



**2008 NATIONAL HIGH SCHOOL MOCK TRIAL  
CHAMPIONSHIP**

Wilmington, Delaware

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## TABLE OF CONTENTS

	<u>Page</u>
PRIMER ON DELAWARE CORPORATE LAW .....	1
STATEMENT OF THE CASE.....	6
COMPLAINT .....	10
ANSWER.....	17
SEPTEMBER 21, 2007 COURT ORDER .....	21
DEVEREAUX TERRY STATEMENT .....	25
SAMMY RODNEY STATEMENT .....	31
ERIN SUSSEX STATEMENT.....	35
PAT KENT STATEMENT.....	40
CHRIS READ STATEMENT .....	44
JAMIE NEWCASTLE STATEMENT .....	52
EXHIBITS .....	56
LAW & JURY INSTRUCTIONS .....	68
NATIONAL HIGH SCHOOL MOCK TRIAL CHAMPIONSHIP RULES.....	76
NATIONAL HIGH SCHOOL MOCK TRIAL CHAMPIONSHIP RULES OF EVIDENCE.....	91
TEAM ROSTER.....	101
SCORE SHEET .....	103
NATIONAL HIGH SCHOOL MOCK TRIAL CHAMPIONSHIP CRITERIA FOR SCORING A TRIAL PRESENTATION.....	104
EXPLANATION OF THE PERFORMANCE RATINGS USED ON THE SCORESHEET.....	106
DISPUTE FORMS.....	107
TIMEKEEPING PROCEDURES.....	109

## **PRIMER ON DELAWARE CORPORATE LAW**

### **I. What is A Corporation?**

A corporation is a non-human entity. Instead, corporations exist both as a matter of common and statutory law. Delaware corporations are governed by statutes known as the Delaware General Corporation Law (the “DGCL”).

The most important feature of a corporation is that it exists entirely separate and apart from its owners. Virtually all the legal and tax advantages associated with corporations flow from this essential element. A corporation can acquire assets, enter into contracts, sue or be sued, pay taxes, and take tax deductions in its name, often without creating obligations on the part of individual owners.

Corporations must have at least one owner, but there is no upper limit. The owners are called shareholders or stockholders. The ownership interests of the shareholders in a corporation are divided into units called stock, shares, or shares of stock. The rules governing corporations along with the advantages and disadvantages apply equally to corporations owned by one or more than one shareholder. A corporation comes into existence when an incorporator files a charter or certificate of incorporation document in the state in which the incorporator is to be viewed as a “resident.” More than half of the Fortune 500 companies in the United States, for reasons too varied to discuss here, have elected to be incorporated in Delaware, even if they do not have a physical presence in the state.

The total number of shares a corporation may issue is unlimited. However, the corporation must issue at least one share of stock for each shareholder. If the corporation will have more than one shareholder, the corporation should issue shares to each stockholder in proportion to their ownership interests. The proportion of the ownership interest among more than one shareholder may vary from a fraction of one percent to a fraction over ninety-nine

percent, depending on the deal the shareholders make when they decide to go into business together.

For example, if you are the sole shareholder, it makes no difference whether you own one share or one million shares. In each case, you own 100% of the corporation. Likewise, if two people have decided to go into business on a sixty-forty basis, it makes no difference whether one owns six shares or six million and the other owns four shares or four million. In each case, their respective interests would be sixty-forty.

## **II. How Does a Corporation Conduct Business?**

Shareholders: A corporation conducts business through a chain of authorized representatives. The shareholders are at the top of the chain. The shareholders, however, do not directly manage the business and affairs of the corporation. Instead, the shareholders meet at least once each year to elect a Board of Directors, which is charged with that obligation.

Directors: Corporations must have at least one director, but there is no upper limit. The directors' job is to make general business decisions for the corporation, including the decision to merge or sell the corporation. Their decisions are then implemented by corporate officers who are appointed by the board of directors. The directors owe two main duties (known as fiduciary duties) to the shareholders: (1) the duty of care; that is to act with care when making a decision on behalf of the corporation; and (2) the duty to act loyally and in the best interests of the corporation by putting the corporation's and its shareholders' interests above the directors' interests.

Officers: The officers may consist of the following: president (a.k.a. chief executive officer), treasurer, and secretary. The president is responsible for managing the corporation's daily operations. The treasurer manages the corporation's money, while the secretary maintains

the corporation's nonfinancial books and records. Corporations may also have one or more vice-presidents. A vice-president's duties may vary, depending on the corporation's needs. For example, the corporation may have vice-presidents for sales, marketing, operations, personnel, and so on.

### **III. Merger and Acquisitions: What is a Hostile Takeover?**

As discussed above, a board of directors votes on important business decisions and recommends action to the corporation's shareholders. This includes whether or not a corporation should be sold or merged with another corporation. Sometimes, however, a company seeking to acquire another company may attempt a "hostile takeover."

A "takeover" is a transaction in which an acquirer seeks to gain control of a target company without the consent of the target's board of directors. Typically it proceeds in two steps. The first is a "tender offer" in which the acquirer offers *directly* to the shareholders to purchase shares held by them at a specified price. If an acquirer can obtain more than 50% of the outstanding shares of the corporation through a tender offer, the acquirer can then typically vote its own board of directors into office. This new board, consisting of the acquirer's nominees, may then cause the target company to "cash-out" the remaining shareholders through a merger or otherwise buy back the remaining stock—thereby eliminating the remaining shareholders who did not tender their shares in response to the tender offer. In the end, the acquirer now owns 100% of the target company.

A corporation, however, has defensive measures available to prevent this type of hostile takeover from happening. One of the defenses against takeover bids is a "poison pill."

### **IV. What is a Poison Pill and How Does it Work?**

There are several variations of "poison pills" that can be implemented by a company that

thinks it may be the target of a takeover by a potential acquirer. Typically, a poison pill plan (also known as a shareholder rights plan) makes it prohibitively expensive for a hostile bidder to buy the target company. The board of directors first adopts a rights plan that typically contains both “flip-in” and “flip-over” rights.

Flip-in: A “flip-in” allows existing shareholders (except the acquirer) to buy more of the target company at a discount. By purchasing more shares cheaply (flip-in), shareholders dilute the shares held by the acquirer. As a result, the acquirer’s takeover attempt is made more difficult and prohibitively expensive.

*Example of a flip-in:* At Viant, a computer consulting firm, its board of directors adopted a poison pill plan. In the plan, Viant issued a dividend (a monetary pay back to the shareholder from the corporation’s profits) to all shareholders. For each share owned, the shareholder can purchase another share for \$0.001. This is activated if either of the following occurs:

- A person or group buys 15% or more of the common stock of Viant.
- A person or group announces its intention to acquire 15% or more of the common stock of Viant.

Of course, the group or person that triggers the above does not have the same right to buy shares at \$0.001. Most of the rest of the shareholders will buy these shares because they are getting new stock at an extremely steep discount. The result is that the hostile acquirer is substantially diluted and would now have to pay a lot more money to achieve his takeover goal.

Flip-over: The “flip-over” allows stockholders to buy the acquirer’s shares at a discounted price after the merger. A flip-over plan distributes rights to shareholders to purchase discounted shares of the acquirer’s holdings in the post-merger company (usually at 50 percent of fair market value). Such significant dilution of the equity holdings of the potential acquirer’s stake makes the merger prohibitively expensive. Unlike the flip-in, the flip-over is a right that takes place post-merger.

*Example of a flip-over:* This time Viant, instead of offering shares to its

shareholders before the acquiring company gains control (flip-in), offers its shareholders the right to purchase shares in the company post-merger at a discounted price. Therefore, upon the merger, these shareholders can now purchase shares of the merged company thereby diluting the ownership interest of the acquirer.

At the end of the day, the conduct of the target company's board of directors in response to a takeover attempt must comply with their fiduciary duties to the shareholders. Shareholders may challenge the board's conduct in court if they believe a breach of fiduciary duty has occurred. This might occur, for example, where the board has refused to "redeem" (or withdraw) the poison pill in the face of an offer that is very attractive to the stockholders of the company. Dissident shareholders can also mount a "proxy contest" to solicit support for a change of management directly from individual shareholders. This process, however, is expensive, cumbersome and time consuming.



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

MID-EAST STEVEDORES SERVICES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C. A. No. 09C-01 LH
	)	
DELAWARE AUTO & MARINE	)	
CORPORATION, PAT KENT, CHARLIE KENT,	)	
PERRY WHITE, CLARKE KENT and LOIS	)	
LANE,	)	
	)	
Defendants.	)	

**STATEMENT OF THE CASE<sup>1</sup>**

Delaware Auto & Marine Corporation (“DAM”) is a Delaware corporation that operates a marine cargo terminal in Wilmington, Delaware. The common stock of DAM is publicly-held and traded on the New York Stock Exchange. Forty percent (40%) of the stock is owned by DAM’s 65 year-old founder, Pat Kent (“Kent”), and the remaining 60% is widely dispersed among institutional and individual holders. Kent is one of five members of the board of directors of DAM. In recent years, the market price of DAM’s stock has remained flat because of a slow-down in shipping activity and because of steadily increasing costs, primarily union-related legacy and benefit expenses.

In January 2007, the board of directors of DAM perceived that DAM was vulnerable to a hostile takeover because of its low stock price. At the time, DAM’s shares traded at approximately \$10.50 per share and had traded in the \$10-\$12 range in the preceding year (2006). Accordingly, on the advice of counsel, DAM adopted what is known as a stockholder rights plan or “poison pill.” A poison pill is an anti-takeover device. It is created through the

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<sup>1</sup> Teams are encouraged to review the Primer on Delaware Corporate Law included with the case materials prior to reading this Statement of the Case.

adoption of a board-approved rights plan in which “rights” are deemed to have been issued to the company’s stockholders. Once a poison pill is adopted, if a person or entity acquires more than 15% (or some other set percentage) of the target company’s stock without approval of the board of directors and without redemption (retirement) of the rights, each stockholder other than the acquiring person or entity is entitled to purchase (at nominal cost) two shares of stock for each share of stock currently held. The effect of “triggering” a poison pill is that it causes the acquiring person’s or entity’s shares to be massively diluted and therefore substantially less valuable. Essentially, there are just three ways to overcome a poison pill: (i) negotiate an acceptable sales price with the target’s board of directors, so that the board voluntarily redeems the rights and approves the acquisition, (ii) run a proxy contest to elect new directors who will withdraw the rights plan; or (iii) file a court action and request that the court order the board to redeem the poison pill. A court may order redemption of a rights plan if it (or the jury) concludes that the board’s refusal to redeem the poison pill constitutes a breach of the directors’ fiduciary duty to the stockholders.

Mid-East Stevedores Services, Inc. (“MESS”) is also in the business of owning and operating marine terminals. It is owned and controlled by Aladin, an independent republic located fifty miles off the coast of Oman. Although Aladin has a sound diplomatic and political relationship with the United States, it is believed by some to have ties to terrorist activity. In recent years, MESS has begun to expand its operation to ports around the world. It does not currently have any operations in the United States. In 2006, MESS purchased 1 share of DAM stock and is, therefore, a stockholder of DAM.

