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Delaware Court of Chancery Applies Entire Fairness in *In re Nine Systems Corporation Shareholders Litigation*: A Sequel to *Trados*, or Something Different?

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On September 4, 2014, Vice Chancellor John W. Noble issued his much-anticipated post-trial decision in *In re Nine Systems Corporation Shareholders Litigation*.[1] In many respects, it closely resembled last year's *Trados* decision.[2] Both cases involved conflict transactions implemented by "dual fiduciaries." As a result, both cases applied the familiar "entire fairness" standard, under which the Court of Chancery must reach a "unitary" conclusion of fairness based upon a "dual inquiry into 'fair dealing and fair price.'"[3] Applying the non-bifurcated, two-prong standard, both cases found that the process was unfair, the price was fair, and the plaintiffs were not entitled to transactional damages.

But *Nine Systems* held that the defendants breached their fiduciary duties while

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From the EDITOR

Detour or Still Full Steam Ahead?

Even if there's a substantial decline in new M&A issuance in the fourth quarter (of which there seems little indication), 2014 would still likely be the second-best-performing year of the 21st Century. As of October 1, global volume has risen over 39% compared to the first nine months of last year. By year's end, 2014 could come respectably close to matching the performance of record-year 2007, with its $4.3 trillion in announced global deals.

For once in recent years, it's truly been an overall global improvement. U.S. deal volume is up 65% year over year, European M&A has risen 27% and the Asia-Pacific region has increased some 24%. Also, the deal boom has benefited all sectors, from healthcare sector mega-deals to a slew of middle-market transactions (in the first nine months of 2014, there were 1,721 completed middle-market deals alone).

There are good indications that the M&A boom will spill over well into 2015. For one thing, a recent Ernst & Young survey found that more corporate executives were planning acquisitions than at any time in the last three years. The firm's Capital Confidence Barometer surveyed more than 1,600 senior executives and found some 40% of respondents anticipate making at least one acquisition in the next 12 months, compared with 35% of respondents a year ago. About 60% of survey respondents said they anticipate total deal volume will further increase over the next year, despite how strong a performance 2014 has turned in so far.

Still there are also a few signs of concern for dealmakers. The third quarter had a slower pace of activity than the red-hot first half of 2014, possibly reflecting a mild summer doldrums or, more troublingly, a decline in buyers. Private equity activity has been quiet. And a chunk of 2014's deal boom has been owed to a significant rise in M&A related to tax inversions—when companies re-domicile their operations to avoid or reduce tax obligations in their original country. Inversion deals represented some $315.3 billion in activity in the first three quarters of 2014, compared to $71.7 billion in the same period in 2013 (including withdrawn or rejected bids).

The problem here, of course, is that government regulators have been doing their best of late to quash future inversion deals. As Jones Day notes in our current issue, the latest Treasury Department notice (which was issued at the end of September) "indicates that Treasury and the IRS are considering (and request comments on) guidance to address strategies that shift U.S.-source earnings to lower-tax jurisdictions."

CHRIS O'LEARY
MANAGING EDITOR

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Trados did not. A close read of these two cases exposes doctrinally significant distinctions that could result in materially different risks for deal-makers and their advisors depending on the facts of a given case. In short, the Court in *Nine Systems* found that the defendants engaged in malevolent conduct that sufficiently infected the transaction such that it failed the unitary standard despite that it was done at a fair price. The Court in *Trados* also found some troubling process facts, but the decision and its application of entire fairness turned more on diverging institutional interests rather than pure self-dealing, and the Court therefore concluded that the defendants met their burden under the entire fairness analysis.

Although these distinctions did not have a significant bottom-line impact on the results in the two cases (in light of no transactional damages being awarded in either case), they could prove significant in future cases. These opinions therefore warrant careful study by litigators and transaction planners. Accordingly, this article details the factual background and legal analysis in *Nine Systems*, recounts *Trados* in brief, and highlights the noteworthy differences between the two. It also highlights implications for M&A lawyers and litigators in future cases.

