

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JERRY KATZMAN, M.D.,

Plaintiff,

v

COMPREHENSIVE CARE CORPORATION,
a Delaware corporation,

Defendant.

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: Civil Action
: No. 5892-VCL
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Chancery Court Chambers
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Tuesday, December 28, 2010
10:01 a.m.

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BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

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TELEPHONIC RULINGS OF THE COURT ON DEFENDANT'S MOTION
TO DISMISS OR STAY AND FOR SANCTIONS, PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT, AND PLAINTIFF'S
MOTION TO STRIKE

- - -

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0524

1 APPEARANCES: (via speakerphone)

2 MICHAEL W. McDERMOTT, ESQ.
Parkowski, Guerke & Swayze, P.A.

3 -and-
4 PETER F. VALORI, ESQ.
of the Florida Bar
Damian & Valori, LLP
5 for Plaintiff

6 STEPHEN C. NORMAN, ESQ.
R. CHRISTIAN WALKER, ESQ.
7 Potter, Anderson & Corroon LLP

-and-
8 ANGELINA M. WHITTINGTON, ESQ.
of the Florida Bar
9 South Law Group, P.A.
for Defendant

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1 THE COURT: This is Travis Laster
2 speaking.

3 MR. McDERMOTT: Good morning, Your
4 Honor. I didn't -- I didn't catch. Is that Your
5 Honor?

6 THE COURT: Yes. It's Travis Laster
7 speaking.

8 MR. McDERMOTT: Good morning. It's
9 Mike McDermott. On the -- of Parkowski, Guerke &
10 Swayze. On the line with me is Peter Valori of the
11 firm Damian & Valori, whose pro hac admission was
12 granted. And I'll let Mr. Walker introduce his
13 counsel.

14 MR. NORMAN: Your Honor, Steve Norman
15 and Christian Walker for CompCare. And with me is
16 Angelina Whittington.

17 THE COURT: Great. Good morning,
18 everyone.

19 Well, thank you, everyone, for getting
20 on the phone. I originally intended only to discuss
21 scheduling when I got you altogether; but in
22 preparation for today, I reviewed all the papers that
23 have been filed. And I really think that this is a
24 simple case that is being made unnecessarily complex

1 and contentious, and there seemed to me to be some
2 obvious answers. And so I'm going to go ahead and
3 give you rulings. So you can sit back for a bit and
4 listen. And then afterwards, you can feel free to ask
5 me questions about any of these things and moving
6 forward. And I did want to have the Florida folks on
7 the line just so you could hear this directly from me
8 rather than having to read it off a cold transcript or
9 to get the feedback from your Delaware folks.

10 So I'm going to start with a few basic
11 principles of indemnification and advancement rights
12 that don't seem to be fully understood but which have
13 controlling impact on this case. The first is that
14 indemnification and advancement are separate and
15 distinct. That's the Advanced Mining Systems case
16 from 1992. It's something that rolls off every
17 Delaware lawyer's tongue.

18 The basic principle is that
19 indemnification and advancement rights from one source
20 are nonexclusive of other sources unless there is a
21 specific agreement otherwise. What that means is a
22 statutory right under Section 145(c) is independent
23 and nonexclusive of a charter right, which in turn is
24 independent and nonexclusive of any bylaw right, which

1 in turn is independent and nonexclusive of any
2 contract right, absent specific agreement to the
3 contrary. That's provided by statute in Section
4 145(f).

5 Now, how do these basic principles
6 apply to the claims here? The employment agreement
7 provides for mandatory indemnification. As Judge
8 Bucklew correctly observed, it does not speak to
9 advancement.

10 Now, as to the employment action,
11 questions of indemnification under the employment
12 agreement are clearly before Judge Bucklew. The
13 employment agreement has an exclusive jurisdiction
14 provision selecting Florida law and the courts in
15 Florida. The plaintiff's reading of this is a
16 choice-of-forum clause and only a choice-of-forum
17 clause is not colorable. This is plainly an exclusive
18 jurisdiction provision for claims under the employment
19 agreement. But because of the nonexclusivity
20 principle, that is not dispositive.