On August 1, 2007, MESS launched a hostile takeover of DAM by announcing that it had commenced an all-cash tender offer<sup>2</sup> for all of the common stock of DAM for \$16 per share. The announcement was quickly derided by Kent, who publicly opposes the offer. During the ensuing months, the board of directors of DAM refused to talk to or meet with the President of Aladin, who publicly invited DAM to engage in friendly negotiations with the hope of concluding a deal.

On September 1, 2007, MESS raised its offer to \$20 per share and announced that this was its final offer. Simultaneously, it filed a lawsuit in the Delaware Court of Chancery<sup>3</sup> seeking an order requiring the board of directors to redeem the poison pill. Many stockholders of DAM, hoping to “cash in” on this premium offer, have contacted the board of directors of DAM, urging the board to relent and redeem the poison pill. In fact, stockholders holding more than 51% of the stock of DAM have tendered their shares. In addition to formally rejecting the “final” MESS offer, DAM has invoked a recently enacted Delaware anti-terrorism statute (8 *Del. C.* § 204) in support of its refusal to even consider negotiating with MESS.

On September 21, 2007, the Delaware Court of Chancery issued a preliminary ruling in the case resolving certain questions as to the burden of proof at trial. A copy of that decision is attached as part of these case materials.

**Plaintiff’s Case:** MESS intends to argue and/or prove at trial that: (i) the defendants have failed to carry their burden of proving (a) Aladin has material ties to

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<sup>2</sup> A tender offer is a public bid for all the shares of a company at a specified price. All tender offers are subject to federal securities laws and regulations. As a practical matter, a tender offeror cannot “take down” (*i.e.*, accept) tendered shares when the target company has a poison pill in place, because it will be deemed to have triggered the pill.

<sup>3</sup> The Delaware Court of Chancery is widely recognized as the nation’s preeminent court for deciding disputes involving corporate law. This unique role stems in part from the fact that thousands of corporations are incorporated in the State of Delaware, including more than half of the Fortune 500 companies.

international terrorism, and (b) the proposed business combination poses a threat to national security; and (ii) the board of directors of DAM has breached its fiduciary duties owed to the stockholders by refusing to redeem the poison pill so that MESS can “take down” (take possession of) the shares and acquire DAM in a second-step merger.

**Witnesses:**

- Devereux Terry -- President of MESS
- Erin Sussex -- Retired Employee and Stockholder of DAM
- Sammy Rodney, CPA -- Accounting Expert

**Defendants’ case:** Defendants intend to prove at trial that: (i) Aladin has “material ties” to international terrorism; (ii) the proposed business combination poses a material threat to national security; and will argue that (iii) MESS has failed to prove that the DAM board has breached its fiduciary duties by refusing to consider the MESS acquisition proposal.

**Witnesses:**

- Pat Kent -- Founder of DAM
- Chris Read -- Terrorism Expert
- Jamie Newcastle -- Head of Security for DAM

In addition to the stipulated facts in the Court’s order of September 27, 2007 both sides stipulate to the following facts:

1. All exhibits included in the case are authentic and accurate in all respects. No objections to the authenticity of the exhibits will be entertained.
2. The signatures on the witness statements are omitted due to electronic delivery of the case.
3. Whenever a rule of evidence requires that reasonable notice be given, it has been given.
4. There is no requirement in Delaware that an expert be formally tendered to the Court.
5. Each of the witnesses has read the Primer and is familiar with its contents.

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

MID-EAST STEVEDORES SERVICES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
DELAWARE AUTO & MARINE	)	C.A. No. 09C-01 LH
CORPORATION, PAT KENT, CHARLIE	)	
KENT, PERRY WHITE, CLARKE KENT and	)	
LOIS LANE,	)	
	)	
Defendants.	)	
	)	

**COMPLAINT**

Plaintiff Mid-East Stevedores Services, Inc. (“MESS”), by and through its undersigned attorneys, for its complaint against defendants Delaware Auto & Marine Corporation (“DAM” or the “Company”) and the individual members of its board of directors, alleges as follows:

**Summary of Action**

1. This is an action by MESS, a stockholder of DAM, to rectify an ongoing breach of fiduciary duty by the members of the board of directors of DAM. MESS has commenced a tender offer for all of the outstanding common stock of DAM. The current offering price of \$20 per share represents a substantial premium over the market price of DAM’s stock, and stockholders holding more than 51% of the stock of DAM have already tendered their shares. Despite overwhelming stockholder support for the offer, the board of directors of DAM has refused to withdraw DAM’s stockholder rights plan (i.e. “poison pill”) to allow the offer to proceed. Moreover, the board has improperly invoked Delaware’s recently-enacted anti-terrorism statute (8 *Del. C.* § 204) in further support of its unjustified refusal to allow the offer to proceed. The board’s refusal to withdraw the poison pill constitutes a breach of fiduciary duty

and its reliance upon Section 204 is wholly unjustified and unlawful. Accordingly, MESS seeks declaratory and injunctive relief to remove these impediments so that it may acquire DAM.

### **The Parties**

2. MESS is a corporation organized under the laws of Aladin. MESS is engaged in the business of owning and operating marine terminals. The President of MESS is Devereux Terry, an Ivy League graduate, who attended boarding school in Delaware.

3. DAM is a Delaware corporation. DAM owns and operates a marine cargo terminal in Wilmington, Delaware. The common stock of DAM is publicly-held and traded on the New York Stock Exchange.

4. Defendant Pat Kent (“Pat” or “Kent”) is the founder of DAM and the Chairman of the Board of Directors. Kent owns 40% of the outstanding common stock of DAM.

5. The other four individual defendants, Charlie Kent, Clarke Kent, Perry White and Lois Lane, are directors of DAM. Charlie is Pat’s brother and Clarke Kent is Pat’s son. Each owns just a few shares of DAM, and is beholden to defendant Kent.

### **BACKGROUND TO THE OFFER**

6. In recent years, DAM’s business has struggled as a result of a slow-down in shipping activity on the Delaware River and because of steadily increasing costs, primarily union-related legacy and benefit expenses.

7. Upon information and belief, in January 2007, the board of directors of DAM believed that DAM was vulnerable to a takeover because of its languishing stock price. In 2006, DAM’s stock traded in the \$10-12 range; currently, it is trading at approximately \$10.50 per share. Accordingly, DAM adopted a stockholder rights plan (or “poison pill”), purportedly to protect itself from unfair and/or coercive hostile offers.

8. Under the poison pill adopted by DAM, if MESS or any such “interested stockholder” acquires more than 15% of DAM’s outstanding common stock, then a “flip-in” provision is triggered and each stockholder of DAM other than MESS has the right to acquire (at the prevailing market price) two shares of stock for each share held. Of course, a triggering of the flip-in provision of the poison pill would cause MESS’s interest in DAM to be massively diluted and thus considerably less valuable.

9. Although courts and scholars alike have recognized the utility of a poison pill to deter low-ball and coercive offers,<sup>4</sup> a board of directors cannot employ indefinitely a poison pill to block a non-coercive offer that presents superior value to the stockholders. Such an abuse of a poison pill is occurring here, as MESS’s offer (described below) is non-coercive and presents value that is far superior to the current market value of DAM.

#### **MESS’s Offer**

10. On August 1, 2007, MESS commenced a tender offer for all the common stock of DAM for \$16 per share. Simply put, MESS will pay cash for *all* DAM stock that is tendered. At the time MESS announced its offer, DAM’s stock was trading at just \$10.50 per share.

11. In response to MESS’s offer, DAM’s founder, defendant Kent, made public statements to the effect that Kent would *never* sell DAM. Moreover, for the past few months, MESS repeatedly has attempted to engage DAM in discussions with a view towards negotiating a friendly acquisition. The board of directors of DAM has refused to meet with, or speak to, any representative of MESS.

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<sup>4</sup> A coercive offer is one that is made for less than all of the shares of corporation, such that stockholders who do not tender risk having to accept a lower price in a second step merger. Stockholders are thus “coerced” into selling for fear that they will lose out on the higher price offered in the tender offer if they do not tender.

12. On September 1, 2007, MESS raised its offer to \$20 per share. This is MESS's final offer. It represents a premium of 90% over the market price of DAM's stock prior to the announcement of the offer.

13. As evidence of just how good MESS's offer is, stockholders holding more than 51% of the stock of DAM have tendered their shares. When considering the fact that defendant Kent holds 40% of the stock, stockholder support of MESS's offer is remarkable, as a vast majority of the disinterested stockholders want to sell their shares to MESS.

14. Despite overwhelming support for the offer, the board of directors of DAM has urged stockholders not to tender their shares and has resisted all attempts by MESS to negotiate a friendly deal.

#### **DAM's Invocation of Section 204**

15. In addition to rejecting the offer, the board of directors of DAM has invoked Delaware's recently-enacted anti-terrorism statute (8 *Del. C.* § 204) in support of its opposition to MESS's offer. Section 204 provides as follows:

Section 1. A corporation may refuse to enter into a business combination (1) with any person that is controlled by or under common control with a foreign state with material ties to international terrorism or (2) that would pose a threat to national security. "Business combination," "controlled by," "person" and "under common control with" shall have the meanings as defined in § 203 of this Chapter."

Section 2. For purposes of this section the term "international terrorism" means activities that

- (A) appear to be intended –
  - (i) to intimidate or coerce a civilian population;
  - (ii) to influence the policy of a government by intimidation or coercion; or



(iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and

(B) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

16. As will be demonstrated at trial, although MESS is owned and controlled by Aladin, Aladin does not have material ties to international terrorism. Indeed, Aladin possesses a sound diplomatic and political relationship with the United States and it vigorously enforces laws and policies designed to fight and eradicate terrorism.

17. Moreover, the acquisition of DAM by MESS will not “pose a threat to national security” within the meaning of Section 204. MESS employs state-of-the-art security at its facilities and boasts an exemplary safety record. If MESS was to acquire DAM, it intends to upgrade security and anti-terrorism measures at the Wilmington facility by, among other things, installing x-ray and radioactive detection devices.

**Count I**  
**(Breach of Fiduciary Duty)**

18. Plaintiff repeats and realleges the allegations in paragraphs 1 through 17 above as if fully set forth herein.

19. The individual director defendants owe fiduciary duties of care, loyalty and good faith to the stockholders of DAM.

20. The director defendants have breached those duties by refusing to withdraw DAM’s poison pill so that MESS may acquire the tendered shares and thereby gain control of the Company. There is no justification for the defendants’ refusal to allow the offer to proceed because the offer is non-coercive and presents economic value to the stockholders substantially in excess of the market price of the Company’s stock.

21. Accordingly, MESS is entitled to preliminary, permanent and mandatory injunctive relief requiring the board of directors to remove the poison pill and any other impediments to the offer.

22. MESS has no adequate remedy at law.

**Count II**  
**(Declaratory Relief Relating To Section 204)**

23. Plaintiff repeats and realleges paragraphs 1 through 22 as if fully set forth herein.

24. As noted, the board of directors of DAM purportedly invoked Section 204 as a basis to refuse to enter into a business combination with MESS. DAM's reliance on Section 204 is improper and unjustifiable because: i) Aladin does not have material ties to international terrorism, and ii) a business combination with MESS would not pose a threat to national security.

25. Accordingly, MESS is entitled to a declaration that DAM cannot avail itself of Section 204 because the requirements of the statute have not been satisfied.

