



**COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE**

WILLIAM B. CHANDLER III  
CHANCELLOR

COURT OF CHANCERY COURTHOUSE  
34 THE CIRCLE  
GEORGETOWN, DELAWARE 19947

Submitted: April 3, 2008  
Decided: April 3, 2008

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Re: *TravelCenters of America, LLC v. Brog, et al.*  
Civil Action No. 3516-CC

Dear Counsel:

Defendants have filed a motion *in limine* to exclude the expert report and testimony of Randall Thomas, the John S. Beasley II Professor of Law and Business at Vanderbilt University Law School.<sup>1</sup> Defendants argue that Professor Thomas's report offers only impermissible legal opinion and should be precluded under Rule 702 of the Delaware Rules of Evidence and this Court's decisions in *United Rentals, Inc. v. RAM Holdings, Inc.*<sup>2</sup> and *In re Walt Disney Co. Derivative Litigation.*<sup>3</sup> Plaintiff argues that defendants mischaracterize Professor Thomas's report and contend that what the professor will offer is well within the proper scope of expert testimony. I have reviewed the parties' submissions along with both the original and supplemental reports prepared by Professor Thomas.

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<sup>1</sup> Defendants do not challenge Professor Thomas's qualifications to serve as an expert or otherwise suggest he lacks the requisite expertise.

<sup>2</sup> C.A. No. 3360-CC, 2007 WL 4465520 (Del. Ch. Dec. 13, 2007).

<sup>3</sup> C.A. No. 15452-NC, 2004 WL 550750 (Del. Ch. Mar. 9, 2004).

Plaintiff intends to have Professor Thomas testify on two substantive matters: (1) whether TravelCenters' advance notice bylaw is consistent with good corporate governance practices and (2) whether the notice submitted by defendants complied with that bylaw's incorporation of federal securities laws. For reasons explained below, I grant defendants' motion to exclude the expert testimony with respect to the first substantive matter, but deny it with respect to the second.

Plaintiff argues that it will submit Professor Thomas's testimony about good corporate governance to rebut defendants' contention that the advance notice bylaw disenfranchises the LLCs' members and should therefore be ignored as "unreasonable." Such testimony does not comport with Rule 702, because it will not "assist the trier of fact to understand the evidence or to determine a fact in issue."<sup>4</sup> This case involves the narrow question of whether defendants, members of a limited liability company, complied with a provision of a contract—the advance notice bylaw. There is no issue of fact as to whether that bylaw is consistent with notions of good corporate governance. At most, defendants may challenge the legal validity of the bylaw, but that is a question of law—not of fact, and, "[i]n this Court, witnesses do not opine on Delaware corporate law."<sup>5</sup> Delaware does not impose a legal requirement on LLCs to draft their bylaws to be consistent with some abstract notion of "good corporate governance." On the contrary, limited liability companies are creatures of contract, "designed to afford the maximum amount of freedom of contract, private ordering and flexibility to the parties involved."<sup>6</sup> To the extent defendants intend to argue otherwise, plaintiff need not offer a rebuttal.

I will, however, allow Professor Thomas to testify with respect to the second substantive issue. Plaintiff contends that defendants' notice failed to comply with the LLC's bylaw because it violated federal securities laws. One specific way plaintiff says it violated those laws was in the omission of material facts. Professor Thomas's report supports these contentions, and this Court has previously allowed expert testimony on the issue of whether a transaction offended the federal

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<sup>4</sup> DEL. R. EVID. 702.

<sup>5</sup> *Disney*, 2004 WL 550750, at \*1.

<sup>6</sup> *In re Grupo Dos Chiles, LLC*, C.A. No. 1447-N, 2006 WL 668443, at \*2 (Del. Ch. Mar. 10, 2006); see also *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 290 (Del. 1999) ("The [LLC] Act can be characterized as a 'flexible statute' because it generally permits members to engage in private ordering with substantial freedom of contract to govern their relationship, provided they do not contravene any mandatory provisions of the Act."); *Bernstein v. Tractmanager, Inc.*, C.A. No. 2763-VCL, 2007 WL 4179088, at \*4 (Del. Ch. Nov. 20, 2007) ("Limited liability companies and corporations differ in important ways").

securities laws.<sup>7</sup> Because the TravelCenters bylaw incorporates requirements from the federal securities laws, what those laws require is at issue in this case, and those laws, unlike the law of contract interpretation, is not Delaware's law.<sup>8</sup> Moreover, to the extent Professor Thomas will testify about whether certain facts are material, his testimony is clearly permissible. As Chancellor Allen noted, "issues of materiality are generally held to be mixed questions of law and fact, but predominantly questions of fact."<sup>9</sup> Consequently, this Court has considered expert testimony on the question of materiality,<sup>10</sup> and defendants have provided no persuasive reasons to depart from such practice in this case.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in black ink that reads "William B. Chandler III". The signature is written in a cursive style with a horizontal line underlining the name.

William B. Chandler III

WBCIII:ram

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<sup>7</sup> See *Bond Purchase, L.L.C. v. Patriot Tax Credit Props.*, 746 A.2d 842, 863 (Del. Ch. 1999).

<sup>8</sup> Cf. *United Rentals, Inc. v. RAM Holdings, Inc.*, C.A. No. 3360-CC, 2007 WL 4465520, at \*1 (Del. Ch. Dec. 13, 2007) ("This Court, however, has made it unmistakably clear that it is improper for witnesses to opine on legal issues governed by Delaware law.").

<sup>9</sup> *Wells Fargo & Co. v. First Interstate Bancorp.*, C.A. Nos. 14696 & 14623, 1996 WL 32169, at \*10 (Del. Ch. Jan. 18, 1996).

<sup>10</sup> See, e.g., *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 64 (Del. Ch. 2001).