages. In connection with the foregoing, parties typically record the custodians possessing duplicate copies and

¹⁵ D.I. 178 at 3; D.I. 177; D.I. 185.

provide that information as a separate field in the production load files.¹⁶

Pursuant to these Guidelines, I recommend the Court order Indemnity to deduplicate future productions both within and across custodians. I also recommend the Court order Indemnity to use email threading for emails and eliminate non-inclusive threads from the production if a more inclusive responsive thread is being produced.

While Indemnity does not have an independent obligation to index Cohen's paper production, most exchanges of e-discovery comprise an exchange of metadata that Cohen is not receiving because his incarceration requires his production to be in paper.¹⁷ Therefore, to remedy this deficit and in lieu of an index, I recommend the Court order Indemnity to extract, print, and produce a spreadsheet or chart providing the following metadata fields:

BegBates: Beginning Bates Number
EndBates: Ending Bates Number
BegAttach: Beginning Bates number of the first Document in an attachment range
EndAttach: Ending Bates number of the last Document in attachment range
Custodian: Name of the Custodian of the File(s) Produced - Last Name, First Name format
All Custodians (or DupCustodian): Name of all Custodians that have custody of a deduplicated Document

¹⁶ Guidelines To Help Lawyers Practicing In the Court of Chancery 23, <https://courts.delaware.gov/chancery/docs/CompleteGuidelines2014.pdf> (last visited January 16, 2018).

¹⁷ *See id.*

FileName: Filename of the original digital file name

EmailSubject: Subject line extracted from an email message

Title: Title field extracted from the metadata of a non-email Document

Author: Author field extracted from the metadata of a non-email Document

From: From field extracted from an email message

To: To or Recipient field extracted from an email message

Cc: CC or Carbon Copy field extracted from an email message

BCC: BCC or Blind Carbon Copy field extracted from an email message

DateRcvd: Received date of an email message (mm/dd/yyyy format)

DateSent: Sent date of an email message (mm/dd/yyyy format)

DateCreated: Date that a file was created based on a creation date metadata field (mm/dd/yyyy format)

DateModified: The last modified date(s) of a non-email Document¹⁸

I conclude Indemnity is not obligated to specify requests for production for which each document is responsive. This Court requires a specific designation of documents produced in lieu of responses to interrogatories under Court of Chancery Rule 33(d), but not for documents produced in response to requests for production. Analyzing how a document is responsive may even invade the realm of attorney opinion work product. I recommend the Court decline to compel Indemnity to identify those requests for production to which a document is responsive.

Finally, I note Cohen's recent request that Indemnity provide Cohen copies of all cases cited in its filings, and certify that no authority exists that is directly

¹⁸ See *Wells Fargo Ins. Serv's USA, Inc. v. Alliant Ins. Serv's, Inc.*, 2017 WL 3895785, at *6 (Del. Ch. Sept 5, 2017).

adverse to Indemnity's petition.¹⁹ Indemnity shall respond to Cohen's request within twenty days.

III. Indemnity's Motion to Withdraw Deemed Admissions

On August 18, 2017, Chancellor Bouchard issued an order granting in part and denying in part Cohen's motion for facts to be taken as established, based on the timing of Indemnity's answers to Cohen's first set of requests for admissions.²⁰ Cohen declared he mailed his first set of requests for admissions on May 15, 2017, but notice of service was not docketed until June 2, 2017. Indemnity states it received the requests on May 31, 2017 and responded on July 3, 2017. The Chancellor ruled that under Rule 36(a), Indemnity is deemed to have admitted the matters set forth in those requests for admissions, but stated that Indemnity "would be within its rights to move to withdraw or amend the admissions."²¹ The Chancellor concluded with a warning to Indemnity to strictly adhere to deadlines in the future, and to affirmatively seek relief if Cohen's incarceration caused delays.²²

Indemnity moved to withdraw the admissions on September 5, 2017, and included amended answers to the requests for admission as an exhibit to that

¹⁹ D.I. 186.

²⁰ D.I. 128.

²¹ *Id.* ¶ 3.

²² *Id.* ¶ 4.

motion.²³ Cohen did not respond to Indemnity's motion. On December 20, 2017, Indemnity included its September 5 motion in its submission to me as a discovery-related motion.²⁴ Cohen did not object to my review of this motion.

This Court has noted that Cohen's incarceration imposes significant delays on all parties with respect to the receipt of filings and documents.²⁵ At the same time, Cohen's incarceration means that he is hard pressed to demonstrate prejudice from delays in this civil case, which has no bearing on his incarceration.²⁶

Prejudice from amendment of Indemnity's requests for admissions would be difficult to demonstrate because this case is currently mired in numerous discovery disputes, which are already slowing progress toward adjudication on the merits. Finally, in my view, the admissions and Indemnity's need to move to withdraw them gave sufficient weight to the Chancellor's reminder to adhere to deadlines. I recommend the Court grant Indemnity's motion to withdraw or amend the deemed admissions, and consider Cohen to be served with those amendments as of the date of Indemnity's motion.

²³ D.I. 132.

²⁴ D.I. 179.

²⁵ D.I. 123, ¶ 3.

²⁶ *Id.* ¶ 4.

IV. Cohen's Motions to Compel and Discovery Timeline

The following discovery motions remain pending: Cohen's motions for an order overruling objections to interrogatories (D.I. 113, 115, 158, 183); Cohen's motions for an order compelling the production of documents (D.I. 134, 161), Cohen's motions for an order overruling objections to admissions (D.I. 157, 182), and Cohen's motion for an order compelling the examination of business records (D.I. 176). Indemnity has responded to all of these motions. I was also charged with recommending a revised timeline for discovery.

I request a teleconference on these remaining issues. I may provide recommendations via letter on some remaining issues in advance. I also request the parties refrain from filing additional discovery motions until I am able to issue a report on the remaining pending motions. The parties shall work with my assistant to schedule a teleconference.

V. Conclusion

This is my report and recommendation on Cohen's motion for judicial notice of adjudicative facts (D.I. 156), Cohen's complaints regarding Indemnity's document production (D.I. 177, 185), and Indemnity's motion to withdraw deemed

admissions (D.I. 132). Exceptions are stayed pending the issuance of a report and recommendations on the remaining discovery disputes.²⁷

Respectfully,

/s/ Morgan T. Zurn

Master in Chancery

²⁷ See Ct. Ch. R. 144(f).