26. MESS has no adequate remedy at law, and DAM's unlawful invocation of Section 204 presents an actual case or controversy that is ripe for judicial review.

WHEREFORE, Plaintiff Mid-East Stevedores Services, Inc. respectfully requests that the Court enter an order:

A. requiring defendants to withdraw the rights plan so that MESS's offer may proceed;

B. declaring that the requirements of Section 204 have not been satisfied and that, therefore, defendant DAM may not avail itself of Section 204;

C. awarding plaintiff its costs and attorneys' fees incurred in connection with this action; and

D. granting such other and further relief as the Court may deem just and proper.

MILFORD & DOVER, LLP

/s/ Dale Dover

Attorneys for Mid-East  
Stevedores Services, Inc.

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

MID-EAST STEVEDORES SERVICES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
DELAWARE AUTO & MARINE	)	C.A. No. 09C-01 LH
CORPORATION, PAT KENT, CHARLIE KENT,	)	
PERRY WHITE, CLARKE KENT and LOIS	)	
LANE,	)	
	)	
Defendants.	)	

**ANSWER**

Defendants Delaware Auto & Marine Corporation (the “Company”), Pat Kent, Charlie Kent, Clarke Kent, Perry White and Lois Lane, by and through their undersigned attorneys, answer the Complaint, as follows:

1. Defendants admit that Mid-East Stevedores Services, Inc. (“MESS”) is a stockholder of the Company, that MESS has commenced a tender offer for all of the common stock of the Company, that the current offering price is \$20 per share, that stockholders holding more than 51% of the stock of the Company have tendered their shares, that the board of directors has refused to withdraw the Company’s rights plan, and that the Company has invoked the provisions of 8 *Del. C.* § 204; the remaining allegations of paragraph 1 are denied.

2. Defendants are without knowledge or information sufficient to form a basis to admit or deny the allegations contained in paragraph 2.

3. Admitted.

4. Admitted.

5. Defendants admit that the other four individual defendants are directors of the Company, and that each owns a few shares of the Company's stock, and deny that such directors are beholden to defendant Kent.

6. Defendants admit that there has been a slow-down in shipping activity on the Delaware River, and that some business costs have been increasing, but deny that the Company's business has "struggled."

7. Admitted.

8. Defendants admit the first sentence of paragraph 8, and deny the second sentence as alleged.

9. The first sentence of paragraph 9 states a legal conclusion as to which no response is required; defendants deny the second sentence of paragraph 9.

10. Admitted.

11. Denied.

12. Defendants admit the first sentence of paragraph 12 and are without knowledge or information sufficient to form a basis to admit or deny the remainder of paragraph 12.

13. Defendants admit that stockholders holding more than 51% of the stock of the Company have tendered their shares, and deny the remainder of paragraph 13.

14. Denied, except admitted that the board of directors has urged stockholders not to tender their shares.

15. Defendants admit that the board of directors of the Company has invoked the provisions of 8 *Del.C.* § 204 and refer the Court to that statute for its full and accurate terms.

16. Denied.

17. Denied.

18. Defendants repeat and reallege their answers to paragraphs 1 through 17 above as if fully set forth herein.

19. Paragraph 19 states a legal conclusion as to which no response is required.

20. Denied.

21. Denied.

22. Paragraph 22 states a legal conclusion as to which no response is required.

23. Defendants repeat and reallege their answers to paragraphs 1 through 22 above as if fully set forth herein.

24. Denied.

25. Denied.

26. Paragraph 26 states a legal conclusion as to which no response is required.

### **ADDITIONAL DEFENSES**

#### **FIRST ADDITIONAL DEFENSE**

The Complaint fails to state a claim upon which relief can be granted.

#### **SECOND ADDITIONAL DEFENSE**

The Board of Directors of the Company properly invoked the provisions of 8 *Del. C.* § 204 because: i) Aladin has material ties to international terrorism; and ii) a business combination with MESS would pose a threat to national security. Accordingly, the Company is legally entitled to decline any and all invitations by MESS to enter into a business combination.

WHEREFORE, defendants respectfully request that the Court enter an order:

A. dismissing the Complaint with prejudice;

B. awarding defendants their attorneys' fees, costs and expenses in defending

this action; and

C. granting such other and further relief as the Court deems just and proper.

THE BEDFORD LAW FIRM

By: /s/ Gunner Bedford  
Attorneys for Defendants

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

Mid-East Stevedores Services, Inc., )  
 )  
Plaintiff, )  
 )  
v. ) Civil Action No. 09C-01 LH  
 )  
Delaware Auto & Marine Corporation, et al., )  
 )  
Defendants. )

**Opinion**

**Submitted: September 17, 2007**

**Decided: September 21, 2007**

Delaware Auto & Marine Corporation (“DAM”) is a Delaware corporation that operates a marine cargo terminal in Wilmington, Delaware. The individual defendants are the members of DAM’s Board of Directors. Plaintiff Mid-East Stevedores Services, Inc. (“MESS”) is in the same business, but it does not yet have any operations in the United States. MESS commenced a cash tender offer on August 1, 2007 for all of the common stock of DAM at a price of \$16.00 per share. The members of the board of directors of DAM have refused to recommend either that offer, or a subsequent \$20.00 per share offer from MESS. On September 1, 2007, MESS filed this lawsuit alleging that the members of the board of directors of DAM had breached their fiduciary duties and seeking an order requiring them to redeem the company’s stockholder rights plan. The matter has been scheduled to go to trial beginning on May 9, 2008.<sup>5</sup> In the course of

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<sup>5</sup> Plaintiff also challenged the constitutionality of 8 *Del. C.* § 204. Pursuant to Supreme Court Rule 41, I certified that question of law to the Delaware Supreme Court. The Supreme Court resolved that question through an expedited appeal and issued a decision on September 12, 2007 upholding the constitutionality of the statute.



the pre-trial proceedings, a question has been raised about the manner in which the burden of proof on certain questions will be allocated at trial.<sup>6</sup> This decision resolves that question.

In rejecting the MESS offer, DAM has relied upon a recently enacted Delaware statute. Section 204 of the General Corporation Law was enacted earlier this year and provides as follows:

Section 1. A corporation may refuse to enter into a business combination (1) with any person that is controlled by or under common control with a foreign state with material ties to international terrorism or (2) that would pose a threat to national security. “Business combination,” “controlled by,” “person” and “under common control with” shall have the meanings as defined in § 203 of this Chapter.”

Section 2. For purposes of this section the term “international terrorism” means activities that –

(A) appear to be intended –

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and

(B) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

The parties have stipulated to the following statements of fact and, therefore, I will presume at trial and will advise the jury that they have been established: (1) MESS is “controlled” by Aladin within the meaning of 8 *Del. C.* § 203; (2) the proposed transaction between MESS and DAM would be a “business combination” within the meaning of 8 *Del. C.*

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<sup>6</sup> The parties have stipulated that as is customary, plaintiff has the burden of proof in showing that there has been a breach of fiduciary duty.

§ 203; and (3) MESS is a “person” within the meaning of 8 *Del. C.* § 203. Left for resolution at trial are the questions of (1) whether defendants have breached their fiduciary duty; (2) whether Aladin has material ties to international terrorism; and (3) whether the proposed business combination would pose a threat to national security. Not surprisingly, each side has argued fervently that their opponents should be required to bear the burden of proof on the last two of these questions.<sup>7</sup>

The members of the board of directors of DAM relied upon the statute, which gives a corporation the power to decline to enter into a business combination under specified circumstances, in making the decision not to accept the proposed offer. Presumably, defendants gathered information pertinent to that decision before relying on the power granted by that statute to decline to enter into the proposed transaction. Having availed themselves of that authority, the defendants should be required to establish facts sufficient to demonstrate why they should be entitled to rely on what is akin to a statutory form of an affirmative defense. Therefore, defendants will bear the burden of proof at trial on the questions of (1) whether Aladin has material ties to international terrorism, and (2) whether the proposed business combination would pose a threat to national security.

Finally, 10 *Del. C.* § 369 provides that “[w]hen matters of fact, proper to be tried by a jury, arise in any cause depending in Chancery, the Court of Chancery may order such facts to trial by issues at the Bar of the Superior Court.” I have concluded that the questions involving international terrorism and national security should be tried by a jury. However, the fiduciary duty questions are issues that ordinarily would be decided by me. Although I could bifurcate the proceedings by deciding some questions of fact myself and having a jury decide others, I am

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<sup>7</sup> The parties have stipulated that as is customary, plaintiff has the burden of proof in showing that there has been a breach of fiduciary duty.

going to exercise my discretion to empanel a special jury to decide all of the questions of fact. However, the jury shall not be asked to fashion the appropriate remedy. These questions, including the question of whether there is an adequate remedy at law, will be addressed by the Court after the jury makes its factual findings as set forth in the verdict sheet.

**IT IS SO ORDERED.**

/s/ Loockerman Henlopen  
Chancellor

Dated: September 21, 2007

## **Plaintiff's Witness Statement Of Devereux Terry**

1           My name is Devereux Terry. I am the President of Mid-East Stevedores Services, Inc.  
2 ("MESS"). MESS is a Delaware corporation, but 100% of the common stock of MESS is owned  
3 by the republic of Aladin.

4           Aladin is a 675 square mile island located in the Arabian Sea, fifty miles off the coast of  
5 Oman. For many years, Aladin was a part of the British Empire, until it achieved independence  
6 in 1947 and became governed as the republic of Aladin.

7           I was born in Aladin and went to school there until I was 14. Although my father grew  
8 up in Aladin, my mother is from England and was educated there and in the United States. My  
9 mother really wanted me to go to school in the United States, so she and my father sent me to  
10 boarding school in Delaware.

11           I didn't know it at the time, but one reason my mother wanted me to go away to school  
12 was because she knew she had a terminal illness. Five weeks after I arrived in Delaware, my  
13 mother died.

14           My father was devastated by my mother's death. While he was very vulnerable, he met  
15 and married a woman who was after his money and they had one child, Drew. When Drew was  
16 a baby, my father realized that his wife did not love him, asked her for a divorce and gave her a  
17 multi-million dollar settlement. Drew's mother left Aladin and vowed that my father would  
18 never be allowed to see Drew again.

19           Although I have not seen Drew since he was a baby, I am aware of his upbringing from  
20 the many news accounts about his exploits. Apparently, he and his mother have lived all over  
21 the Middle East and Europe. At some point, he became involved with terrorist organizations.

### **Plaintiff's Witness Statement - Devereux Terry (Cont'd)**

22 He has personally taken responsibility for some of the most heinous terrorist activities ever  
23 perpetrated—taking hundreds of innocent lives.

24 My first year at boarding school was difficult enough after my mother's death, and I also  
25 had the problem that not all of my fellow students were welcoming of foreigners. Fortunately, I  
26 got to know my classmate Reese Blackbird well and my visits to his family home in the chateau  
27 country outside of Wilmington, Delaware made the school holidays bearable when I could not  
28 travel all the way back to Aladin.

29 By my second year at boarding school, I had become well enough settled that I was  
30 chosen by my fellow students to be a member of the school Honor Council. The Honor Council  
31 had the responsibility of enforcing the school's Honor Code.