21 A Section 145(c) indemnification right
22 for success on the merits and the bylaw
23 indemnification right, at least as far as I can see,
24 have never been pled in Florida and are not before

1 Judge Bucklew. Because of the nonexclusivity
2 principle, which is statutory under Section 145(f),
3 having an indemnification right under an employment
4 agreement does not cover and does not displace a
5 separate statutory Section 145(c) right or a bylaw
6 right. And it certainly doesn't cover or displace the
7 bylaw indemnification right.

8 There is also no problem with raising
9 these other two rights as sources of indemnification
10 now. There was an argument made in the briefs that
11 this stuff should have been raised earlier. Well, an
12 indemnification claim really is not ripe for
13 disposition until the completion of the underlying
14 action.

15 Now, we have an odd bifurcation of
16 this issue where technically the indemnification claim
17 is ripe for purposes of filing but it's not ripe for
18 adjudication. And so Delaware courts routinely stay
19 indemnification claims until the outcome of the
20 underlying action. And there's two quite basic
21 reasons for that. First is that its facts developed
22 in the underlying litigation can and will affect the
23 indemnification analysis. And that's whether it's
24 being done by a court or whether the determination is

1 being made by, for example, directors. That's why
2 it's premature for directors to make an
3 indemnification determination while the underlying
4 action is pending, because something could happen that
5 would change the analysis.

6 The second major reason is that
7 Section 145(c), success-on-the-merits indemnification,
8 is mandatory for a covered person. There's no good
9 faith or other conduct requirement. So there's a
10 whole long list of indemnification questions that can
11 be avoided and may be rendered completely moot if a
12 covered person succeeds on the merits and becomes
13 entitled to indemnification under Section 145(c).

14 Now, if you want a more extensive
15 discussion of these principles and citations to other
16 cases that apply them, you can see Paolino versus Mace
17 Securities, 985 A. 2d -- 985 A. 2d 392 at 397 through
18 398.

19 Nevertheless, notwithstanding the
20 separateness of these legal theories, there is
21 necessarily quite a bit of overlap between the
22 employment agreement indemnification right, the
23 Section 145(c) indemnification right, and the bylaw
24 indemnification right. If these folks have mandatory

1 indemnification under the employment agreement
2 indemnification right, it doesn't make any sense to
3 say that they win a second time or lose a second time
4 under Section 145(c) or the bylaw right. It also
5 doesn't make much sense to me to have two courts
6 looking at this at the same time.

7 So what I am going to do is, I am
8 going to stay Counts I and II pending the outcome of
9 the Florida indemnification proceeding. I also,
10 frankly, think that all possible sources of
11 indemnification should be considered by the same
12 judge. Here, I think in the first instance, that
13 should be Judge Bucklew.

14 Now, as to advancements for the
15 employment action, the bylaws provide for an
16 advancement right under Section 8.02. An advancement
17 right remains live until the final disposition of the
18 claim on the merits. Final disposition includes the
19 resolution of any appeal. Thus, advancement rights
20 remain live through appeal. If you want to see an
21 extensive discussion of this issue, you can see Vice
22 Chancellor Strine's decision in Sun-Times Media Group,
23 954 A. 2d 380, and particularly pages 401 through 408.

24 So advancements for the employment

1 action under Section 8.02 are, therefore, still live.
2 Advancements could be mandated for appeals. Indeed,
3 it's hard for me to see how they wouldn't be, and it
4 doesn't appear to me like the advancement right has
5 yet been raised in any other court.

6 There are cases that say this Court
7 should adjudicate a summary advancement right
8 proceeding, notwithstanding the existence of other
9 underlying litigation on the merits. That's because
10 this Court has expertise in adjudicating advancement
11 rights. That's because this Court is able to focus on
12 them precisely, while the other court is focusing on
13 the merits; and it's because advancement disputes are
14 determined on the pleadings. So it doesn't require
15 any factual analysis that would displace the role of
16 the other court. If you want to see the seminal
17 decision from the Delaware Supreme Court espousing
18 this principle, you can consult Fujisawa
19 Pharmaceutical Company Limited versus Kapoor, 655
20 A. 2d 307 from 1995.

