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Re: *In re Baker Hughes Incorporated Merger Litigation*, C.A. No. 2019-0638-LWW

Dear Counsel:

This decision addresses the Plaintiffs' Renewed Motion to Compel (the "Renewed Motion").[1] Through the Renewed Motion, the plaintiffs ask the court to order defendant Martin Craighead and non-party Baker Hughes Company ("Baker Hughes") to produce documents. The discovery sought broadly relates to the 2017

[1] Pls.' Renewed Mot. to Compel Discovery ("Renewed Mot.") (Dkt. 92).

merger of Baker Hughes Incorporated ("BHI") and General Electric Company's oil and gas business ("GE Oil & Gas").[2]

A single claim remains in this action against one individual defendant. Specifically, a disclosure claim is pending against Craighead—the CEO of BHI and Chairman of its board at the time of the merger—based on the allegation that the company did not attach certain unaudited historical financial statements for GE Oil & Gas to its proxy statement.

The parties are at an impasse over the scope of discovery in this case. The plaintiffs have served over 70 document requests seeking materials across either 15- or 27-month time periods.[3] The respondents, for their part, assert that the discovery sought—and resulting burden it would impose—is disproportionate to the limited remaining claim. Although they acknowledge some discovery is appropriate, they have yet to produce a single document in this litigation.

Craighead has proposed a pragmatic path forward. He asks that the court set a schedule to resolve his pending motion for summary judgment and order phased discovery. Under that approach, the parties would complete discovery concerning

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[2] *Id.* ¶ 6.

[3] Pls.' Mot. to Compel Discovery at Ex. 1 (Dkt. 68).

Craighead's liability—the subject of his motion—while discovery relating to remedies is deferred.

I previously expressed an unwillingness to bifurcate issues in this action, preferring to first give guidance on a suitably tailored discovery scope that would allow the parties to cooperatively resolve their dispute. The plaintiffs' new request for merger process discovery to rebut Craighead's deal price defense coupled with the parties' ongoing standoff has led me to revisit that approach.

I conclude that phased discovery first addressing Craighead's liability in connection with his summary judgment motion is the most efficient way to advance this matter. Accordingly, the Renewed Motion is granted insofar as it concerns the discovery appropriate to address the arguments raised in Craighead's summary judgment motion. The remaining discovery sought is deferred until a later stage.

I. BACKGROUND

In this letter opinion, I assume the reader's familiarity with the facts of this case, which were summarized in the court's October 27, 2020 memorandum opinion resolving the defendants' motions to dismiss.[4] The single claim found to be viable was for breach of fiduciary duty based on the allegation that "the Proxy contained a

[4] Dkt. 55.

material omission because it did not include [certain] Unaudited Financials."[5] That disclosure claim survived only as to Craighead, who was named as a defendant in his capacity as an officer of BHI.[6]

This case has largely stalled since the October 2020 decision.

On June 15, 2021, the plaintiffs filed their initial Motion to Compel Discovery (the "Initial Motion").[7] In the Initial Motion, the plaintiffs argued that Craighead and Baker Hughes had refused to provide discovery necessary to prove the quasi-appraisal remedy to which the plaintiffs purport they are entitled and to prove Craighead's state of mind in withholding the GE Oil & Gas unaudited financials.[8] Respondents Craighead and Baker Hughes replied that many of the plaintiffs' document requests are untethered from the sole remaining claim in this case (and even from the merger).[9]

On September 27, 2021, endeavoring to resolve their dispute, I provided the parties with guidance on the dozens of document requests at issue and asked that they attempt to meet and confer on how to implement that guidance.[10] I explained

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[5] *Id.* at 35.

[6] *Id.* at 16; Dkt. 57.

[7] Dkt. 68.

[8] *Id.* ¶¶ 6-7.

[9] Dkts. 72, 74.

[10] Tr. Guidance on Initial Motion to Compel ("Guidance Tr.") (Dkt. 88) at 4:20-24.

that many of the plaintiffs' requests exceed the bounds of relevance and proportionality, noting that the case is "not about the entire merger process any longer" or about "the other Baker Hughes directors, and their relationships or interests."[11] I observed that the plaintiffs needed to "make a much greater effort to tailor their requests to the needs of this case, in light of the single claim that's remaining."[12] I also noted that the plaintiffs were "entitled to discovery that goes to the elements of their remaining claim" and to the remedy they are seeking given that the court has not yet weighed in on the proper remedy (if any) associated with their claim.[13]

Meanwhile, on September 3, 2021, Craighead filed a motion for summary judgment along with an opening brief in support.[14] That motion makes two primary arguments: (1) that Craighead reasonably relied on advisors to prepare the merger proxy; and (2) that Craighead is entitled to exculpation under 8 *Del. C.* § 102(b)(7) because he acted as a director in preparing the merger proxy. The plaintiffs have not

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[11] *Id.* at 6:4-9.