32 One of the other students at the boarding school was Chris Read. Chris was one of the  
33 students who were not very kind to me when I arrived at the school. He/she seemed to think that  
34 only people who grew up in the U.S. should be allowed to attend our boarding school. Chris got  
35 high grades and was the captain of the basketball and tennis teams. Chris was applying to  
36 several Ivy League colleges, but because he/she was at our school on a scholarship, he/she was  
37 going to need a full scholarship and expenses to be able to attend any of them.

38 In the fall of his/her senior year, Chris was accused of cheating. His/her case came  
39 before the Honor Council and I sat on the panel that heard his/her case. The night before the  
40 hearing, the student who was going to testify against Chris suddenly withdrew from school and  
41 left the campus. Although we still had the original witness statement and other supporting  
42 evidence, the Honor Council's procedures required that we dismiss the case. I was told by  
43 another student that the Ivy League college that was Chris's first choice (Harvard University)

### **Plaintiff's Witness Statement - Devereux Terry (Cont'd)**

44 learned about the allegations, and that was the basis for the denial of his/her application for  
45 admission.

46 I ended up attending Harvard. I have been told by fellow boarding school alums that  
47 Chris believes that I told Harvard about the allegations against Chris so that I would not have any  
48 competition for the single slot they allot for an incoming freshman from our school. Of course, I  
49 had nothing whatsoever to do with that report. I did not see Chris after graduation, although I  
50 knew that he/she went to college and I heard a rumor that after graduation, he/she went to work  
51 for one of the intelligence agencies.

52 After I graduated from college, I decided to spend a few more years in the U.S. before  
53 returning to Aladin. Reese and I had remained close, and I continued to visit his family's house  
54 in Delaware. On one of those visits, Reese's father told us that he was convinced that the house  
55 next door was now being used as a safe house for one of the intelligence agencies. We did not  
56 take that seriously, because we never thought that the suburbs of Wilmington, Delaware would  
57 be well suited for a safe house, so we did not give his comment much thought. However, one  
58 night Reese and I were out walking his dog, and saw Chris in the passenger seat of a car pulling  
59 into that driveway. That was when I remembered the rumors about where Chris had gone to  
60 work after graduation.

61 I am not proud of admitting this, but I must confess that my memories of how unkind  
62 Chris had been to me in boarding school were still painful and Reese and I decided to try to play  
63 a trick on him/her. For the next week, I made sure I had lots of conversations using Reese's  
64 phone, and pretended that I was talking to someone about my "hatred" of the United States and  
65 its allies and my hope that someday terrorists would take action against the U.S. The whole

**Plaintiff's Witness Statement - Devereux Terry (Cont'd)**

66 episode was very childish, but Reese and I thought it would be funny if Chris went to his/her  
67 employers with his/her suspicions about me and then got in trouble when Chris's superiors found  
68 out that few Americans are as Americanized as I am.

69 I got my M.B.A. and was ready to return to Aladin. My father was the President of  
70 MESS, so I went to work for him. Over the years, MESS has prospered and grown, but our  
71 operations were concentrated in the Middle East and Europe. I took on greater levels of  
72 responsibility at MESS, and eventually took over the presidency from my father. I had always  
73 been interested in expanding our operations into the United States, but I knew I would have to  
74 make monthly trips to the U.S. if that happened, and I was reluctant to be that far away from my  
75 father. Last year, when my father learned about Drew's latest atrocity, he was so upset that he  
76 suffered a fatal heart attack.

77 After my father's death, I decided to pursue the possibility of a U.S. presence. MESS has  
78 the good fortune of having the backing of the government of Aladin, so we don't always  
79 experience the same problems as some of our competitors, who have to deal with public  
80 stockholders and who must borrow money from commercial banks.

81 I had been aware for many years of Delaware Auto & Marine Corporation ("DAM") and  
82 routinely followed its trading activity. In early 2007, I felt that the market trading price  
83 undervalued the company and thought it would be a good investment and would complement  
84 MESS's operations.

85 I asked our lawyers to prepare the necessary papers to allow us to acquire DAM. On  
86 August 1, 2007, MESS commenced an all cash offer for all of the common stock of DAM at a

**Plaintiff's Witness Statement - Devereux Terry (Cont'd)**

87 price of \$16 per share. Unlike most other potential acquirers, we didn't have to include any  
88 financing conditions because the offer was all cash, all up front. The same day, I sent a letter to  
89 Pat Kent, asking if we could meet to discuss our offer.

90 To my great surprise, he/she never responded to any of my overtures. Despite his/her  
91 silence, my advisors and I continued to pursue such due diligence as we could without his/her  
92 cooperation and, ultimately, we raised our offer to \$20 per share, which we said was our final  
93 offer. The premium we have offered to DAM stockholders is so attractive that I can't believe  
94 that the board won't allow the stockholders to make their own decision on whether they want to  
95 accept it.

96 In light of the fact that DAM's board of directors had adopted a poison pill, we knew that  
97 we would need to get court assistance to help us go through with the acquisition, if the board was  
98 not willing to negotiate a deal with us. Therefore, on September 1, 2007, we filed this lawsuit in  
99 the Court of Chancery, seeking an order requiring the board of directors to redeem the poison  
100 pill.

101 As part of its response, DAM has claimed that Aladin has ties to terrorists and that I am  
102 secretly working with my estranged brother Drew to promote terrorist activities. Nothing could  
103 be further from the truth. The last time I saw Drew was when he was just learning how to walk.  
104 After his mother took as much money as she could from my father in their divorce, neither she  
105 nor Drew ever returned to Aladin.

106 The suggestion that Drew is somehow tied to the prime minister of Aladin is just as  
107 ridiculous. One of the consequences of the fact that Aladin is an island is that it is very  
108 expensive to live and do business there, because of the obviously increased costs of



**Plaintiff's Witness Statement - Devereux Terry (Cont'd)**

109 transportation. The only way that the residents of the republic have managed to establish and  
110 maintain high standards of living is because of the fact that the government goes to great lengths  
111 to promote the stability of its government and its commitment to capitalism. The last thing that  
112 anyone tied to the government would want to do is create the impression of Aladin having ties to  
113 anyone associated with terrorism.

114 I have reviewed this statement this 8th day of May 2008. It is true and correct and I have  
115 nothing further to add.

116 /s/  
117 \_\_\_\_\_  
118 Devereux Terry

## Plaintiff's Witness Statement – Sammy Rodney

1 My name is Sammy Rodney. I am a member of the Deloitte Ernst KPMG Coopers, LLP  
2 accounting firm (otherwise known as the “Big One”). I am a Certified Public Accountant, and I  
3 have testified as an expert witness in numerous valuation matters. One of my previous cases  
4 involved a sale of Kim Woolley’s chicken farm (Woolley’s Chickens) to Edgar Townsend. I’ll  
5 never forget the smell of those hen houses when I did my own site visit. I could smell ‘em the  
6 minute I entered Sussex County. I now understand that Kim has a bad case of “seller’s  
7 remorse,” but all I can say is “I call them like I see them.”

8 I have been retained by the plaintiff in this case to consider whether, in my expert  
9 opinion, it is unlikely in the coming years that DAM’s market price (\$10.50 per share prior to the  
10 initial tender offer, and in the range of \$10-\$12 during the year preceding the tender offer) will  
11 ever approach the current MESS offering price of \$20 per share.

12 In my expert opinion, there’s *no* way that the historically weak market price of DAM  
13 stock will *ever* approach the *very* generous price offered by MESS.

14 The basis for my opinion is three-fold. First, as the Stock Price History (Exhibit 3)  
15 demonstrates, there was a dramatic (\$22 per share to \$12 per share) drop in the value of DAM  
16 stock after the attacks of September 11, 2001. The stock has never rebounded. Instead, it inched  
17 up to a high of \$13 per share in 2002, followed by a steady decline, to a low of \$10 per share in  
18 2005 and 2006.

19 Second, after the first tender offer of \$16 per share was announced, the market price of  
20 DAM stock only moved 50¢ -- from \$10.50 to \$11.00! And, when the already-generous \$16  
21 offer was increased by \$4 in the face of *silence* from DAM and its so-called “board of directors,”  
22 the market price moved up only another 50¢ -- to \$11.50! In my opinion, this pathetic market

### Plaintiff's Witness Statement – Sammy Rodney (Cont'd)

23 reaction to the tender offer is significant and reflects how little confidence the market has in  
24 DAM's potential.

25 Third, my Valuation Analysis (Exhibit 2) shows that even MESS's \$16 per share offer  
26 was more than fair to DAM's shareholders when the per share sale prices of companies in  
27 comparable lines of business are considered. For instance, California Port, Inc. sold three years  
28 ago for \$14 per share and Florida Port, Inc. sold two years ago for \$12 per share – a clear  
29 downward trend for maritime shipping businesses. It's true that Texas Port, Inc. sold last year  
30 for \$25 per share after its shipping lanes were dredged, but that company is handling a highly  
31 specialized commodity (those authentic Texas Hold'em cards), and I believe that to be the reason  
32 for the higher sale price. Conversely, *air* transport businesses have continued to outstrip the  
33 maritime businesses in value. Witness the sale of Eastern Air Transport, Inc. in 2004 for \$20 per  
34 share and the sale of Western Air Transport, Inc. a year later for \$25 per share. I know that  
35 Southern Air Transport, Inc. sold last year for only \$18 per share, but I can only assume that the  
36 company got some bad advice and was sold on the cheap.

37 And now MESS has *increased* its offer to \$20 per share for the stock of DAM!

38 How can *anyone* realistically believe that *this* Company is going to do anything other  
39 than just die on the vine? As Gordon Gekko said in the movie *Wall Street* when describing a  
40 “dog” company, “if [DAM] ran a funeral parlor nobody would die.” Pat Kent may have his/her  
41 “Business Plan,” but it's hardly worth the paper it's printed on. I can't imagine anything that's  
42 more pie-in-the-sky! Pat is wildly enthusiastic about the hoped-for dredging of the shipping  
43 lanes. But doesn't the prospect of bigger ships bring with it the prospect of bigger shipping  
44 disasters? Massive oil spills? And how could the “Plan” be more speculative, when the

**Plaintiff's Witness Statement – Sammy Rodney (Cont'd)**

45 dredging would require cooperation on the part of the Army Corps of Engineers, funding, and  
46 regulatory approvals, and when the retrofitting of the Company's facilities at the Port of  
47 Wilmington would require funding, approvals, and more employees? I've heard from more than  
48 one reliable source that Pat already has been turned down for funding. I've also reviewed stock  
49 analyst reporting, including from Zacks Investment Research, that indicate clearly that DAM's  
50 strategic plans are bigger than its financial britches can handle. Moreover, even if Pat's "Plan"  
51 could ever be even partially successful, he's/she's suggesting a ten-year rollout of the Plan, by  
52 the end of which he'll/she'll be 75 years-old!

53         What a wonderful opportunity all of DAM's stockholders (including founder Pat Kent)  
54 now have – to take the money and run! And the Company's retirees can now sleep peacefully,  
55 knowing that healthcare and other benefits will be secured!

56         And I'm no "terrorism" expert, but come on! Some loser Osama Bin Laden wanna-be,  
57 who has had nothing to do with the family of the President of Aladin, should stand in the way of  
58 this great acquisition? It just isn't right. It just isn't the American way!