Factual Background of *Nine Systems*

Nine Systems arose out of the 2002 recapitalization of a two-year-old startup in the streaming media industry. The company raised early-stage capital from Wren Holdings, Javva Partners, and Catalyst Investors, as well as a group of minority stockholders introduced to the company by an investment firm, Lipper & Co. As of late 2001, Wren, Javva, and Catalyst collectively owned 54% of the company's stock and over 90% of the company's senior debt. Wren, Javva, Catalyst, and Lipper each appointed a member to the company's five-member board, with the remaining seat filled by the company's CEO.[4]

While the company struggled to make payroll, it was also considering two acquisitions to boost its lagging revenue and cash flow. Andrew Dwyer, an individual associated with Wren, proposed that the company finance the contemplated acquisitions through a recapitalization in which the participating investors would own approximately 40% of the company after financing the acquisitions, with current stockholders owning 30%, and other constituents, including management and the parent company of one of the targets, holding the remaining 30%.[5]

In "handwritten scribbles," Dwyer fixed the company's pre-money valuation at $4 million. The board apparently accepted this number at face value, without understanding Dwyer's methods or reviewing his calculations.[6] The board members associated with Wren, Javva, and Catalyst, as well as the company's CEO, all voted to approve the proposed recap. The Lipper-affiliated director, Abraham Biderman, abstained because he felt he did not have a chance to review sufficiently the terms of the recap and because he felt it was unfairly dilutive to current stockholders.[7]

The board met again a few days later. At that meeting, Wren and Javva agreed to invest $2.5 million to fund the acquisitions. Catalyst deferred because it had not yet sufficiently analyzed the company's acquisition opportunities, but it secured a 90-day option to participate in the recap alongside Wren and Javva if it later decided otherwise.[8]

A week later, at the behest of Biderman, the board discussed and approved a slightly revised capital structure for the company post-recap. The company's current stockholders would be diluted to approximately 7%, the company's senior debt would be exchanged for a new series of Preferred A stock that would own approximately 20%, and the "new money" participating in the recap would own the remaining 73%. The board approved the recap in this revised form on January 17, 2002, and the first of the two contemplated acquisitions closed. The second proved more difficult; closing was delayed, and more money was needed. Wren and Javva funded them for $800,000.[9]

The challenged recap was therefore an inside-round financing in which two of the company's significant stockholders invested approximately $3.3 million of new money at a $4 million pre-money valuation in exchange for convertible promissory notes representing approximately 51% of the company's fully diluted equity. All told, Wren, Javva, and Catalyst owned 54% of the fully diluted equity of the company before the recap and approximately 80% after it, and the plaintiff stockholders were diluted from approximately 26% down to approximately 2%.[10]

Despite those efforts, the company continued to experience financial difficulties. The company also stopped communicating with its stockholders. The company's fortunes turned around in 2006, when an attempt to raise $25 million in new equity led to the company's sale for approximately $175 million.[11] Only then, in connection with the sale four years later, were stockholders made aware of how Wren and Javva had consolidated their hold on the company.[12]

Six long years of stockholder litigation ensued. After an 11-day trial, Vice Chancellor Noble issued his 147-page post-trial opinion.

The Court of Chancery's Opinion

Standing

Although rare for a post-trial decision, the Court's legal analysis began with the threshold issue of standing. As a result of the 2006 merger, the parties agreed that the plaintiffs only had standing to assert claims arising from the 2002 recap to the extent those claims were direct rather than derivative. But the parties disagreed about the nature of the claims asserted.[13]

The plaintiffs argued that they had standing to challenge the recap directly under an expropriation theory[14] on the ground that Wren, Javva, and Catalyst constituted a control group that breached duties owed to the minority stockholders. Alternatively, the plaintiffs argued that they could challenge the recap directly under Vice Chancellor J. Travis Laster's *Carsanaro v. Bloodhound Technologies, Inc.*[15] decision because a majority of the board that approved the recap was conflicted.[16]