[12] *Id.* at 6:22-7:1.

[13] *Id.* at 7:14-18.

[14] Dkt. 77.

responded to that motion but filed a Rule 56(f) affidavit stating that discovery is necessary to adequately defend against it.[15]

For seven months following the court's discovery guidance on the Initial Motion, the parties were silent. I assumed (wrongly) that the parties were engaged in productive discovery efforts. It turns out that the opposite was true. The parties remain at a standoff over the scope of discovery, with each side interpreting the court's prior guidance as support for their own position.

On May 2, 2022, the plaintiffs filed their Renewed Motion. They argue that despite the case having been in the discovery phase since November 2020, the respondents have not produced any documents.[16] The plaintiffs further assert that the respondents "dropped a game-changer" when Craighead announced that he intends to rely on the deal price as a defense to the plaintiffs' quasi-appraisal argument. As a result, they contend that are entitled to "the same process discovery to which they would be entitled in an appraisal action."[17]

The Renewed Motion seeks four categories of discovery:

a. Discovery needed to calculate quasi-appraisal damages, including materials concerning the value of BHI, GE O&G, and pro forma BHC;

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[15] Dkt. 81.

[16] Renewed Mot. ¶ 1.

[17] *Id.* ¶ 5.

b. Discovery concerning Craighead's breach of duty, including materials needed to assess his state of mind;

c. Discovery concerning Craighead's DGCL §141(e) defense, and any related defense at common law, that he relied upon advisors (e.g., Davis Polk and Goldman Sachs), the reasonableness of that reliance, and whether he was acting as a director or officer at the time; and

d. Discovery into the Merger process sufficient to rebut Craighead's belatedly asserted deal price defense and to show that the deal price is not a reliable indicator of value.[18]

The respondents acknowledge that they have not produced any documents—even those the plaintiffs are admittedly entitled to. They counter, however, that they have repeatedly sought to negotiate the scope of discovery while the plaintiffs refuse to meaningfully confine their requests in accordance with Chancellor Bouchard's decision or my guidance."[19] In Craighead's view, as long as the plaintiffs are focused on discovery needed to obtain a quasi-appraisal remedy, then "their discovery demands will remain disconnected from their liability claim."[20] Craighead proposes that the court adopt a phased approach to discovery designed to first address the issues of liability presented in his motion for summary judgment.[21]

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[18] *Id.* ¶ 6.

[19] Def. Craighead's Opp'n to Renewed Mot. ("Craighead Opp'n") ¶ 2 (Dkt. 98).

[20] *Id.* ¶ 3. Baker Hughes likewise argues that the plaintiffs have made "no effort at all . . . to limit the scope of discovery in light of the claim remaining in this case and the Court's September 2021 guidance." Baker Hughes' Opp'n to Renewed Mot. ¶ 13 (Dkt. 99).

[21] Craighead Opp'n ¶ 21.

Oral argument on the Renewed Motion was presented on June 23, 2022.[22]

II. ANALYSIS

Court of Chancery Rule 26 provides for discovery "regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case."[23] "[T]he scope of allowable discovery . . . is tied to the issues presented in the litigation."[24] This court has the discretion to limit "the scope of discovery to those matters that are truly relevant."[25]

This court also "has discretion to resolve scheduling issues and to control its own docket."[26] In my view, it is appropriate to exercise that discretion to adopt the phased approach proposed by Craighead. If Craighead prevails on his motion for summary judgment, discovery relating to remedies will be unnecessary.

This action will effectively be bifurcated with issues of liability addressed first. Rather than separate trials, threshold arguments regarding Craighead's liability will be presented at the summary judgment stage.[27]

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[22] Dkt. 111.

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

[24] *Hamilton P'rs, L.P. v. Highland Cap. Mgmt., L.P.*, 2016 WL 612233, at *2 (Del. Ch. Feb. 2, 2016) (citation omitted).