59         Besides, I've visited Aladin in performing accounting services for MESS. Contrary to  
60 the testimony of Chris Read, my commercial airline flights were never limited to takeoffs and  
61 landings during daylight hours in Aladin. And, in reviewing the financial records of MESS, I  
62 never saw any evidence of any payments to terrorists!

63         Finally, it's my pleasure to serve as an expert witness in this case. My charge for doing  
64 so (and for preparing the Stock Price History and the Valuation Analysis) is \$500,000 no matter  
65 the outcome of the case. Companies like MESS are willing to pay my fees for the work I do

**Plaintiff's Witness Statement – Sammy Rodney (Cont'd)**

66 because I'm worth it—plain and simple. The fee I receive here will represent about half of my  
67 gross income for the year.

68 I have reviewed this statement this 8th day of May 2008. It is true and correct and I have  
69 nothing further to add.

70 /s/  
71 Sammy Rodney

### **Plaintiff Witness Statement of Erin Sussex**

1 My name is Erin Sussex. I am 59 years old and live in Wilmington, Delaware. I am  
2 single; my long-time companion (Lee) passed away two years ago. I have eight grandchildren.

3 I graduated from Wilmington High School in 1966. After graduation, with the help of  
4 my father, I got a job at the Port of Wilmington as an employee of Delaware Auto & Marine  
5 Corporation (“DAM” or the “Company”), where I have been employed for the past 40 years. I  
6 retired six months ago. Several of my children now work at DAM. I could have stayed on  
7 longer, but I felt as if I had enough money to make it through my retirement years. After all, I  
8 figured it was time to live a little and to start scratching some things off my “bucket list” if you  
9 know what I mean.

10 When I first started working at DAM, I was an office worker and did pretty much  
11 whatever my boss told me to do. I did a lot of errands and clerical work, but I yearned to work  
12 out on the docks where it looked more interesting loading and unloading cargo from ships  
13 around the world. Eventually, I was able to join the dock workers union and started to make  
14 pretty good money, about \$6.00 per hour when I first joined. When I retired I was making about  
15 \$75 per hour.

16 Let me tell you a little about the Port of Wilmington. The port is a full service port that  
17 handles over 400 vessels per year. The Delaware River is one of the busiest waterways in the  
18 United States for international shipping. The port occupies approximately 300 acres of land and  
19 has almost a half-dozen warehouses, two of which are temperature controlled. The port sits  
20 approximately 3 1/2 miles from downtown Wilmington, Delaware, and has easy access to rail  
21 lines and Interstate 95. The port is a deep-water port and can handle large cargo ships; the  
22 limiting factor, however, is the depth of the Delaware River. It is not deep enough to

**Plaintiff's Witness Statement - Erin Sussex (Cont'd)**

23 accommodate "super-class" cargo ships. There has been talk of dredging the River to permit  
24 access to the port by this super-class of ships, but I don't know where that stands now.

25 My title was "warehouse foreman." As a warehouse foreman, I directed the storage of  
26 off-loaded cargo into warehouses if storage is required before it is picked up by trucks or rail for  
27 delivery. Most off-loaded cargo is shipped within hours or a day or two of delivery, but  
28 sometimes we need to warehouse cargo until it can be trucked to another location. At the Port of  
29 Wilmington, we import fruit from South America, automobiles from Europe, and occasionally  
30 shipments from the Far East of consumer products, which can include anything from sneakers to  
31 household electrical products, such as TVs, DVD players and indoor fans. Last year we got a  
32 whole boat load of Texas Hold'em cards—we're hoping to steal some of that business from the  
33 Port of Texas.

34 Ever since I started working for DAM, I invested in the stock of the Company whenever I  
35 had a few extra dollars. Some years I only invested \$100 a year, but other years I sank almost  
36 \$1,000 into DAM stock.

37 I knew it was a good Company, as I occasionally would run into Pat Kent on the docks  
38 and we would chat. Good person, that Pat, down to earth and someone whom I knew I could  
39 trust. Pat was always looking out for us, even though we carried a union card. Pat took great  
40 pride in the Company, and he/she once told me that he/she looked after it like it was one of  
41 his/her children. He/she also once told me that he/she would never sell DAM, no matter what  
42 the price.

43 Although I like Pat as a person, I think the board of directors is breaching its fiduciary  
44 duty to the stockholders by stonewalling on this MESS takeover. Who are they to say the

**Plaintiff's Witness Statement - Erin Sussex (Cont'd)**

45 stockholders should be denied the opportunity to obtain a premium for their stock? My stock in  
46 DAM represents 90% of my life savings. At \$20 per share (the amount of the MESS offer), I  
47 stand to make almost \$150,000 over the market price of my DAM stock. With that money, I  
48 could retire comfortably and might still have some left to help with my grandchildren.

49         There is another reason I need the money. My granddaughter suffers from a rare genetic  
50 disease that has stunted her growth. There is an experimental drug that her doctors believe may  
51 enable her to grow another 3” - 5” above what the doctors believe will be her maximum height of  
52 four feet (without the drug). This drug is extraordinarily expensive, costing about \$10,000 per  
53 year, and she will need to take it for 2 - 3 years until she stops growing. Because it is considered  
54 an “experimental” drug, her parents’ insurance company won’t pay for the prescription and her  
55 parents cannot otherwise afford it. (They both work at DAM too.) What a wonderful gift to a  
56 child in need; if only I had the money.

57         I don’t buy the notion that selling the Company to MESS presents a security concern. I  
58 worked for DAM for 40 years and we never had a security-related problem. Well, almost never.  
59 There were a couple of times when some kids jumped the fence, broke into a warehouse and  
60 stole some sneakers. But then we got security dogs, which sleep in the warehouses. That did the  
61 trick.

62         The only other security incident I recall is getting a nasty case of fire ants that must have  
63 come in on a shipment of bananas from South America. The bananas sat in the warehouse for a  
64 day or two, and the next thing we knew the warehouse was teeming with fire ants. Customs  
65 agents and bioterrorism authorities were called in to handle the problem.



**Plaintiff's Witness Statement - Erin Sussex (Cont'd)**

66 I should also mention that DAM now requires that every employee carry an identification  
67 card which has our picture on it and which provides electronic access to the yard and  
68 warehouses. This system has worked well and seems to prevent unauthorized persons from  
69 entering the premises. I will admit that employees sometimes lose their cards and then borrow  
70 their friend's cards to gain access. Additionally, on occasion, I have used my kids' identification  
71 cards to visit old friends at DAM since I retired. But there can be nothing wrong with that,  
72 everybody there knows me and I would never do anything that poses a security risk.

73 I know Jamie Newcastle, who I understand is a witness for the defendants. I have known  
74 Jamie for a long time and, frankly, I was shocked when Jamie was appointed head-of-security at  
75 DAM. Back in the old days pilfering was a bit of a problem. It doesn't happen anymore, thanks  
76 to Jamie, or at least that's what Jamie would have us believe. The funny thing is, a couple of  
77 years ago, we had a bunch of new Sony TVs sitting in the warehouse for a few days. I later went  
78 over to Jamie's house for a Super Bowl party, and there sitting in the family room is the same  
79 make and model. I asked Jamie where the TV came from; Jamie tells me "Sears." I happened to  
80 be in Sears a few days later, and, curious to see how much Jamie paid, I asked the salesman to  
81 see that model, and he tells me, "not in stock; hasn't shipped yet." I think we all know where  
82 Jamie got the TV. I never said anything because I did not feel comfortable squealing on a fellow  
83 dock worker.

84 Lastly, when I first heard about the MESS proposal, I e-mailed Pat Kent, thinking that, as  
85 a long-time employee, Pat would level with me about whether the offer was serious or not and  
86 whether the board would consider selling the Company. Pat did not reply, but Pat's assistant  
87 sent me a reply, which is attached as Exhibit 6.



## **Defense Witness Statement of Pat Kent**

1           My name is Pat Kent. I am 65 years old and am the founder of Delaware Auto & Marine  
2 Corporation. I fondly refer to the Company as “DAM.”

3           I started DAM more than 40 years ago – in 1965 – when I barely had two nickels to rub  
4 together. The Company began as a small marine cargo operation at the Port of Wilmington,  
5 trying to build on the rich history of shipping and shipbuilding in the Wilmington area. And it  
6 made all the difference that the U.S. military was involved in the Vietnam conflict and needed  
7 some extra civilian “shipping” help! Boy, was I grateful for that good old American support!

8           Before we knew it, the business was thriving. We thought about expanding to the ports  
9 of New York City, Baltimore, and Newport News, Virginia but it would have been too much for  
10 me to handle; admittedly, I am a “micromanager.” But we always operated as a family, with  
11 most of our employees becoming owners of the business. In 1985, we “went public,” with our  
12 initial public offering of stock. The IPO was very successful, with the stock selling for \$5.00 per  
13 share, and the stock has actively traded on the New York Stock Exchange ever since. From 1985  
14 through 2000, we saw a wonderful, steady increase in the value of the stock – from \$5.00 per  
15 share to a high of \$22.00 per share!

16           I’ve always been President and Chief Executive Officer of DAM. I own 40% of the  
17 Company’s stock, and the other 60% is owned by many institutional and individual investors. In  
18 fact, I’m proud to say that many of our first employees are still stockholders!

19           DAM has a board of directors with five members – four directors in addition to myself. I  
20 serve as chairperson of the board. Three of our five directors, Charlie Kent (my brother), Perry  
21 White (my cousin), and Lois Lane (my accountant), have no affiliation with the Company  
22 whatsoever other than serving as directors. The other director is Clarke Kent, my son. The

## Defense Witness Statement - Pat Kent (Cont'd)

23 whole board is so terrific. I can't imagine a group more committed to the best interests of the  
24 Company and its stockholders. The thought that I could influence how they would vote on  
25 matters affecting DAM is utterly preposterous.

26         It is a fact that, in the last few years, DAM's stock price hasn't been what it *should* be –  
27 and certainly hasn't been what it *could* be. We've seen some stiff competition from air  
28 transportation of cargo since the attacks of September 11, 2001, and we've been facing higher  
29 retiree and other costs. Need to be sure that we take care of the family!

30         In January of last year, the other directors and I were concerned that the Company, with  
31 its temporarily-low stock price, might be ripe for the picking by someone who wouldn't care  
32 about what I – we – had built over the many years. So, with our lawyers' advice, we put in place  
33 a "poison pill" for everyone's benefit.

34         About eight months later, in August of last year, sure enough, Mid-East Stevedores came  
35 after us! Now, I've got nothing against foreign companies or foreign countries, but MESS is a  
36 foreign company owned by a foreign country! And, from what I'm told, the brother of the  
37 company's president is a known terrorist!

38         So MESS launched in our direction its \$16 per share "tender offer." Well, it may have  
39 been an offer, but it wasn't tender. They wanted to hijack our company – our family of more  
40 than 40 years – for some measly extra few bucks above what the stock had been trading at!  
41 How could the board justify giving up all that we had worked for, and when the Company still  
42 has such a bright future? And sell the Company to a terrorist-harboring country? Never! Every  
43 American should be outraged by this.

