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Does a Nonresident Del. Officer's Service to a Corporation Allow Courts to Compel Testimony?

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Does a nonresident officer's prior service to a Delaware corporation allow the Delaware courts to compel her to appear to testify at trial as a third-party witness? What if that officer's testimony—and credibility—was critical to the case? These are the questions that the stockholder plaintiffs put to Vice Chancellor J. Travis Laster in *In re PLX Technology Stockholders Litigation*, C.A. No. 9880-VCL (Del. Ch.). The vice chancellor refused to compel such an appearance—even where issues of credibility are paramount. Thus, practitioners in Delaware preparing cases for trial must recognize that the deposition of a nonresident, former corporate officer may well be the only chance an opposing advocate has to elicit and present testimony for use at trial, even from witness that all parties concede is critical to the case.

Left to right: James L. Hallowell and Lee R. Crain of Gibson Dunn & Crutcher

The *PLX* plaintiffs sued Potomac Capital Partners, L.P., for aiding and abetting the PLX board's alleged breach of fiduciary duty in approving the all-cash acquisition of PLX by Avago Wireless. In discovery, plaintiffs deposed Arthur Whipple, who had been PLX's CFO when the merger was approved but had left the company shortly afterwards. The plaintiffs did not allege that Whipple had breached any duty or engaged in misconduct, but his account of events—and his credibility in testifying to that account—were "core to a lot of the case." H'rg. Tr. (Mar. 16, 2018) ("Tr.") at 3:22-23. The p laintiffs, therefore, were not content to simply play video of Whipple's testimony at trial. Rather, they issued a subpoena, served on PLX's registered agent, to compel Whipple to travel from California to Delaware to testify as a live witness. Whipple retained his own counsel and resisted the subpoena, preferring to stay out of the fray and simply go about his West Coast life. The plaintiffs moved to enforce.

The plaintiffs offered as their statutory hook 10 *Del. C.* Section 3114(b). The statute provides that all Delaware corporate officers implicitly elect the corporation's agent to accept service of process "in all civil actions or proceedings brought in this state, by or on behalf of, or against such corporation, in which such officer is a necessary or proper party, or in any civil action or proceeding against such officer for violation of a duty in such capacity … ." The p laintiffs contended that the statute allowed them to compel Whipple to testify on essentially two grounds: "bringing a CFO into trial involving the corporate governance of a company is exactly what" Section 3114(b) is about; and because the statute grants Delaware courts jurisdiction to hale former officers

into court as litigation *parties*, it should also allow Delaware courts to compel former officers to appear at trial as *witnesses* (a greater-includes-the-lesser argument). *See* Tr. at 4:24-5:3, 5:14-17, 6:7-10. By contrast, Whipple contended that the plain text of Section 3114(b) rendered the subpoena unenforceable.

Section 3114(b)'s scope is not a new issue, although whether the provision allows a Delaware court to compel a non-party to testify at trial as a witness has not previously been explored in detail. The Supreme Court last addressed Section 3114(b) in *Hazout v. Tsang Mun Ting*, 134 A.3d 274 (Del. 2016). There, the court explained that Section 3114(b) reaches two types of cases— where a nonresident officer is sued for violation of her duties *and* where a nonresident officer is a "necessary and proper party" to a suit against a corporation. This approach to the statute countered a three-decade-old Chancery interpretation holding that a nonresident could only be sued in Delaware if the suit arose from her "rights, duties, and obligations which have to do with service" as an officer or director, and "not simply that he or she may be both a proper party as well as a director." *Hanna Ranch v. Lent*, 424 A.2d 28, 30 (Del.Ch. 1980). According to Chief Justice Leo Strine in *Hazout*, *Hanna Ranch* improperly constrained Section 3114(b) by merging its "Necessary or Proper Party Provision and the Internal Affairs Claim Provision."

It was with this backdrop—the Supreme Court's expansion of Section 3114(b) beyond *Hanna Ranch*'s narrow interpretation and its textualist approach to the statute—that Vice Chancellor Laster confronted whether Section 3114(b) allowed him to compel a non-party to testify at trial. He answered with a firm no. Like the Supreme Court, the vice chancellor focused on the statute's text: it allows jurisdiction over a "necessary or proper *party*," or in an action "*against* such officer." Nonparty Whipple, by contrast, had no "tangible legal interest" in the case or rights that needed to be adjudicated, and thus Section 3114(b) did not allow the court to compel him to testify.

Commenting further, Vice Chancellor Laster distinguished Whipple's status from other instances in which the subpoena *could* be enforced against a non-party. He noted that had Whipple been a current officer, the court could have compelled the company to produce him. Or had the case been a "true internal affairs case"—presumably rather than one for aiding and abetting a breach of fiduciary duties—a former officer's service could constitute "implied consent" to being forced to testify about the corporation's affairs. But the corporation was not a party (and in any event could not control Whipple), and the case was not about internal affairs. Whipple could stay in California.

The implications of this decision are numerous. The Delaware courts will continue to focus on Section 3114(b)'s text, and less on the practical needs (or wants) of litigants in particular cases. As Vice Chancellor Laster realized, his decision left "me and the litigants with practical problems … in terms of evaluating credibility," particularly where the court is the ultimate factfinder. And this is no small matter, since experienced counsel and courts recognize the critical importance of live witness testimony, particularly when credibility determinations need to be made. *See, e.g., Keys v. State*, 337 A.2d 18, 26 (Del. 1975) (Quillen, C. concurring). Consequently, trial counsel must think carefully in discovery about how to best obtain and preserve evidence from nonresident directors and officers. Indeed, even current corporate officers may well leave a company by the time trial commences. Counsel must assume that depositions of officers and directors—whether current or former—may be the only chance an attorney gets to present testimony to the court. A deposition in such circumstances therefore cannot be merely exploratory but must be presumptively prepared for trial. Likewise, counsel needs to anticipate the *court's* questions, for the court will be unable to interject with its own as it can during trial.

Section 3114(b)'s reach is not limitless. The Delaware courts take its text seriously, and litigants must adapt to the difficulties that such an approach poses in preparing cases for trial in the Delaware courts.

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