[25] *Grunstein v. Silva*, 2009 WL 4698541, at *20 (Del. Ch. Dec. 8, 2009).

[26] *Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1107 (Del. 2006).

[27] Craighead has not requested that the court formally bifurcate this proceeding and hold separate trials under Court of Chancery Rule 42(b).

This court has previously exercised its discretion to bifurcate issues in furtherance of efficiency. In *BAE Systems Information and Electrical System Integration Inc. v. Lockheed Martin Corporation*, for example, the court bifurcated an action into a contract interpretation phase and a damages phase where doing so "effectively postpone[d] the parties' need for much of the discovery they requested" and could "avoid the expenditure of resources on issues that need not be decided at all."[28] Similarly, in *Julian v. Eastern States Construction Services, Inc.*, the court bifurcated the liability and damages aspects of a case to avoid "the inefficiencies of requiring [a party] to expend resources on discovery relating to possibly unnecessary valuation issues."[29]

The plaintiffs argue that taking up liability issues first will cause unnecessary delay, duplication of effort, and prejudice.[30] I disagree. This case has made little progress for nearly two years. Any delay caused by resolving Craighead's summary

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[28] 2011 WL 2716020, at *1 (Del. Ch. June 1, 2011).

[29] 2009 WL 1211642, at *2 (Del. Ch. May 5, 2009); *see also Garfield v. BlackRock Mortg. Ventures, LLC*, C.A. No. 2018-0917-KSJM, at 9 (Del. Ch. Jan. 21, 2020) (TRANSCRIPT); *Fortress Inv. Gp., LLC v. LM Holdco, Inc.*, C.A. No. 2020-0159-KSMJ, at 39 (Del. Ch. Aug. 31, 2010) (TRANSCRIPT); *Mehra v. Teller*, C.A. No. 2019-0812-KSJM (Del. Ch. Dec. 9, 2019) (Ltr. Op.); *Murray v. Murray*, C.A. No. 2018-0193-KSJM, at 36-38 (Del. Ch. Nov. 8, 2021) (TRANSCRIPT); *Allerand FS Investco, LLC v. RA03 Pittsfield Remainderco, LLC*, C.A. No. 2019-0779-JTL, at 564 (Del. Ch. Feb. 19, 2020) (TRANSCRIPT).

[30] Pls.' Reply in Further Supp. of Renewed Mot. to Compel Discovery ¶ 11 (Dkt. 104).

judgment motion will be slight by comparison. And any potential prejudice to the class is outweighed by the burden on the respondents (and third parties) of providing broad discovery—primarily focused on remedies—where a discrete disclosure claim untested beyond the pleading stage remains.

That is not to excuse the respondents' steadfast refusal to produce documents. Documents squarely within the scope of the court's prior guidance—including categories that bear on liability—should not have been wholly withheld. The respondents must now work promptly and cooperatively with the plaintiffs to provide relevant discovery as outlined in this decision.

The first phase of discovery will focus on Craighead's liability: that is, whether Craighead breached his duty of care with respect to the failure to disclose the GE Oil & Gas unaudited financial statements. The scope of discovery relevant to that subject includes documents concerning whether Craighead was acting as a director or officer, his state of mind, and whether he reasonably relied on advisors. The Renewed Motion is therefore granted with regard to categories (b) and (c) of the discovery sought by the plaintiffs.[31]

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[31] *See* Renewed Mot. ¶ 6; *infra* pp. 6-7.

The Renewed Motion is—at present—denied with regard to categories (a) and (d).[32] That includes discovery focused on a quasi-appraisal remedy and the deal price. Those categories of discovery will be deferred until a later stage of this proceeding, subject to the outcome of Craighead's motion for summary judgment.

In terms of next steps, the parties shall meet and confer on a schedule for completing discovery and briefing with regard to Craighead's motion for summary judgment. A proposed scheduling order shall be filed within ten days of this decision.[33] The respondents shall promptly begin a rolling production of the documents pertinent to the liability phase of this proceeding.

I ask that within one week, the parties confer on and submit a proposed order to implement the court's decision to grant, in part, the Renewed Motion as outlined above.

Sincerely yours,

/s/ Lori W. Will

Lori W. Will
Vice Chancellor

cc: All counsel of record (by *File & ServeXpress*)

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[32] *See infra* pp. 6-7.

[33] If the parties are unable to agree on a schedule, each side may submit a proposed scheduling order along with a letter outlining the areas of disagreements and the court will enter one.