COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

April 10, 2014

Christine S. Azar, Esquire
Labaton Sucharow LLP
300 Delaware Ave., Suite 1225
Wilmington, DE 19801

S. Mark Hurd, Esquire
Morris, Nichols, Arsht & Tunnell LLP
1201 N. Market Street
Wilmington, DE 19801

Ronald N. Brown, Esquire
Skadden, Arps, Slate,
Meagher & Flom LLP
One Rodney Square
Wilmington, DE 19801

Raymond J. DiCamillo, Esquire
Richards, Layton & Finger, P.A.
One Rodney Square
Wilmington, DE 19801

Re: *In re TPC Group Inc. Shareholders Litigation*
Consolidated C.A. No. 7865-VCN
Date Submitted: April 3, 2014

Dear Counsel:

The Plaintiffs in this stockholder class action have moved to strike entry number 12[1] to the Errata Sheet[2] of Neil A. Wizel ("Wizel" and the "Motion to Strike"). Wizel is a managing director of Defendant First Reserve Corporation

[1] The Plaintiffs do not oppose the other eleven corrections on the Errata Sheet for mistyped testimony.

[2] Errata sheets are anticipated by Court of Chancery Rule 30(e) which provides in part: "Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them."

("First Reserve"). The Plaintiffs seek to contradict an earlier Wizel affidavit with his subsequent deposition testimony (but without the revision of this Errata Sheet entry) in support of their fee application for purportedly creating a corporate benefit—an increase in merger consideration—while prosecuting this action.

In August 2012, Defendant TPC Group Inc. ("TPC") entered into a merger agreement with affiliates of Defendants First Reserve and SK Capital Partners (together, the "PE Group") in which the PE Group would acquire the outstanding common stock of TPC for $40 per share in cash, or approximately $850 million, including net debt (the "Merger").[3] The Plaintiffs filed complaints in this Court in September 2012, and then an amended complaint in October, alleging that the TPC board of directors (the "Board," and together with the PE Group, the "Defendants") breached their fiduciary duties in agreeing to the Merger and that the PE Group aided and abetted those breaches. The Plaintiffs moved for a preliminary injunction of the Merger, and the Court scheduled a hearing for November 28, 2012. The parties conducted expedited discovery, culminating in

[3] For present purposes, the background facts are drawn from the generally undisputed facts in the submissions by the parties. *See* Pls.' Mot. to Strike Errata Correction of Neil A. Wizel ("Pls.' Mot.") ¶¶ 4-25; FRSK's Opp'n to Pls.' Mot. to Strike Errata Correction of Neil A. Wizel ("PE Group's Opp'n") ¶¶ 1-10.

the Plaintiffs' serving their expert report on the PE Group on October 29 and then their opening brief in support of their preliminary injunction motion on November 3.

In the meantime, Innospec Inc. ("Innospec"), a potential strategic acquirer, submitted a non-binding proposal to the Board to acquire the outstanding common stock of TPC at a price between $44 to $46 per share. That proposal was publicly announced on October 8, 2012. Under the terms of the merger agreement, the Board permitted Innospec to conduct certain due diligence on TPC. After additional negotiations following Innospec's proposal, the PE Group and TPC revised the terms of the Merger to increase the per-share consideration from $40 to $45, representing an approximate $79 million increase in the purchase price.

The revised terms of the Merger were publicly announced on November 8, 2012. The Plaintiffs withdrew their preliminary injunction motion in light of the increased Merger consideration and various supplemental disclosures. Soon thereafter, in December 2012, Innospec announced that it would not submit a binding offer for TPC. Within two days, TPC's stockholders approved the Merger.

The Plaintiffs voluntarily dismissed their amended complaint in February 2013 and then submitted a fee application in March.

Out of their total fee application for $3.9 million, the Plaintiffs seek $3.15 million as compensation for contributing to the increase in the Merger consideration.[4] In opposition to the fee application, the Defendants submitted an affidavit of Wizel in which he stated that the litigation in this Court had no role in the PE Group's decision to increase the Merger consideration.[5] During additional discovery conducted in support of their application, the Plaintiffs deposed Wizel on October 22, 2013. At his deposition, Wizel testified:

> Q. And after the price was increased by $5 a share, did you have any independent view of what that meant for the litigation?
>
> [Objection]
>
> A. No. I – I didn't consider it, no.
>
> Q. Did you think that it would make the pursuit of the litigation more difficult?

[4] Pls.' Opening Br. for Application for an Award of Att'ys' Fees and Expenses 38-42.
[5] Pls.' Mot. Ex. A (Wizel Aff. ¶¶ 13-18).