44         MESS then raised its offer to \$20 per share, saying that this is its "final offer." First of

### Defense Witness Statement - Pat Kent (Cont'd)

45 all, I don't believe that this is the final offer! I mean, how in the world can that group be trusted?  
46 But, more importantly, this Company is *not for sale*. The board of directors has never put it up  
47 for sale, and our best days are to come. In fact, I see them on the horizon now and I have a  
48 Business Plan (Exhibit 1) to move us from "good to great"! (Dredging of the shipping lanes of  
49 the Delaware River will allow for bigger and better ships to visit our key port, and I heard  
50 recently from someone who had heard that the Army Corps of Engineers is really enthusiastic  
51 about the dredging project!) It is true, by the way, that I haven't yet had any luck in putting out  
52 "feelers" for funding to support the Business Plan, but I'm sure that the funding will come  
53 through. In fact, one of my banker friends told me that he just needed to get beyond some "bad  
54 loan" write-offs from other customers this year and he could then talk with me again about what  
55 I have in mind. The bottom line: My company is my only focus and I care about it deeply. For  
56 MESS, we would be just one of many ports, and I have grave concerns that they want us for the  
57 wrong reasons.

58 I know that Erin Sussex and some other stockholders (those who own just over one-half  
59 of the stock that I don't own) think that the time may be right to sell out. And I think the world  
60 of Erin! But how can we be assured that *new* owners would take care of our treasured long-time  
61 employees? And how do we know that even the \$20 per share would *begin* to truly represent the  
62 long-term potential of our beloved Company? If it's a fight that MESS wants, it's a fight that  
63 they'll get! I'm sticking a flag in what I've built here and I'm going to defend it come what may.

64 Finally, I wouldn't believe anything that this smooth-talking "expert" Sammy Rodney  
65 has to say. My long-time friend, Kim Woolley, hired Sammy years ago to help sell Kim's  
66 business. To say that Sammy committed malpractice with the so-called "valuation" of that

**Defense Witness Statement - Pat Kent (Cont'd)**

67 business would be an understatement! Kim tells me that Sammy so under-valued that business  
68 that it may as well have been put up for a “fire sale.” And then Sammy added insult to injury by  
69 charging Kim about \$1 million for the “expert” help. Of course Kim couldn’t *prove* that Sammy  
70 did anything wrong since, according to Kim, Sammy had already shredded all of the work papers  
71 and deleted all of the e-mails to and from the buyer of the business! And I think I heard  
72 somewhere that the buyer was Sammy’s brother-in-law, Edgar Townsend.

73 I have reviewed this statement this 8th day of May 2008. It is true and correct and I have  
74 nothing further to add.

75 /s/  
76 Pat Kent

## Defendant's Witness Statement of Chris Read

1 My name is Chris Read. I am a managing director of CH Enterprises, Inc. CH  
2 Enterprises, Inc. provides consulting services concerning issues of national security.

3 I received my B.A. in international relations, with minors in German and Arabic from the  
4 University of Massachusetts. After college, I was recruited by the External Defense Agency.  
5 The External Defense Agency is an intelligence gathering department of the United States  
6 government which has authority to operate both within and outside the borders of the United  
7 States. Due to my language skills, I was given an undercover position with the agency. I went to  
8 the EDA training school at Camp Harrington to receive specialized training for that work. My  
9 official cover was as an employee of the United States Department of State. I am able to  
10 disclose publicly the fact that I formerly served in an undercover capacity because I was publicly  
11 named by a reporter who had learned my identity from a White House staffer. I guess my  
12 husband/wife shouldn't have written that Op. Ed. piece endorsing the President's opponent in the  
13 upcoming election. Once I retired from the EDA, I formed CH Enterprises, Inc.

14 In my twenty years with the EDA, I spent most of my time living and working in Europe  
15 and the Middle East. My assignments were to develop as much intelligence as possible about  
16 possible terrorist activities targeted at the United States and its allies.

17 I have first-hand knowledge of the psychological and physical impact of terrorist activity.  
18 Several years ago, I was involved in an operation in Germany. One of my colleagues and I had  
19 made contact with an ex-girlfriend of a member of a terrorist organization. Through the  
20 information we were able to gather from her, we were very hopeful that we could discover not  
21 only the names of other members of that organization, but also the identities of those financing  
22 their operations. My colleague, Ken Miller, had attended Camp Harrington with me and we had

### **Defense Witness Statement –Chris Read (Cont'd)**

23 worked closely together for many years. We had become such close friends that on the rare  
24 times when we were able to go on vacation, we usually went together.

25 On one particular morning, I was supposed to meet Ken for breakfast and we were going  
26 to drive together to a meeting with our informant. However, when Ken got up that morning, he  
27 realized that his car battery was dead, so rather than driving to meet me, he took public  
28 transportation to my apartment. It was a very cold morning, and Ken offered to go out to warm  
29 up the car while I finished getting ready. I have always regretted that I accepted his offer. Inside  
30 the apartment, I heard a terrible explosion and ran outside to see that my car had exploded, with  
31 Ken inside. Eyewitnesses who were down the street said that he got in the car, closed the door  
32 and seconds later, the explosion occurred.

33 The subsequent forensic analysis determined that the car bomb was set to explode when  
34 the ignition was turned on. Clearly, the bomb was intended for me, since I live alone and no one  
35 would have expected that anyone else would have started the car. I had already planned to make  
36 the prevention of terrorism my career, but I vowed then to spend the rest of my life tracking  
37 down and helping to stop terrorists.

38 I have also lived in various countries in the world where terrorism is a daily occurrence.  
39 More than once, I have been nearby when suicide bombers have exploded their devices on buses  
40 or in public meeting places. I have been fortunate enough only to suffer minor physical injuries  
41 on those occasions.

42 In recent years, I have become increasingly worried about the possibility that terrorists  
43 will be able to undertake activities in the United States. One of the great joys about retiring from  
44 the EDA and moving back to the United States has been the ability to observe people who are



**Defense Witness Statement –Chris Read (Cont'd)**

45 able to go about their daily lives without having to worry about whether they are about to  
46 become victims of terrorist attacks. I am doing everything I can to make sure that nothing  
47 happens to change that way of life.

48         During the course of my activities, I have become aware of facts that show that the so-  
49 called republic of Aladin has close ties to known terrorists. I have relied upon information from  
50 confidential sources and our own intelligence data in reaching my conclusions regarding  
51 Aladin's ties to terrorism. Intelligence analysts like me typically rely on this kind of information  
52 in assessing security risks generally and terrorist activities specifically.

53         I have flown into Aladin's national airport on many occasions. Aladin's national airport  
54 only allows commercial and general aviation takeoffs and landings during daylight hours. The  
55 articulated reason is for safety, since the runway ends in the Arabian Sea. (Attached as Exhibit 7  
56 is a satellite photo of the airport that I directed to be taken in advance of a reconnaissance  
57 mission.) As you can see from the photo, however, the runway is plenty long. Any competent  
58 commercial pilot could negotiate this runway day or night. During the course of the mission that  
59 I led in late 2006 (recently declassified for Senate intelligence hearings), I was able to access  
60 airport take-off and landing logs, leases and other official records, all of which were kept under  
61 lock and key in the airport's heavily guarded business office. These records reflected the  
62 occupancy of various airport facilities and the flight traffic patterns at the airport. Now that the  
63 mission has been declassified, I was able to secure (during pretty intense interrogation relating to  
64 another matter utilizing only approved and authorized EDA techniques) a certification from the  
65 records custodian of the airport that the records I reviewed exist, that they were genuine, that  
66 they were made at or near the time of the events recorded therein, and that they were maintained

**Defense Witness Statement –Chris Read (Cont’d)**

67 in the ordinary course of the airport’s business and made as part of the airport’s regular practice.  
68 Needless to say, the custodian was none too happy to learn that we had been snooping around his  
69 records but eventually he knew and understood what he had to do. What can I say, I’m a spy and  
70 my mission was a matter of national security. Based on my review of the airport records, I  
71 learned that one of the hangars at the airport is devoted exclusively to aircraft owned by entities  
72 that are well-known in the intelligence community and by me personally to be associated with  
73 terrorist organizations. I also discovered that those aircraft are allowed to use the airport  
74 facilities for night operations even though other aircraft of similar sizes were restricted to day  
75 time operations. Although I do not have the records themselves (for obvious reasons), I do have  
76 the certification from the records custodian. (See Exhibit 8.)

77         The common stock of Aladin’s largest commercial bank is 21% owned by Aladin itself.  
78 One of the vice-presidents of that bank, who has been a trusted and past proven reliable source of  
79 mine for the last twenty-three years, has shown me records indicating that millions of dollars are  
80 on deposit with that bank in the name of known terrorist entities. Needless to say, in my line of  
81 work, we regularly rely upon information from reliable confidential informants to assess and  
82 reach conclusions about threats to national security. (See Exhibit 8.)

83         Property records in Aladin, which reflect both ownership information and property  
84 descriptions, are publicly available and I learned through my examination of those records that  
85 the prime minister of Aladin owns a retreat at the southern tip of the island, to which private  
86 access is available through use of a private airstrip or a protected inlet. During one of my  
87 reconnaissance missions, I observed directly and was able to take a picture of the prime minister  
88 at that retreat in the company of Drew Terry, an admitted terrorist. My copy of that photograph

**Defense Witness Statement –Chris Read (Cont'd)**

89 was stored on my camera phone. After taking the picture, I realized that I should leave the  
90 country right away, and I returned to the United States via London. My flight to the U.S. was on  
91 August 11, 2006, right after the authorities uncovered a plot to explode devices on transatlantic  
92 flights. As a result of the plot, the airlines required all passengers to place all carryon items in  
93 plastic and put them through checked luggage. When I went to the luggage carousel in New  
94 York, I was never able to find my phone, and I presume it must have been stolen (as were the  
95 possessions of many other passengers that day).

96 The prime minister of Aladin has always publicly proclaimed his distaste for terrorist  
97 activities and has always claimed that the country of Aladin will not tolerate or support any  
98 terrorists or organizations with ties to terrorism. In particular, he has gone out of his way to  
99 condemn publicly Drew Terry. When asked about Drew Terry by reporters, he has always stated  
100 that they have never met. He reaffirmed this just last month, well after the time that I took the  
101 photograph of him with Drew Terry. Needless to say, the prime minister's public statements  
102 simply were not true.

103 Drew Terry was born in Aladin. However, his mother and he moved out of that country  
104 when he was very young, and he was raised in various countries around the world. He is  
105 rumored to speak a dozen languages. When he was a young man, he became involved with  
106 various terrorist organizations. He often works alone and undertakes operations that permit him  
107 to blend into his surroundings and escape after he commits his atrocities. When I left EDA, he  
108 had been linked to nineteen different terrorist incidents. The official casualty list from his  
109 activities was 413 dead and 973 injured. Since I left EDA, there have been several other  
110 incidents involving him, with similarly devastating results.

**Defense Witness Statement –Chris Read (Cont’d)**

111           Drew Terry is the youngest brother of Devereux Terry, the President of MESS. I am  
112 aware that “Dev” claims that he/she has not seen Drew in many years and that Dev claims to  
113 have no ties to international terrorism, but I am aware of facts to the contrary. Indeed, I have  
114 known for twenty years that he/she harbors a deep hatred of the United States and its allies.