21 Now, I'm prepared to address the
22 advancement right issue. It's a separate and
23 independent right. It's not currently before Judge
24 Bucklew, but a lot of the concerns that animate

1 advancements being adjudicated separately by the
2 Delaware Court aren't at issue in this proceeding
3 because the trial level action has already been
4 litigated before Judge Bucklew. Judge Bucklew's
5 already looking at indemnification issues.

6 There is necessarily some overlap in
7 the analysis of advancement and indemnification,
8 although they are separate and distinct. One example
9 is the covered person analysis. The covered person
10 analysis applies to both types of rights. And I don't
11 see any reason for a multiplicity of judges to be
12 looking at the cousin issues -- hyphenate that --
13 sibling issues, however you want to call it, of
14 indemnification and advancement.

15 So given the posture of this case, I
16 think the advancement issue for the employment action
17 should be presented to Judge Bucklew in the first
18 instance. If for any reason the Florida Court doesn't
19 want to deal with advancements, I'm happy to do it.
20 We do it all the time. But because all of this is
21 currently before Judge Bucklew and it is in a stage
22 where -- where merits determinations have already been
23 made at the trial level and we're talking about
24 proceedings going forward, including on appeal, I

1 think in deference to the other court and as a matter
2 of comity, the employment action advancement question
3 should be presented first in Florida. If the Florida
4 Court passes, I'm happy to address it.

5 Now I'm going to turn to advancements
6 for the injunction action as opposed to the employment
7 action. As yet, there is no final disposition on the
8 merits in the injunction action. Therefore,
9 advancements remain live. Remember, final disposition
10 means a disposition, including any appeals, finality.
11 Therefore, a dismissal without prejudice does not
12 qualify as a final disposition.

13 It's quite easy to look at the
14 pleadings in Florida, as I have done, as well as the
15 rulings there to date, although it's really a
16 pleading-stage analysis, and determine that
17 Mr. Katzman was sued by reason of his status in a
18 covered capacity. He is therefore entitled to
19 advancements under Section 8.02 of the bylaws.

20 Ms. Whittington does not qualify as
21 independent counsel for the purpose of Section 8.02.
22 That is the clear teaching of the *Nakahara v NS* 1991
23 *American Trust* case, 739 A. 2d 7 -- at 789. And it's
24 reinforced by Chancellor Chandler's decision in

1 Chamison versus HealthTrust, Inc., 735 A. 2d 912, Del.
2 Chancery 1999, where the Chancellor found that a
3 director with unique defenses had the right to
4 separate counsel distinct from the other directors
5 because that alone, the different attorney alignments
6 and representation issues were enough to potentially
7 create a conflict that allowed the defendant to have
8 separate counsel.

9 So here, any determination as to
10 advancements under the bylaws would need to be the
11 result of balanced, independent, reasoned inquiry by
12 truly independent counsel. If you want to see an
13 example of what the -- that type of analysis entails,
14 you can look at the Waltuch versus Conticommodity
15 Services litigation from the Second Circuit -- the
16 Court of Appeals cite is 88 F. 3d at 87 -- where they
17 describe the type of analysis that was gone through by
18 a Delaware law firm to make the type of independent
19 determinations that are required under Section 145.
20 Ms. Whittington's letter is not such a determination.
21 It's a litigation position.

22 So for those reasons, I am granting
23 summary judgment in favor of Mr. Katzman for purposes
24 of advancements for the injunction action. And, also,

1 because it is settled that under Section 145(c), when
2 you're successful on the merits in an indemnification
3 or advancement action, you get fees for fees, I'm also
4 granting the request for fees for fees. As to the
5 advancement claim for the injunction action, not as to
6 anything else.

7 Now I'm going to turn to the motion
8 for sanctions. And, again, I'm going to give you all
9 some general principles. I think lawyers should think
10 twice, three times, four times, perhaps more before
11 seeking Rule 11 sanctions or moving for fees under the
12 bad faith exception. I think it's a good idea to have
13 somebody else in your firm, who's perhaps not directly
14 involved in the action, pick up the phone and call the
15 other side and talk about it before you throw this
16 type of stuff around or put it in a pleading. These
17 types of motions are inflammatory. They involve
18 allegations of intentional misconduct by counsel and,
19 as a result, what they usually result in almost
20 inevitably is an escalation of hostilities.