The defendants disagreed on the law and the facts. On the law, the defendants argued that the plaintiffs could only challenge the recap directly if there was a controlling stockholder or control group, and not merely because of a conflicted board majority. And as a factual matter, the defendants argued that there was neither a control group nor a conflicted board majority.[17]

Vice Chancellor Noble rejected each of these arguments. First, he held that the plaintiffs could challenge the recap directly under the expropriation theory because Wren, Javva, and Catalyst acted as a control group, and not as independent actors with parallel interests. Importantly, Vice Chancellor Noble reached this conclusion despite finding no evidence of any meaningful historical relationship between the three entities. In support of this conclusion, the Court relied on circumstantial evidence that included communications among representatives of Wren, Javva, and Catalyst that excluded Biderman. But the key fact that led the Court to conclude that a control group existed was the 90-day option to invest in the recap that the Court found was given by Wren and Javva to Catalyst, but not disclosed to the entire board. The Court found that Catalyst was given this right in exchange for its support for the recap, both at the board and stockholder levels. Thus, Vice Chancellor Noble concluded that Wren, Javva, and Catalyst formed a control group that owed fiduciary duties to the minority stockholders such that they had standing to challenge the recap directly.[18]

Alternatively, Vice Chancellor Noble concluded that the plaintiffs had standing to challenge the recap directly because there was no independent and disinterested board majority. Citing *Bloodhound* with approval (while noting that its holding had not been reviewed by the Delaware Supreme Court), Vice Chancellor Noble concluded as a matter of law that "[t]he expropriation principle operates only when defendant fiduciaries (i) had the ability to use the levers of corporate control to benefit themselves and (ii) took advantage of the opportunity."[19] Thus, under *Bloodhound*, and now *Nine Systems*, this principle holds whether the defendant fiduciaries are controlling stockholders or a conflicted board of directors.

Vice Chancellor Noble had no trouble concluding that as representatives and fiduciaries of Wren and Javva, respectively, two members of the five-member board were conflicted because of their status as "dual fiduciaries." And, because of his finding that Catalyst received a 90-day option to invest in the recap, Vice Chancellor Noble concluded that Catalyst's board representative occupied a similarly conflicted "dual fiduciary" position. Therefore, Vice Chancellor Noble held that the plaintiffs had standing to challenge the recap directly under an expropriation theory because it was not approved by a disinterested and independent board majority.[20]

Entire Fairness

For the same reasons that the plaintiffs had standing to challenge the recap directly—namely, that a control group existed and the lack of a disinterested and independent board majority—the Court held that the entire fairness standard applied to the recapitalization. Vice Chancellor Noble observed that "[t]his standard has two well-known components—'fair dealing and fair price,' which at times are referred to as 'procedural fairness and substantive fairness'—from which the Court must reach a unitary conclusion on the entire fairness of the business decision or transaction at issue."[21]

On the process side, the defendants acknowledged that the recap was "not perfect," but contended that the process was fair in light of the company's desperate need for cash. Vice Chancellor Noble disagreed, describing the process as "grossly inadequate,"[22] "grossly unfair,"[23] and "beyond unfair,"[24] principally because of five key facts: (1) that Biderman, after voicing opposition, was "knowingly excluded" from formal and informal board meetings and discussions regarding the recap and generally "trivialized" and "marginalized" by the defendants throughout the process; (2) that Dwyer alone calculated the $4 million pre-money valuation without input from anyone on the board and without sharing his valuation methodology with anyone on the board; (3) that Catalyst and no other stockholders received an undisclosed 90-day option to participate in the recap; (4) that the defendants failed to disclose to stockholders material facts about the recap, including who participated in the deal and on what terms; and (5) that material terms of the convertible notes given to Wren and Javva in the recap changed in their favor after the board's approval.[25]