> A. I'm sure – I'm sure that I did – that did occur to me. It would make sense.[6]

Nine days after his deposition, Wizel submitted the Errata Sheet seeking to correct his answer from "I'm sure – I'm sure that I did – that did occur to me. It would make sense." to "I didn't think about it, but it would make sense."[7] In explaining the reasons for this revision, Wizel stated that he "[m]isunderstood [the] question during testimony," that the given answer was not correct, and that answers to other, similar questions reflect accurate testimony.[8]

The Plaintiffs contend that this entry on the Errata Sheet should be stricken under the principles of the "sham affidavit" doctrine.[9] They argue that Wizel should not be permitted to create a factual dispute over whether he thought that the $5 per share increase in the Merger consideration would make the Plaintiffs' action in this Court more difficult to pursue.[10] The PE Group, in response, contends that the sham affidavit doctrine does not apply, especially not to this procedural

[6] Pls.' Mot. Ex. B (Wizel Dep. 70:1-11).
[7] Pls.' Mot. Ex. C (Errata Sheet).
[8] *Id.*
[9] Pls.' Mot. ¶¶ 26-29.
[10] *Id.* ¶ 30.

situation.[11] Even if the Court recognized the doctrine, the PE Group argues, the Motion to Strike should be denied because the Plaintiffs have failed to demonstrate the requisite elements for it to apply here to the Errata Sheet.[12]

The Delaware Supreme Court has yet to endorse or define the proper application of the sham affidavit doctrine.[13] To the extent the doctrine may be recognized in Delaware, it would require the Court to find certain elements before striking an affidavit or part thereof:

> (1) prior sworn deposition testimony; (2) given in response to unambiguous questions; (3) yielding clear answers; (4) later contradicted by sworn affidavit statements or sworn errata corrections; (5) without adequate explanation; and (6) submitted to the court in order to defeat an otherwise properly supported motion for summary judgment.[14]

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[11] PE Group's Opp'n ¶¶ 13-16.
[12] *Id.* ¶¶ 17-20.
[13] *See Cain v. Green Tweed & Co., Inc.*, 832 A.2d 737, 741 (Del. 2003) ("We need not address the validity or scope of the [sham affidavit] doctrine, because we find it to be inapplicable in this case.").
[14] *See In re Asbestos Litig.*, 2006 WL 3492370, at *5 (Del. Super. Nov. 28, 2006); *but see Howell v. Kusters*, 2010 WL 877510, at *3-4 (Del. Super. Mar. 5, 2010) (applying the principles of the sham affidavit doctrine in resolving a motion to strike an affidavit submitted in opposition to a motion to amend the complaint, which was filed after the completion of witness depositions).

The Court concludes that, even if the sham affidavit doctrine applies,[15] it would not bar the Errata Sheet correction at issue because the answer that Wizel seeks to correct was given in response to an ambiguous question. Specifically, the question about Wizel's thoughts was ambiguous because it was not limited to a single period of time: it could have referred to before the PE Group increased its offer, but it could also have referred to after the increase.[16] The ambiguity is particularly evident when considering the preceding question, which explicitly limited the period of time to which that question referred as "after the price was increased by $5 a share." The Court reaches this conclusion even though neither Wizel nor his counsel objected to this particular question as ambiguous during the deposition.[17]

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[15] *See, e.g.*, *Graven v. Lucero*, 2013 WL 6797566, at *4 n.21 (Del. Ch. Dec. 20, 2013) (noting the doctrine did not apply to a particular affidavit submitted with a summary judgment answering brief while expressly "not endors[ing] or defin[ing] the scope of the doctrine").

[16] As a general matter, increasing merger consideration will make enjoining a transaction more difficult. That is a proposition with which Wizel apparently agrees. Whether the thought crossed his mind between the filing of this action and the higher offer may be relevant here. Thus, when Wizel entertained thoughts of the obvious must be clear and unambiguous if the answer to the question is to be particularly useful.

In addition, given its fragmented nature, the initial answer Wizel gave at his deposition is not clear. Furthermore, the corrected answer is largely consistent with the testimony identified by Wizel on the Errata Sheet as one reason for the change. *See* Wizel Dep. 65-66, 69.

[17] Wizel's timely submission of the Errata Sheet intended to correct his deposition testimony in the manner contemplated by Court of Chancery Rule 30(e) distinguishes this situation from one in the preliminary injunction context in which a deponent submits an affidavit possibly intended to contradict earlier deposition testimony, a practice upon which this Court at times has looked

Under these circumstances, because Wizel seeks to correct his unclear testimony given to an ambiguous question in a timely and reasonable manner,[18] entry number 12 to the Errata Sheet correction of his deposition is consistent with Court of Chancery Rule 30(e). Accordingly, the Plaintiffs' Motion to Strike is denied.[19]

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

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with disfavor. *See, e.g.*, *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 819 (Del. Ch. 2011) ("With their answering briefs, the defendants lobbed in four affidavits from witnesses who were deposed. Each of these lawyer-drafted submissions sought to replace the witnesses' sworn deposition testimony with a revised and frequently contradictory version. . . . Except on routine or undisputed matters, I have discounted these 'non-adversarial proffers' and relied on the deposition testimony and contemporaneous documents.") (citations omitted).

[18] *Cf. Donald M. Durkin Contracting, Inc. v. City of Newark*, 2006 WL 2724882, at *4-5 (D. Del. Sep. 22, 2006) (excluding errata sheets submitted under Rule 30(e) of the Federal Rules of Civil Procedure by a witness claiming she was confused during the deposition after the court concluded there was "no indication of confusion in the deposition transcript" and where the corrections would not only "alter her answers on key issues," but also "posit alternative theories and defenses that [a defendant] now appears to be preparing to advance at trial").

[19] Nonetheless, the Plaintiffs are not prevented from noting, in their fee application, that this change was made to Wizel's official deposition testimony. Tr. of Teleconference Pls.' Mot. to Strike Errata Correction 16.