21 Now, what this does within the
22 specific lawsuit is, it makes it difficult for counsel
23 to work together responsibly to prepare a case for
24 trial. Hostile counsel are less likely to agree on

1 matters, even easy matters. I think had there not
2 been an unfortunate level of hostility here, people
3 likely could have agreed to present all of the
4 indemnification issues to the Florida Court. That's
5 just logical. It just makes sense as a matter of
6 judicial and litigant resources.

7 Now, on a larger scale, accusatory
8 motions and filings, I believe, poison the litigation
9 atmosphere. They make it difficult to enjoy the
10 practice of law. We have a strong tradition of
11 civility in Delaware, and aggressive motions run
12 counter to that.

13 I recognize that right now there's an
14 unspoken thought probably running through the minds of
15 the Delaware lawyers, and it will likely cross the
16 minds of future readers of this transcript, should
17 there be any. And that thought would go something
18 like this: "Vice Chancellor Laster, aren't you being
19 a little bit hypocritical? There are transcripts
20 where you've mentioned Rule 11 or shifted fees or
21 where you've asked lawyers for their good faith basis
22 for an allegation or an argument. Isn't this a double
23 standard?"

24 And to that I say you're absolutely

1 right. There is a double standard. And because I'm
2 consciously applying a double standard, I think I can
3 absolve myself of being hypocritical. I think there's
4 a huge difference between counsel criticizing each
5 other and making aggressive motions and the Court
6 raising this issue from time to time. When counsel do
7 it, matters escalate. It becomes a food fight.
8 People get angry at each other. Things get worse.
9 When a judge does it, matters deescalate. People
10 think twice. They think hard about their actions.
11 They calm down.

12 Here's another thing. The other thing
13 that I do and the reason I think it's important, is,
14 because it brings the lawyers in to the situation.
15 And you do that for a simple reason. Lawyers are the
16 repeat players who are in a position to enforce
17 expectations. That's particularly true for the
18 Delaware lawyers. Think back to your torts class and
19 the principle of the least-cost avoider. Maybe your
20 client will be in Delaware occasionally; forwarding
21 counsel, perhaps once. None of the forwarding counsel
22 in this case have I ever encountered before, but the
23 Delaware lawyers are repeat players. And so they have
24 to inform clients and forwarding counsel of the

1 expectations for a Delaware proceeding. And there the
2 critical actors -- they are the critical actors in
3 maintaining the Delaware traditions of civility.

4 Now, fortunately, Delaware lawyers are
5 very responsive and attentive. When I first came on
6 the bench, I had -- two or three times I had to talk
7 about deposition practice and overfrequent and hostile
8 objections, and I shifted fees for it and I ordered
9 depositions retaken. Since then it's been an absolute
10 nonissue. I read a lot of depositions, and I haven't
11 seen the problem at all.

12 So what's the bottom line here? Let
13 me be the bad guy. For most types of conduct that
14 really merits Rule 11 or fee-shifting, you shouldn't
15 need to point it out. It should be obvious from the
16 briefing that someone's out of line. Perhaps some
17 things need to be raised, like discovery misconduct
18 that goes on out of view; but in a case like this one,
19 where the issue is whether someone filed frivolous
20 claims in an improper forum, you don't need to make
21 the Rule 11 or bad faith motion. If they did it, it's
22 going to be obvious.

23 So with that background, the motion to
24 strike is granted. The motion for sanctions was a

1 Rule 11 motion. The October 12th, 2010, e-mail from
2 Ms. Whittington shows that's what was intended and
3 that's what it was. It's not a good idea to change
4 your story midstream.

5 So given that change of story and the
6 failure to comply with the facial requirements of Rule
7 11, I am awarding fees to Mr. McDermott and his client
8 for the briefing on the sanctions motion and the
9 motion to strike.

10 I'm also denying the motion for
11 sanctions for the separate and independent reason that
12 there was a good faith basis to sue here, given the
13 nonexclusive nature of the indemnification rights
14 under Section 145 and the bylaws.