With respect to fair price, the defendants fared much better. As a threshold matter, they convinced Vice Chancellor Noble that the proper entity to be valued was the startup company prior to the two recap-funded acquisitions.[26] Next, the defendants argued that notwithstanding the process by which it was reached, Dwyer's $4 million pre-money valuation was fair because the company's equity was underwater at the time of the recap. Seizing on contemporaneous documents about the company's value, the plaintiffs countered that the company was worth $30.9 million.[27]

Notably, Vice Chancellor Noble found this contemporaneous evidence of the company's value, including management projections, not credible. Specifically, he found that the company's management had proven itself incapable of producing reliable projections when it missed performance metrics three months out by a factor of three.[28]

Without credible contemporaneous evidence of value, the fair price analysis became a battle of the experts. And, the experts' valuation exercise was made more challenging because the company was a startup attempting to help create a streaming media industry in 2002. The company had no history of earnings or cash flow, and Vice Chancellor Noble thus agreed with the defendants' expert that the most reliable valuation methodology was a multiples-based analysis using comparable companies.[29]

After applying the observed multiples to the company's revenues, applying a private company discount to reflect poor earnings quality, and subtracting the company's debt, the Court concluded that the fair value of the company's equity at the time of the recap fell in a range from negative $4.33 million to negative $1.75 million. Because the plaintiffs' stock had no value at the time of the recap, the Court concluded that no amount of dilution could be deemed unfair, as "the [p]laintiffs necessarily 'received the substantial equivalent in value of what they had before.'"[30]

Putting together the two prongs—process and price—of the unitary standard, however, Vice Chancellor Noble ultimately concluded that the defendants failed to meet their burden of proving the transaction entirely fair. Vice Chancellor Noble discussed *Trados* and cited it favorably for the "defining principle of entire fairness—that a court's conclusion is *contextual*."[31] Importantly, Vice Chancellor Noble emphasized "that the fair price inquiry presented at trial was severely hampered by the unfairness of the process by which the [b]oard came to the $4 million valuation, including, but not limited to, the combination of the lack of reliable projections, the [b]oard's ignorance of Dwyer's valuation methodology, and the decision not to have any input from Biderman as an independent director or an independent financial advisor."[32]

Recalling *Trados*

Trados involved the sale of another venture capital-backed company, a transaction which generated cash and stock for management and preferred stockholders, but returned nothing to the common. The software company at issue in the case had accumulated significant venture capital in the run-up to the technology bubble. Wachovia and Hg Capital were early investors, and VC-heavyweight Sequoia Capital became involved when the company acquired a Sequoia portfolio company in a stock-for-stock merger.[33] Together with Invision, a Swiss private equity firm, these investors owned preferred stock with a liquidation preference that was growing at 8% annually.[34]

Through their investments in the company, the venture capitalists also secured board seats. Hg Capital, Sequoia, and Wachovia each nominated one of their current or former employees to the company's board.[35] Sequoia also nominated another director who had previously working as chief operating officer at one of Sequoia's companies.[36] Invision nominated an ostensibly independent director, and management held the two remaining seats.[37]

Like in *Nine Systems*, the company hit headwinds during the early 2000s recession and experienced significant pressure in funding its operations. The board terminated its existing CEO and hired a caretaker CEO—Joseph Campbell—who allowed the board and the large investors to determine how best to proceed. Estimating a low likelihood for a successful turnaround, and frustrated with their languishing investments in the company, the VC-influenced board commenced a parallel process: Campbell would develop a business plan, while entertaining potential suitors for the company.[38] In particular, the board instructed Campbell to keep SDL—the company's most likely acquirer—"at the table."[39]