115           I first met Dev when we attended the same Delaware boarding school. Dev was very  
116 aloof from the other students, and made it clear that he/she would much rather be sailing around  
117 the world on one of his/her father’s yachts than “stuck,” as he/she put it, in Delaware with those  
118 of us who were not as sophisticated as he/she. Dev was very envious of my academic and  
119 athletic success at school, since his/her father’s money was not able to buy those achievements  
120 for him/her.

121           One of our classmates at school was Taylor Nicholson. Somehow, Dev figured out that  
122 Taylor’s father was employed by a close friend of Dev’s family. During our senior year, Dev  
123 went to Taylor and told him that unless he agreed to file a complaint with the Honor Council  
124 about me, he/she would make sure that Taylor’s father got fired from his job. Under that duress,  
125 Taylor filed a complaint, saying that I had cheated on an exam. The pressure of that lie  
126 eventually got to Taylor, and he quit school, refusing to perjure himself at the Honor Council  
127 hearing.

128           I had originally intended to apply to Harvard where Dev ended up attending, but once I  
129 realized why Dev had orchestrated the whole ploy, I withdrew my application, not wanting to  
130 have to run into Dev at college.

131           In the course of one of my assignments for the EDA, I had occasion to accompany a  
132 defector to an agency owned house for a debriefing session. By coincidence, the house was

**Defense Witness Statement –Chris Read (Cont'd)**

133 located next door to a house owned by one of my former boarding school classmates. As part of  
134 our routine security measures, we wiretapped the telephone lines of the neighboring houses. It  
135 was then that I overheard a conversation involving Dev, in which he/she openly confessed  
136 his/her hatred for our country and his/her desire to support terrorist activities.

137 Attached as Exhibit 4 is the transcript of that telephone conversation. I personally  
138 listened to the audio recording of the conversation and oversaw the transcription of the  
139 conversation.

140 My source at the bank in Aladin has also shown me records that show that wire transfers  
141 in the amount of millions of dollars from accounts held by MESS have gone to accounts in the  
142 Cook Islands held by organizations that have financed some of Drew Terry's activities. There is  
143 no way that financial transactions of that size could have taken place involving MESS bank  
144 accounts without the knowledge and consent of Dev Terry.

145 It is my opinion that both Dev Terry, the President of MESS, and the country of Aladin  
146 have material ties to an organization involved in international terrorism.

147 I have also been advised that the Army Corps of Engineers is about to announce that the  
148 Delaware River is going to be dredged to a sufficient depth to allow the largest ships in the world  
149 to dock at the port of Delaware. In my opinion as an expert on terrorism, I believe that it would  
150 be a threat to national security to allow a company such as MESS, with ties to international  
151 terrorism, to have unfettered access to the port, particularly when there will be no limit on the  
152 types of vessels that can dock there.

153 I have reviewed this statement this 8th day of May 2008. It is true and correct and I have  
154 nothing further to add.

**Defense Witness Statement –Chris Read (Cont'd)**

155  
156

/s/ \_\_\_\_\_  
Chris Read

## **Defense Witness Statement of Jamie Newcastle**

1           My name is Jamie Newcastle. I am 46 years old and am Head of Security at Delaware  
2 Auto & Marine Corporation (“DAM”). Starting out as a fork-lift operator, I worked my way up  
3 through the ranks at DAM and eventually decided that I wanted to work for security at DAM. In  
4 2004, I was appointed Head of Security in Wilmington after receiving a degree in criminal  
5 justice from Rodney College, which I attended at night.

6           Let me give you a little background about my Port. In 2006, more than a thousand  
7 commercial vessels entered or left the mouth of the Delaware Bay heading to or returning from  
8 foreign nations. More than four hundred vessels were unloaded or loaded at our Port carrying an  
9 import/export tonnage in excess of 4 million tons. In addition, we have berthed passenger  
10 vessels such as the MV Twin Capes and other vessels of the Cape May – Lewes Ferry fleet, each  
11 of which carries up to 100 vehicles and 1000 passengers. We have also hosted tall ship regattas,  
12 provided a temporary home to Delaware’s tall ship (the Kalmar Nykel), and acted as host to  
13 naval vessels from this country and abroad. Suffice it to say, we are a very busy Port; security is  
14 and has to be a top priority for us. When I think of what happened when those terrorists blew a  
15 hole in the USS Cole while docked at the Port of Aden in Yemen I just cringe. I also get very  
16 angry.

17           I don’t know much about foreign policy or this country called Aladin, but I do know  
18 about port security, and in my opinion MESS’s acquisition proposal presents a “clear and present  
19 danger” to the United States. By the way, I like Tom Clancy novels and have read all of them.

20           Security at the Port of Wilmington is comparable to security at the other East Coast ports.  
21 Our first line of defense is the Coast Guard. To my knowledge, however, the Coast Guard only  
22 does random checks of vessels entering and leaving the mouth of the Delaware Bay in Southern

## Defense Witness Statement - Jamie Newcastle (Cont'd)

23 Delaware. As I mentioned, in 2006, more than a thousand commercial vessels entered or left the  
24 mouth of the Delaware Bay headed to or returning from foreign nations. Obviously, that's a lot  
25 of ships. There are Coast Guard stations located at or near Cape May, New Jersey and Lewes,  
26 Delaware. On average, there are just two Coast Guard vessels devoted to making random checks  
27 of vessels entering and leaving Delaware Bay.

28         In 2006, only one out of every twenty vessels passing through was randomly checked and  
29 inspected by the Coast Guard. This means that a vessel loaded with contraband stands only a 5%  
30 chance of being stopped; the chances that the Coast Guard would actually discover an illegal  
31 substance, device, or other contraband in the course of a spot check are probably well below  
32 50%.

33         Once a vessel arrives in the Port of Wilmington, we also conduct random, visual  
34 inspections of the cargo-holds and containers. Typically, we inspect two to three arriving vessels  
35 per week and, in each instance, we usually check four to five containers on each of those vessels.  
36 Containers are those big boxes you see stacked on cargo ships and then carried by rail or trucks.

37         I have been told that if MESS acquires DAM, it has promised to install a scanning device  
38 that is currently under review by the Homeland Security Department. That device works as  
39 follows: either a truck or a cargo container passes through a garage-like gamma ray detector,  
40 which produces an image (similar to an x-ray) of what is inside the container; video cameras and  
41 an optical character recognition device capture the numbers on the container; a radiation monitor  
42 then scans the container. All of this data is then displayed on a computer screen and stored for  
43 later use. And, by the way, this device would cost over \$100 million to install and operate. Even  
44 if MESS employed this state-of-the-art scanning system, it is my opinion that such a system



## **Defense Witness Statement - Jamie Newcastle (Cont'd)**

45 would not prevent hazardous materials or weapons from being off-loaded in Wilmington. This is  
46 particularly so if the operation of the scanning device isn't really looking for dangerous cargo.  
47 Currently, there is no such system for x-raying containers at the port. We do have dogs at the  
48 port that are trained to sniff out explosives, drugs and other contraband.

49 Over the years there have been a couple of potential security breaches at the port. A  
50 couple of years ago, when I was still a fork-lift operator, I accidentally dropped a pallet of VCRs  
51 and Sony TVs. In cleaning up the broken crates we discovered a stash of Russian-made pistols.  
52 All of the TVs and VCRs had to be thrown out. What a shame—I love Sony products (I'm a  
53 proud owner of a Sony myself). An investigation revealed that they likely had been placed in the  
54 container when the vessel was loaded in Hong Kong.

55 Then there was the time in the late 1990s when the dogs sniffed out an unmarked box of  
56 dynamite in one of the warehouses. We called the bomb squad in, and they disposed of it. There  
57 were rumors that it may have been brought into the warehouse by one of our own dock workers,  
58 but the source was never determined, as far as I know.

59 These kinds of incidents (and my criminal justice training) lead me to believe that every  
60 container coming into the port is a potential "Trojan horse." Terrorists could hide a dirty bomb  
61 in a cargo container and, the next thing you know, it could be headed for a major U.S. port. Like  
62 I said, the chances of detecting it before entry to the port are pretty slim.

63 Despite my best efforts, employees at DAM tend to overlook and often ignore security  
64 measures. No one thinks that a breach will occur on their watch, and some employees are just  
65 downright careless. Sadly, too much time has passed since 9/11 and we have let our guard down.

**Defense Witness Statement - Jamie Newcastle (Cont'd)**

66 Take Erin Sussex's kid, for example. I don't know how many times I have reprimanded young  
67 Sussex for allowing others to use his/her identification card.

68 I have worked hard to maintain the best possible security at the port. Thanks to my  
69 efforts, DAM has received very favorable comments from a consultant retained to evaluate and  
70 recommend security at the port. The consultant's report is attached as Exhibit 5. Suffice it to  
71 say, security is a top priority at DAM. Given MESS'S alleged ties to terrorism, I have little  
72 doubt that security will no longer be a top priority at the Port of Wilmington should MESS  
73 succeed in its takeover battle.

74 There is one last thing I should say about the MESS acquisition proposal. Because of the  
75 big stink about security issues, MESS has made a point of saying that it intends to have  
76 federally-trained security workers at DAM, like the TSA employees at airports. That does not sit  
77 well with me; why should it, it basically means I'm out of a job if the Company is acquired.

78 I have reviewed this statement this 8th day of May 2008. It is true and correct and I have  
79 nothing further to add.

80 /s/  
81 Jamie Newcastle

**BUSINESS PLAN  
DELAWARE AUTO & MARINE CORPORATION**

- I. Goal:** Move Delaware Auto & Marine Corporation from “Good” to “Great”!
- II. Time Period:** 2007 to 2017
- III. Action Steps**
  - A. Support dredging of shipping lanes in Delaware River
    - 1. Secure participation of Army Corps of Engineers
    - 2. Obtain approvals from Delaware and New Jersey authorities
    - 3. Initiate and complete dredging
  - B. Retrofit facilities at Port of Wilmington to accommodate larger ships
    - 1. Secure funding from banks and/or venture capitalists (approximately \$100 million)
    - 2. Obtain zoning and environmental approvals from state and local authorities for berth reconstruction
    - 3. Initiate and complete reconstruction
  - C. Hire additional employees
    - 1. Secure funding
    - 2. Identify prospective hires
    - 3. Hire employees

**EXHIBIT 2**

**DELOITTE ERNST KPMG COOPERS, LLP  
VALUATION ANALYSIS  
SALE OF COMPANIES  
IN COMPARABLE LINES OF BUSINESS**

<b><u>Company</u></b>	<b><u>Year of Sale</u></b>	<b><u>Price Per Share</u></b>
California Port, Inc.	2004	\$14.00
Florida Port, Inc.	2005	\$12.00
Texas Port, Inc.	2006	\$25.00
Eastern Air Transport, Inc.	2004	\$20.00
Western Air Transport, Inc.	2005	\$25.00
Southern Air Transport, Inc.	2006	\$18.00

**EXHIBIT 3****STOCK PRICE HISTORY  
DELAWARE AUTO & MARINE CORPORATION  
1985 TO DATE**

<b><u>DATE</u></b>	<b><u>PRICE PER SHARE</u><sup>8</sup></b>
[Jan. 2, 1985	\$5.00 per share at time of IPO]
1986	\$5.00 - \$6.00
1987	\$6.00 - \$7.00
1988	\$7.00 - \$8.00
1989	\$8.00 - \$9.00
1990	\$9.00 - \$10.00
1991	\$10.00 - \$11.00
1992	\$11.00 - \$12.00
1993	\$12.00 - \$13.00
1994	\$13.00 - \$14.00
1995	\$14.00 - \$15.00
1996	\$15.00- \$16.00
1997	\$16.00 - \$17.00
1998	\$17.00 - \$18.00
1999	\$18.00 - \$19.00
2000	\$20.00 - \$22.00
2001	\$12.00 - \$20.00 (drop to \$12.00 after Sept. 11, 2001 attacks)
2002	\$12.00 - \$13.00 (slighter, slower rise)
2003	\$11.00 - \$12.00 (slighter, slower rise)
2004	\$10.50 - \$11.50 (slighter, slower rise)
2005	\$10.00 - \$12.00 (slighter, slower rise)
2006	\$10.00 - \$12.00 (slighter, slower rise)
July 31, 2007	\$10.50
[Aug. 1, 2007	Mid-East announces \$16 per share tender offer]
Aug. 2, 2007	\$11.00
[Sept. 1, 2007	Mid-East raises offer to \$20 per share]
Sept. 2, 2007	\$11.50

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<sup>8</sup> As traded on the New York Stock Exchange.

