COURT OF CHANCERY
OF THE
STATE OF DELAWARE

WILLIAM B. CHANDLER III
CHANCELLOR

P.O. BOX 581
GEORGETOWN, DE 19947
TELEPHONE (302) 856-5424
FACSIMILE (302) 856-5251

Submitted: December 6, 2004
Decided: December 6, 2004

Ronald G. Poliquin
Young, Malmberg, & Howard, P.A.
502 South State Street
Dover, DE 19901

Michael F. Bonkowski
Saul Ewing LLP
P.O. Box 1266
Wilmington, DE 19899-1266

Re: *Korn, et al. v. New Castle County, et al.*
Civil Action No. 767-N

Dear Counsel:

Having carefully considered the parties' submissions, I grant plaintiffs' Motion for Order Compelling Discovery (the "Motion"), subject to the instructions and rulings contained in this letter opinion. Plaintiffs' Motion sought to compel defendants to provide more complete answers to questions 5 through 29 of Plaintiffs' Requests for Admissions and, purportedly, to all interrogatories propounded in Plaintiffs' First Set of Interrogatories Directed to Defendants. Interrogatories numbers 3 through 14, however, concern the same subject matter as questions 5 through 29 of the Requests for Admissions, and my decision is directed to those interrogatories.

As to Plaintiffs' Requests for Admissions, defendants gave the same response to each of questions 5 through 29, objecting to the request as both calling for a legal conclusion and being taken out of context. Subject to those objections, the defendants denied each request as stated. It is clear that plaintiffs' requests for admissions were taken verbatim from defendant Thomas P. Gordon's speech, which announced the creation of certain reserve and/or stabilization accounts.[1] Plaintiffs seek to have defendants admit 1) whether these accounts exist, and 2) whether they were ever proposed to or voted upon by the New Castle County Council.

These requests do not call for a legal conclusion, but for a simple answer of fact—either the accounts exist or they do not. If they do exist, then whether the creation of said accounts was ever proposed to or voted upon by the New Castle County Council is also a question of fact. Because the requests for admissions are neither misleading nor taken out of context, and because they do not call for a legal conclusion, defendants' objections to Plaintiffs' Requests For Admissions numbers 5 through 29 are overruled. To the extent that the overruling of these objections causes defendants to amend their "denied as stated" responses, defendants are hereby granted leave to do so. Any amendments shall be served upon plaintiffs by Friday, December 10, 2004. To the extent that defendants deny any requests for admissions, and the substance

[1] The speech is Ex. A to Pls.' Reply to Defs.' Resp. to Mot. To Compel.

of those denied admissions is later proven, defendants may be subject to appropriate sanctions under Court of Chancery Rule 37(c).

With respect to Plaintiffs' First Set of Interrogatories Directed to Defendants, defendants have argued that adequate answers to interrogatories numbers 3 through 14 have been made. I disagree. Although not a model of clarity, it is nonetheless easily discernible that each interrogatory numbered 3 through 14 is four-fold. First, plaintiffs desire to know the statutory authority for the creation of each reserve or stabilization account. Second, plaintiffs ask whether each particular account is a reserve or a stabilization account. Third, plaintiffs wish to know when each account was created and the account's name. Fourth, plaintiffs ask for a detailed transaction report of the activity in each account from creation to the present balance. Similar to their responses in the requests for admissions, defendants have merely copied and pasted the same answer to each of the twelve interrogatories in question.

It is clear that all the interrogatories in question are premised upon the same assumption: that defendant Gordon meant what he said in his speech that the twelve reserve or stabilization accounts had been created. If, as is implied by the defendants' responses to the requests for admissions, the accounts do not exist, then the answers to each interrogatory should be quite simple: the account does not exist and, therefore, it cannot be either a reserve or stabilization account, it was never created, and there has never been any

activity in the account, and there is no authority for creating an account that does not exist. If that is the answer, defendants may be subject to sanctions for filing knowingly false responses to the interrogatories. Defendants, however, did not respond that the accounts do not exist, but instead merely directed plaintiffs to look for the needle in the proverbial haystack of more than 4700 pages of documents, implying that the accounts do exist, and later attempted to clarify via email the status of the accounts.[2] To the extent that the accounts do exist, the defendants' responses are totally inutile to plaintiffs, insufficient, and constitute a failure to reply under Court of Chancery Rule 37(a)(3).

With respect to the lists of statutory authority for each of the twelve accounts in question, if the accounts exist, defendants are hereby ordered to provide the specific statutory authority pursuant to which each individual account was created. If the same statutory authority was used to create each account, then that should be defendants' answer. If the authority for the creation of different accounts is not identical, defendants' answers should reflect those differences.

With respect to the latter three parts of each interrogatory, the account statements provided by defendants to the Court in the unsolicited sur-reply letter of December 6, 2004 do not answer the interrogatories. It is impossible to determine from those documents whether each of the twelve accounts in

[2] *See* Ex. B to Defs.' Resp. to Mot. To Compel.

question exist, where they exist, what they are named, when they were created, what balance is in each account, what activity has occurred in each account since its creation, or whether each account is a reserve account or stabilization account. It may be that the funds attributed to the twelve accounts mentioned by defendant Gordon are commingled in less than twelve bank or investment accounts. If that is the case, there must be some form of accounting ledger that exists to delineate how much of the commingled funds are attributable to each of the twelve accounts and their specific balances as they were mentioned publicly by defendant Gordon.

In sum, defendants are hereby ordered to provide supplemental responses to their Response to Plaintiffs' First Set of Interrogatories Directed to Defendants by Friday, December 10, 2004. Each response shall detail the exact answer to each part of the interrogatory. Defendants' assertion that Court of Chancery Rule 33(d) permits them to merely refer plaintiffs to the relevant documents is misguided. Rule 33(d) permits an answer to an interrogatory to refer to business records instead of providing the answer only when "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served." Such is not the case here. Defendant Gordon publicly announced that the twelve accounts were created. If they were created, he would know how. If they were created, he will know the balance and how they were funded, especially given the fact that

he announced those balances to the public. The burden of ascertaining the answer is *not* substantially the same as between the plaintiffs and defendants here.

Therefore, defendants are hereby ordered to, in accordance with the conclusions made herein:

1) Amend, if necessary, their responses to Plaintiffs' Requests for Admissions numbers 5 through 29 by Friday, December 10, 2004.

2) Provide supplemental responses to Plaintiffs' First Set of Interrogatories Directed to Defendants numbers 3 through 14 by Friday, December 10, 2004.

IT IS SO ORDERED.

Very truly yours,

*/s/ William B. Chandler III*

William B. Chandler III

WBCIII:amf