Campbell split his time between managing the struggling company and trying to sell it. In terms of the former, he secured a round of venture debt, which provided the company with much needed capital, and reduced the company's expenditures. Due to his efforts, the company achieved record revenue and profitability.[40] On the heels of those positive developments, the board decided to pursue a sale, casting aside Campbell's business plan after a discussion that "lasted fifteen minutes."[41]

Shortly thereafter, Campbell successfully negotiated a sale of the company for $60 million, consisting of $50 million in cash and $10 million in stock. A stumbling block, however, was the fact that the accrued value of the preferred stock exceeded $57 million, which left little incentive for management, who held significant amounts of common stock, to pursue such a sale.[42] Anticipating that, the board had previously created a management incentive plan, whereby Campbell and other executives stood to benefit from a sale even if their holdings of common stock earned nothing.[43] The entire board approved the transaction, and management, voting alongside the preferred stockholders, supplied the requisite common stockholder approval. Interestingly, Microsoft, a small passive common stockholder, abstained from voting because "the economic result" was not one they would approve.[44]

The Court of Chancery's Holdings

Entire Fairness

Vice Chancellor Laster held that entire fairness applied because six of the seven board members were not disinterested and independent.[45] The three venture capital directors were "dual fiduciaries" who faced an actual conflict of interest in deciding whether to vote in favor of the transaction.[46] Sequoia's other nominee had a close relationship with the venture capital firm, which the Court felt compromised his independence.[47] And the two management directors were personally interested in the transaction through their participation in the management incentive plan.[48] The defendant directors thus had the burden of proving that the transaction was entirely fair.

Unfair Process

The evidence on process, according to Court, "weighed decidedly in favor of the plaintiff."[49] The preferred stockholders' desires to liquidate their interests drove each step in the sale process, including its initiation, structure, and approval. Vice Chancellor Laster found particularly damaging how the board structured the management incentive plan, which largely immunized management from considering the transaction from the common stockholders' perspective. In sum, the Court found that "the defendant directors did not adopt any protective provisions, failed to consider the common stockholders, and sought to exit without recognizing the conflicts of interest presented by the [m]erger."[50]

Fair Price

Without any credible contemporaneous evidence on fair price, *Trados* also turned into a battle of the experts. While defendants prevailed in that regard, the Court ultimately concluded that the common stockholders "did not have a realistic chance of generating sufficient return to escape the gravitational pull of the [preferred stockholders'] large liquidation preference."[51] The common stock, in the Court's view, simply had no economic value before the sale, and the common stockholders therefore received the "substantial equivalent in value of what they had before."[52]

No Liability

As a result of his conclusion that the price was fair, Vice Chancellor Laster held that the directors did not breach their fiduciary duties, and therefore entered judgment in favor of the defendants and awarded no transactional damages.

Reconciling the Dueling Decisions

Facts

Nine Systems and *Trados* involve two very different sets of facts. While *Trados* involved institutional conflicts of interest[53] and haphazard board decision-making processes,[54] *Nine Systems* involved more sinister forms of fiduciary misconduct, including self-dealing,[55] expropriation,[56] and disenfranchisement.[57]

For instance, *Nine Systems* largely turned on Vice Chancellor Noble's findings that Wren, Javva, and Catalyst constituted a control group, executed a self-interested recap to concentrate ownership in their hands, and froze out a fellow director (and potential advocate for the minority). In particular, the Court found that Wren and Javva gave Catalyst a 90-day option to invest in the recapitalization—a clear *quid pro quo* in the Court's mind—in exchange for its approval of the recap. That opportunity was neither offered nor disclosed to the minority stockholders or the full board. With their combined hard control over the company at the board and stockholder levels, the trio expropriated almost 25% of the company away from the minority stockholders. And they did so essentially without input or oversight from the director nominated by the minority stockholders.