15 Now, there's a weak argument that I
16 would actually go forward with this case on grounds of
17 comity; but technically, only the employment agreement
18 is at issue in Florida. That may be a nicety of
19 Delaware corporate law to understand these
20 nonexclusive -- the nonexclusive nature of these
21 rights. I, frankly, wouldn't expect general
22 litigators to have focused on this rather erudite
23 area. General litigators often don't perceive the
24 clear distinction between advancement and

1 indemnification rights. That's one of the reasons why
2 the issue came up in Advanced Mining.

3 But Delaware lawyers certainly do.
4 And by the time this came to Delaware, again, I would
5 have hoped that there would have been some discussion
6 about whether there really was a basis for a Rule 11
7 or bad faith fee claim, given the nature of the
8 employment agreement, the fact that advancements were
9 not contemplated under the employment agreement or
10 anything else in Florida, and the separate and
11 nonexclusive nature of the three sources of rights
12 that the covered party has in this case; namely,
13 Section 145(c), the bylaws, and the employment
14 agreement.

15 So in terms of implementing my ruling,
16 here's what I want to have people do: As to the fee
17 awards for the fees on fees and the motion to strike
18 and for sanctions, Mr. McDermott, please make a good
19 faith allocation of your side's fees. Submit an
20 affidavit and the supporting invoices to Mr. Norman.
21 I will expect Mr. Norman to review them and for you
22 all to confer. And if, indeed, there is some type of
23 dispute that needs to be brought to my attention,
24 certainly I will entertain it. But I think if the two

1 of you work together and talk about these things,
2 knowing both of you, I think that it's unlikely that
3 you will disagree. But certainly if you do, I'm
4 around.

5 As to advancements for the injunction
6 action, I would like the parties to scaven an order
7 providing for Comprehensive Care Corporation to pay
8 going forward -- and that includes advancements
9 incurred to date -- within 30 days of the receipt of
10 invoices from Mr. McDermott's firm. And I want
11 Mr. McDermott to certify that he has reviewed those
12 invoices on an item-by-item basis, that he has
13 consulted with his Florida counsel, and that it is his
14 belief that the fees were reasonably incurred in
15 connection with the injunction action. And once
16 again, that will necessitate some type of discussion
17 between Mr. Norman and Mr. McDermott, but you all know
18 how flexible the standard for advancements is. And I
19 hope that that should alleviate any problems going
20 forward.

21 Then, finally, the order should
22 provide that as to all matters relating to the
23 employment action, I am deferring to the Florida
24 Court. If Judge Bucklew prefers not to deal with any

1 of these issues, I think most logically advancements,
2 I'm happy to take them up; but I think that there's a
3 lot of good reasons why all this should be before one
4 tribunal who will interpret all of the indemnification
5 rights and make a reasoned determination. I don't see
6 a lot of reason for two fora to be expending judicial
7 resources on this.

8 Now, that is the end of my lengthy
9 comments and rulings. So now I will invite any of the
10 lawyers on the phone to ask me any questions about any
11 aspect of them or about moving forward. And let's
12 start with the plaintiffs, and then I'll go to the
13 defendants.

14 So, Mr. McDermott, it's your turn.

15 MR. McDERMOTT: Thank you. Good
16 morning, Vice Chancellor. I have just two quick
17 points -- two quick questions.

18 No. 1, with respect to the employment
19 action, we are expecting a final judgment at some
20 point. And -- and I understand that you're suggesting
21 that once we have a final judgment, in the event of an
22 appeal, that we should -- should first present an
23 advancement claim under the bylaws and Delaware law to
24 Judge Bucklew.

1 THE COURT: Correct, because, again,
2 the -- the normal rationale for having an advancement
3 claim done here summarily is that the other litigation
4 is ongoing and we can deal with the advancements
5 rapidly and, therefore, there's no need effectively to
6 bother the other court with it because it doesn't
7 require deep analysis of the merits. Here, that
8 concern really isn't in play. And since Judge Bucklew
9 is delving into all of these issues, I think as a
10 matter of comity, the Florida Court should address
11 them in the first instance.