That type of untoward conduct was not at issue in *Trados*. Instead, *Trados* involved the institutional norms and economic incentives of venture capital investors, which rendered the venture capital directors conflicted in light of the company's dim prospects. And the Court found that, although the conflicted directors "fully appreciated" their diverging interests, they chose not to form a special committee or obtain a fairness opinion.[58] Despite those uncured conflicts, the sale was hardly a success for the preferred stockholders. The preferred stockholders failed to earn their full liquidation preference (usually set to a venture capital fund's hurdle rate), and they presumably chalked up their investment as a losing proposition. On the whole, the conduct in *Trados* was certainly less than laudable, but the relative seriousness of the misconduct in *Nine*

Systems appears to have weighed on Vice Chancellor Noble's ultimate decision on liability.

Entire Fairness

Despite applying the same two-part test, and reaching the same conclusion as to each of the two parts, *Trados* and *Nine Systems* reached opposite conclusions with respect to liability. In *Trados*, unfair process plus fair price equaled no liability, while in *Nine Systems*, the same inputs resulted in a determination that the defendants breached their fiduciary duties.

Trados appears to contemplate a "top-of-the-range" fair price safe harbor for an entire fairness transaction. The Court characterized the test of fairness as whether "the minority stockholder shall receive the substantial equivalent in value of what he had before."[59] In the Court's view, it was the defendant directors' burden to prove that test of value. From that standpoint, holding the defendant directors liable made little sense if stockholders received precisely what they otherwise would have been entitled to. Indeed, the Court held that the defendant directors proved that the company's stock had no economic value before the sale. Thus, by receiving nothing from the sale, the stockholders received the substantial equivalent of what they had before. Indeed, even if the transaction were unwound, the common stockholders would have fared no better. The company simply "did not have a realistic chance of generating a sufficient return to escape the gravitational pull of the large liquidation preference" on the preferred stock.[60] Having found that the common stockholders were unharmed, the Court declined to conclude that the defendants had committed a fiduciary breach.

Nine Systems, in contrast, declined to permit a safe harbor. The Vice Chancellor explained that the unitary standard "constitute[s] a judicial judgment that in some respects is reflective of subjective reactions to the facts of a case."[61] The Court found the process employed in the case "grossly unfair," which rendered the fair price proven at trial not "entirely fair" under the unitary standard.[62] The Court hesitated in sanctioning the defendants' blundering into a fair price where the conduct was so egregious. For that reason, the Court even considered disgorgement and rescissory remedies, which by the plaintiffs' calculations could have resulted in damages of approximately $120 million and $50 million, respectively. While it noted that "'the scope of recovery for breach of the duty of loyalty is not to be determined narrowly,'"[63] especially in the context of these self-dealing fiduciaries, the Court ultimately concluded that it would have been too difficult to assess such damages. Failing to find those remedies availing, the Court nevertheless found it appropriate to award attorneys' fees as damages.

Conclusion

Both *Trados* and *Nine Systems* are worth careful study for dealmakers and litigators confronted with a potential entire fairness transaction. Transacting parties can take comfort that no damages were awarded in both cases. But deeper considerations should not be ignored by advisors and practitioners alike.

The competing liability determinations are important. Depending on the individuals involved and their chosen careers, directors deemed to have breached their fiduciary duties may face long-lasting reputational consequences. A finding that a director breached his fiduciary duty, moreover, could prove costly in terms of indemnification and D&O coverage. And in another case where the Court finds a breach of fiduciary duty, disgorgement or rescissory damages could be a catastrophic result for individual defendants.

There are also serious secondary liability concerns at play for investment firms and potentially advisors. The plaintiffs in *Nine Systems* succeeded in their aiding and abetting claims against Wren, Javva, and Catalyst. In *Trados*, even if the preferred stockholders aided and abetted the directors in undertaking the sale, they could not be liable because the Court determined there was no underlying breach.

Finally, advisors should also take heed of a recurring theme in Delaware jurisprudence—the emphasis on process. Both *Trados* and *Nine Systems* involved a total absence of modern deal-making "process," be it a special committee, majority-of-the-minority vote, or even market check. Without any evidence of contemporaneous fair value, the Court's fair price decision must ultimately rise or fall with expert evidence.