12 But if for some reason, you know,
13 after Judge Bucklew looks at it, you know, the
14 decision is made that look, advancements are a
15 somewhat technical issue, let Delaware deal with it,
16 I'm happy to deal with it. But this is --
17 particularly on the appeals point, between Sun-Times
18 and some other cases, Bergonzi, I mean, this is --
19 this is a pretty easy one.

20 MR. McDERMOTT: Okay. Thank you.

21 And my only second question is with
22 respect to the injunction action. We have already
23 presented to CompCare an undertaking and invoices
24 that -- for amounts incurred through, I believe it was

1 the end of August, in an amount of approximately
2 \$49,000. Those are reasonably redacted invoices. May
3 they be deemed to have been submitted?

4 THE COURT: Look, the only -- the only
5 thing that that would change is the time from which
6 interest runs as to any determination. I am not going
7 to mess with that.

8 What I want, because this has been,
9 frankly, a little more contentious than it needs to
10 be, I want you and Mr. Norman to get involved. And I
11 want you, again, to give the certification that you
12 have reviewed them line by line and that you've talked
13 to your Florida counsel and that these are expenses
14 reasonably incurred for purposes of advancements. If
15 you've already done that, I commend you. And then you
16 can send over that certification later today or
17 tomorrow. If it turns out that, because of this call,
18 you feel that you need to make some further inquiry
19 and you send it over in a couple days, that's fine.
20 If it's a matter of whether you send over another copy
21 of this stuff, you and Mr. Norman can figure out
22 whether you actually need to send another copy. I
23 can't imagine that -- you know, what's the stack?
24 It's probably a quarter of an inch, half an inch?

1 MR. McDERMOTT: I understand, Your
2 Honor. I'll work with Mr. Norman on that, Your Honor.

3 THE COURT: Yep.

4 MR. McDERMOTT: Thank you, Your Honor.

5 THE COURT: Any other questions from
6 your side before I hear from the defendants?

7 MR. McDERMOTT: I -- I don't believe
8 so, Your Honor, unless Mr. Valori has any.

9 MR. VALORI: No, Your Honor. Thank
10 you.

11 MR. McDERMOTT: Thank you.

12 THE COURT: Okay. Mr. Norman, what
13 can I do for you in terms of questions?

14 MR. NORMAN: Well, I don't know about
15 questions. I guess I have a procedural concern on the
16 summary judgment. Your Honor's granted summary
17 judgment without giving us the opportunity to file a
18 brief. And there are issues that I think relate to
19 the advancement claim, including the fact that there's
20 two defendants in the Florida case, and a lot of this
21 conduct didn't even occur with respect to CompCare.
22 It's a predecessor company. Whether advancements even
23 apply is an issue that we haven't even delved into.

24 So I guess I'm kind of surprised that

1 summary judgment's been granted when we haven't even
2 had a chance to respond yet. So I guess that's my
3 concern. I mean, if Your Honor's going to grant
4 summary judgment without affording us the opportunity
5 to respond, then there's nothing I can do about it.

6 THE COURT: I think as to Mr. Katzman,
7 who's the covered person, it's clear. Whether there
8 are, you know, allocation issues as to the -- as to
9 the amount of fees that are incurred, you can, you
10 know, negotiate those and talk about those in the
11 first instance with Mr. McDermott.

12 As to covered person, again, having
13 read the Florida stuff, I don't see what the argument
14 is. I hear what you're saying as to allocation
15 because of multiple defendants. Have the discussion.

16 What was your other issue?

17 MR. NORMAN: Well, I think we have an
18 issue about whether he is a covered person. The
19 conduct that's at issue is a predecessor company.
20 It's not even CompCare. I'm not fully up to speed on
21 the issues, but I understand there's an issue about
22 whether or not he might be a covered person. And we
23 were going to brief that issue if we had a chance to
24 do it. I'm not -- I apologize for not being fully up

1 to speed on this issue this morning, but I think there
2 is an issue about whether he is a covered person or
3 not.

4 THE COURT: All right. Is anybody
5 more knowledgeable about this covered person issue who
6 can shed light on it to me? Because I can tell you
7 from reading the stuff from the Florida action, I
8 didn't see it. It looked to me like it was a pretty
9 clean covered analysis. But, you know, maybe I'm
10 missing something. So what is this argument?

11 MR. NORMAN: Christian -- I don't
12 know if Christian is still on. Christian does know a
13 little more about it. I have not had a chance, like I
14 say, to get into the nitty-gritty about this argument;
15 but I do know that it did relate to a prior company.
16 And ... So I'm not sure --

17 (Telephone conference operator
18 interruption)

19 THE COURT: Do we -- do we still have
20 Ms. Whittington?

21 MS. WHITTINGTON: Your Honor, I'm
22 here.

23 MR. WALKER: I'm sorry, Your Honor,
24 This is Christian Walker. I just had a bad connection

1 and fell off the line and am just now back in. Sorry
2 to interrupt.

3 THE COURT: That's fine.

4 MR. NORMAN: Christian, you might have
5 more detail about the covered person issue that I
6 don't have. I don't know if you can fill Your Honor
7 in on that.

8 MR. WALKER: Sorry. Yeah, I missed
9 just the past few minutes. I got a bad connection
10 down here.

11 THE COURT: It's pretty -- here's the
12 basic question. From what I looked at, it looked like
13 the covered person analysis for the injunction action
14 was clean. And I saw no reason to have people engage
15 in the type of briefing about really simple issues
16 that's been going on to date.

17 But what Mr. Norman is saying is that
18 there's actually a covered person issue that perhaps
19 is not clear from the record. And so I am asking for
20 somebody to tell me what that issue is.

21 MR. WALKER: Yes, Your Honor. And the
22 issue is that the bylaws provide for advancement to
23 current employees, as I understand it -- I don't have
24 it before me -- and does not provide for advancement

1 to the former employees or others. And so I believe
2 that that is at least one issue with respect to the
3 primary issue with respect to advancement under the
4 Florida injunction action.

5 And there's -- I know we're not
6 addressing the indemnification issues for the Florida
7 action, but that was going to be addressed at the same
8 time, because there are some separate issues there
9 that have not been discussed today that pertain, for
10 example, to the merger that took place back in January
11 of 2009.

12 THE COURT: I've stayed that. That's
13 in front of the other judge.

14 MR. WALKER: Sure.

15 MR. NORMAN: Well, Your Honor, again,
16 I apologize. I didn't realize we were going to
17 discuss the merits of our -- the brief that we haven't
18 filed yet; but if we could maybe put in a letter to
19 Your Honor to see if we can -- you know, it raises
20 some concerns, that Your Honor might want to at least
21 hear the issue.

22 THE COURT: No, no. Look, I don't
23 want to do anything precipitously. I mean, I granted
24 summary judgment because it appeared to me from the

1 record that I was looking at that there wasn't going
2 to be any possible dispute about this man's covered
3 capacity status. If there is a -- a dispute about
4 this man's covered capacity status for the advancement
5 action, then a grant of summary judgment is
6 inappropriate. And, look, I -- I trust what you're
7 saying, Mr. Norman, that if you've got a bona fide
8 argument, you ought to be able to raise it.

9 So here's what I want to do, then. I
10 am going to reconsider and vacate the aspect of my
11 ruling relating to the summary judgment. You guys
12 have heard what my mindset is on this. Let us have
13 limited, focused briefing on the covered -- well, not
14 just the covered person issue but on the advancement
15 issue for the injunction action. You guys can talk
16 about who goes first. Since I think there's a prima
17 facie case here, it makes some sense for Mr. Norman to
18 go first; but let's do this quickly. Let's do it --
19 let's have the whole thing done in a matter -- let's
20 say in 30 days. Let's schedule a little hearing with
21 my secretary in about 30 days. And if I conclude
22 where I am today as to covered capacity status, then
23 I'm going to want some type of order precisely along
24 the lines I talked about in terms of the advancements

1 going forward.

2 And so if -- Mr. McDermott, if you
3 want to go ahead and start that certification process,
4 then that will -- by the time you send it over, that
5 will be the time that I will deem it submitted for
6 purposes of interest starting to run on any
7 advancements that haven't been timely paid.