At bottom, the fundamental difference between the two cases might be as simple as the nature of the challenged transactions. *Trados* involved a third-party cash-out merger, an end-stage transaction for the subject company that Vice Chancellor Laster concluded was unlikely to outgrow its cumulative preferred dividend. *Nine Systems* involved an insider recapitalization in which the subject company survived and achieved a $175 million exit. The Court was careful in its damages analysis to acknowledge and avoid the risk of hindsight bias, but the *in terrorem* effect of Wren and Javva earning a 2,000% return on the challenged investment cannot be ignored.[64]

In any event, it should also be noted that both sides in *Nine Systems* may be contemplating an appeal—the defendants on liability and the plaintiffs on damages—so the Delaware Supreme Court may ultimately clarify the doctrine with respect to conflicted "dual fiduciary" transactions in the next six-to-nine months.

NOTES

1. 2014 WL 4383127 (Del. Ch. Sept. 4, 2014).
2. *In re Trados Inc. S'holder Litig.*, 73 A.3d 17 (Del. Ch. 2013).
3. *Nine Sys.*, 2014 WL 4383127, at *1.
4. *Id.* at *5, 7.
5. *Id.* at *7-8.
6. *Id.* at *9.
7. *Id.* at *10.
8. *Nine Sys.*, 2014 WL 4383127, at *10-12.
9. *Id.* at *12.
10. *Id.* at *20.
11. *Id.*
12. *Id.*
13. *Nine Sys.*, 2014 WL 4383127, at *21.
14. For background on the Delaware Supreme Court's articulation of the expropriation theory, see *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006).
15. 65 A.3d 618 (Del. Ch. 2013).
16. *Nine Sys.*, 2014 WL 4383127, at *21.
17. *Id.*
18. *Id.* at *23-26.
19. *Id.* at *29 (quoting *Bloodhound*, 65 A.3d at 658-59).
20. *Id.* at *29-32.
21. *Nine Sys.*, 2014 WL 4383127, at *34.
22. *Id.* at *47.
23. *Id.*
24. *Id.* at *1.
25. *Id.* at *35-38.
26. *Nine Sys.*, 2014 WL 4383127, at *39-40.
27. *Id.* at *38.
28. *Id.* at *40-42.
29. *Id.* at *42-46.
30. *Id.* at *46 (quoting *Trados*, 73 A.3d at 76).
31. *Nine Sys.*, 2014 WL 4383127, at *46.
32. *Id.* at *47.
33. *Trados*, 73 A.3d at 21-23.
34. *Id.* at 21.
35. *Id.* at 22-23.
36. *Id.* at 54.
37. *Id.* at 23.
38. *Trados*, 73 A.3d at 26-27.
39. *Id.* at 28.
40. *Id.*
41. *Id.* at 31.
42. *Id.* at 20, 33.
43. *Trados*, 73 A.3d at 33.
44. *Id.*
45. *Id.* at 45.
46. *Id.* at 46-47.
47. *Id.* at 55.
48. *Trados*, 73 A.3d at 55.
49. *Id.* at 56.
50. *Id.* at 61-62, 76.
51. *Id.* at 77.
52. *Id.* at 78.
53. *Trados*, 73 A.3d at 48-51.
54. *Id.* at 62-65.
55. *Nine Systems*, 2014 WL 4383127, at *50.
56. *Id.* at *21-32.
57. *Id.* at *31.
58. *Trados*, 73 A.3d at 52.
59. *Id.* at 76 (quoting *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 114 (Del. 1952)).
60. *Id.* at 77.
61. *Nine Sys.*, 2014 WL 4383127, at *47 (quoting *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1140 (Del. Ch. 1994)).
62. *Id.*
63. *Id.* at *51 (quoting *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 445 (Del. 1996)).
64. *Id.* at *20.