8 But, as I say, I -- I didn't see any
9 issue from the papers. But I don't want to do
10 anything precipitously. And so I'm happy to have
11 briefing on that and to -- we'll have a further
12 hearing 30 days out on -- solely on the advancement
13 issue, solely for the injunction action.

14 MR. NORMAN: Your Honor, can I make a
15 suggestion?

16 THE COURT: Sure.

17 MR. NORMAN: I mean, I don't want to
18 raise an issue -- again, I apologize, because I
19 haven't had a chance to delve into the merits of this.
20 So -- but I think what we should do first is, we
21 should take a look to make sure we have an issue. I
22 don't want to raise an issue for Your Honor that
23 doesn't need to be raised.

24 THE COURT: No. And I appreciate

1 that. I'm going to go ahead and set this schedule.
2 If you call up Mr. McDermott and you say "Look, you
3 know, I've looked at this and it's either not
4 something that, upon further reflection, we want to
5 fight about or it's not worth the candle," that's
6 fine. I think that's being responsible. And I also
7 think you're being responsible in representing your
8 client by raising this with me. And I'm -- I'm more
9 than happy to consider it. And, you know, I won't --
10 I won't react negatively if it turns out you talked to
11 Mr. McDermott and you say, "You know what, this
12 covered capacity issue is a lot clearer than I
13 thought."

14 But if there really is, you know, an
15 employee, former employee situation, that's important.
16 And if this fellow wasn't an officer or director -- I
17 mean, I had the impression that it wasn't simply a
18 former employee situation. But I'm -- I'm more than
19 happy to hear about it, but I'm also more than happy
20 for you all to resolve it. But let's set the schedule
21 now so that -- because this is -- the advancement
22 action is a summary proceeding. But set the schedule
23 now. It will be on there. And if you want to moot it
24 out, you can moot it out.

1 MR. McDERMOTT: Your Honor, this is
2 Mike McDermott, if I may just briefly respond. And I
3 understand that Your Honor has vacated the ruling. I
4 just wanted to point out two things.

5 One, with respect to the briefing, you
6 know, I invited -- I filed this motion for summary
7 judgment on November 30th and invited Mr. Walker to --
8 to wrap this briefing and any issues relating to it
9 into the -- into the briefing schedule that just
10 commenced and -- and finished on December 23rd.

11 But more importantly, with respect to
12 the -- the subject matter and to the -- to the merits,
13 reviewing the complaint under Count III, the breach of
14 fiduciary duty, paragraph 63, it says, "As a senior
15 executive of CompCare, Katzman owed a fiduciary duty
16 to CompCare by the nature of his relationship to
17 CompCare." So --

18 THE COURT: Look, as I say, Mr.
19 McDermott, you've heard me. I thought there was a
20 prima facie case here. I didn't think that there was
21 something there was a dispute of fact over, and that's
22 why I thought granting summary judgment sua sponte was
23 a good way to move this case forward. But I also
24 credit Mr. Norman. If he's got an issue that he feels

1 needs to be briefed, he's entitled to have that done.
2 And I also believe that if, upon reflection, he gets
3 into this and believes that his argument is not worth
4 the candle, that he'll pick up the phone and call you
5 and you guys won't bother me with this.

6 But I'm not going to -- as I say, I
7 had a different impression from reading it, but I'm
8 not going to impose that on folks today if there
9 really is a disputed fact about this.

10 MR. McDERMOTT: I understand, Your
11 Honor. Thank you.

12 THE COURT: All right? Well, then,
13 why don't you do this: Give me an order scrivening
14 the stay issue. Give me an order scrivening --
15 actually, that's the only thing you can scaven at
16 this point. So give me an order scrivening the stay
17 issue and work out a briefing schedule and a hearing
18 date on the advancement issue. And I'll look forward
19 to talking to you all in 30 days. And if you all work
20 it out before then, fantastic.

21 ALL COUNSEL: Thank you, Your Honor.

22 THE COURT: All right. Great. Good
23 to talk to everybody.

24 (The proceedings concluded at 10:40 a.m.)

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CERTIFICATE

I, NEITH D. ECKER, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 33 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 29th day of December 2010.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 113-PS
Expiration: Permanent