External Defense Agency

FILE # 142876-OFG2

Security Measures - Wilmington Safe House

**CONFIDENTIAL**

THE FOLLOWING TELEPHONE CALL WAS MADE BY DEVEREUX TERRY TO TELEPHONE NUMBER [REDACTED] AT APPROXIMATELY 10:37 P.M. ON OCTOBER 14, 1998, FROM A PRIVATE TELEPHONE AT THE HOME OF JOHN AND LAURA BLACKBIRD IN WILMINGTON, DE.

TERRY: Hello [unintelligible] - It's Dev - how are you?

UNKNOWN: I'm doing well, my friend. It's good to hear from you.

TERRY: Yeah, I'm sorry it's been so long - things have been pretty busy at work. I'm actually thinking of heading back to Aladin soon. I miss my father...and my country.

UNKNOWN: How is your family?

TERRY: My father is doing alright, and is getting used to being a bachelor again. He still misses my mother. I still miss her too.

UNKNOWN: Of course you do. I know you're still emotional. It must be hard to know that she sent you away so you wouldn't have to see her in the last few weeks of her life! [unintelligible] but I know that I wouldn't have been able to forgive her for that.

TERRY: I know, I know - but she was my mother! The one thing that really burns me up is that she sent me to a western country at all. And the US - could it get any worse? The one country in the world that throws its weight around like a bull in a china shop - only they should know better. They know what it is to be under the thumb of another country, and they fought their way out of it. This country looks at us and thinks only how best to exploit us. Well the tides are turning, my friend. I've been paying attention to the news lately, and all around the world you can see organizations begin to stand up to them. I wouldn't be surprised if someone decided it was time to attack right at the heart of the enemy, here in the U.S.

UNKNOWN: Do you really think so? That someone will attack the U.S.?

TERRY: Well, I'm not going to say that I have any solid information, but it certainly would bring me great pleasure if it did happen. I've lived here since I was 14, and each day the hatred grows. It's becoming close to unbearable.

UNKNOWN: Then why are you still staying? Why don't you go back to Aladin?

TERRY: I'm thinking of doing that, but as much as I hate this country, I still need to learn more about it. If I am going to run my father's company after him, I need to know the available markets and need to be able to [unintelligible - static bursts - 30 seconds]

UNKNOWN: ...then you won't be going back any time soon?

TERRY: I really just don't know. I haven't talked to my father much about it, but I know he wants me to come back eventually.

UNKNOWN: How does he feel about you being in the U.S.?

TERRY: He's always been so misguided about American foreign relations - he only sees them as trying to help, not as being a destructive force. Sometimes it's tough to talk to him about it. Anyway, I'm coming to see you next week, if that is ok.

UNKNOWN: Sounds good. I'll [unintelligible] talking to you.

TERRY: okay, bye.

END OF CALL

SEAFORD SECURITY CONSULTANTS, LLC

TO: Jamie Newcastle, Head of Security  
FROM: Seaford Security Consultants, LLC  
RE: Evaluation and Recommendations For Delaware Auto & Marine Corporation  
DATE: July 2006

It was our pleasure to assist you in evaluating security measures at Delaware Auto & Marine Corporation (“DAM”). As you know, Seaford Security Consultants, LLC (“SSC”) is a worldwide provider of consulting services specializing in port and maritime security. At your request, our industry experts conducted a thorough review of DAM’s security measures and are pleased to provide you with this report.

Set forth below in Section I are specific criteria that we believe are essential to the provision of minimum security measures at all international ports-of-call. In Section II of this report, we have made certain recommendations that we believe will help DAM improve security measures. Finally, in Section III of this report, we have ranked DAM among its peer group of marine cargo terminal operators.

**Section I.**

A. Human Resources

1. Does terminal maintain full-time security force? Yes
2. Is security force experienced and trained in criminal justice? Yes
3. Is there a defined chain-of-command? Yes
4. Is there an auditing system in place to identify security breaches among security personnel? No



5. Is security force compensated competitively? Yes.

B. Facilities

1. Are the premises adequately fenced, making entry difficult absent major breach? Yes.
2. Is access to and from premises electronically recorded? Yes (by i.d. card and 24 hour surveillance).
3. Are the premises adequately lighted? Yes.
4. Are warehouses locked when not in use? Yes
5. Is all equipment inventoried? Yes.
6. Is use of employee i.d. card strictly enforced? No.

C. Security Equipment

1. Does facility employ x-ray scanning of off-loaded cargo? No.
2. Does facility check for radioactive substances? Random checks only
3. Does facility maintain temperature-controlled warehouses? Yes.
4. Does facility maintain sufficient equipment and personnel to inventory all off-loaded cargo? Yes.
5. Does facility maintain 24-hour surveillance and backup? Yes.
6. Does facility comply with U.S.D.A. regulations concerning imports? Yes.

D. Security Operations

1. Are the premises aggressively patrolled to provide a visible deterrent? Yes.
2. Is there adequate security training for security personnel? Yes
3. Is there a direct line of communication with local and state emergency authorities? Yes.
4. Are there fire fighting and EMT services on site? Yes, but limited.

## **Section II – Recommendations**

Overall, security measures at DAM are rated good to very good. In order to make DAM first-rate in terms of security and anti-terrorism measures, however, we recommend that DAM undertake the following: (i) Improper use of employee identification cards (mandatory): Based on interviews with employees at DAM, it appears that some employees have engaged in the practice of lending i.d. card to fellow employees and/or family members. This practice presents obvious and serious security risks and should not be tolerated. Employees engaging in this practice should be disciplined. (ii) Auditing system for security force – (optional): DAM should consider implementing an auditing system to ensure that security guards and personnel are not involved in activities that could lead to security breaches. We would be happy to discuss with you how such an auditing system can be implemented. (iii) Investment in X-ray equipment (optional): Although not currently required by state or federal law, x-ray equipment designed to detect devise metal objects is currently being deployed in ports around the world. A number of ports have also begun to deploy devices that can detect radioactivity in containers off-loaded from vessels. These devices require significant capital expenditure but provide state-of-the-art security.

## **Section III – Company Rankings (based on technology employed and fewest numbers of security breaches/ incidents per container ship).**

1. Honk Kong Voyages, Ltd. (employs x-ray and radioactive detection devices at all ports)
2. Mid-East Stevedores Services, Inc. (employs x-ray and radioactive detection devices at all ports).
3. Uruguay Unloaders (employs radioactive detection devices only).
4. Stanley Stevedores

5. Delaware Auto & Marine Corporation
6. California Port, Inc.
7. Magellan Marine Services
8. Florida Port, Inc.
9. Breham Dockworkers GmbH
10. Cargo Carriers Corp.

**EXHIBIT 6**

MESSAGE

FROM: CLewes@DelawareAutoMarine.com  
SENT: September 6, 2007 @ 11:45 a.m.  
TO: E.Sussex@aol.com  
CC: Kent, Pat

Dear Erin:

Mr./Ms. Kent asked me to respond to your message. As you can imagine, Pat is very busy right now, but asked me to tell you that "it's not happening." Perry White and Lois Lane are among Pat's closest friends and he/she intends to make sure that they will act appropriately to dispose of Aladin's scandalous offer.

FROM: E.Sussex@aol.com  
SENT: September 4, 2007 @ 10:23 A.M.  
TO: PKent@DelawareAutoMarine.com  
SUBJECT: Mid-East Stevedores Announcement

Dear Pat,

I just heard about this. Is this true? What does it mean for us? I don't know how you feel, but it sure would be nice to cash out at that price (if it's for real)!



**Certification of Records Custodian – Aladin International Airport**

I, Albert Stiftel, do depose and say, under penalty of perjury, that:

1. I am general manager of Aladin International Airport (the “airport”) and have held that position for fifteen years. In that capacity, I am the custodian of all records maintained by the airport.
2. For as long as I have been affiliated with the airport we have maintained take-off and landing logs, hangar leases and other records related to the official operation of the airport.
3. The records that Chris Read described to me that he reviewed during his spy mission in my airport in late 2006 were genuine, were made at or near the time of the events recorded therein, and were maintained in the ordinary course of the airport’s business activity and made as part of the airport’s regular practice.
4. The records Chris Read reviewed do reveal the owners of aircraft using our hangars at the airport and do indicate that several of these aircraft were permitted to take-off from and land in the airport during nighttime hours. I cannot and will not say whether these entities are associated with terrorist organizations.
5. I have reviewed this Certification and it is true and accurate to the best of my knowledge and belief.

---

Albert Stiftel

SWORN TO AND SUBSCRIBED BEFORE ME, A NOTARY PUBLIC OF THE COMMONWEALTH OF VIRGINIA, AT LANGLEY, FAIRFAX COUNTY, VIRGINIA, THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2007.

---

George Mason, IV

My commission expires on November 10, 2011.

8 Delaware Code § 204

Section 1. A corporation may refuse to enter into a business combination (1) with any person that is controlled by or under common control with a foreign state with material ties to international terrorism or (2) that would pose a threat to national security. “Business combination,” “controlled by,” “person” and “under common control with” shall have the meanings as defined in § 203 of this Chapter.

Section 2. For purposes of this section the term “international terrorism” means activities that –

(A) appear to be intended –

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and

(B) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

Section 3. This Act is effective July 1, 2007.

*Synopsis: Some states have statutes allowing members of boards of directors to consider the interests of employees and other non-stockholder constituencies when considering whether to enter into a business combination. The General Assembly has decided to adopt a limited version of such a statute, which is intended to give the members of a board the ability to take into account interests of national security when considering a proposed business combination.*

## **JURY INSTRUCTIONS**

**(THESE ARE NOT TO BE READ IN OPEN COURT BY THE PRESIDING JUDGE)**

Now that you have heard the evidence and the arguments of counsel, it is my duty to instruct you about the law governing this case. Although you as jurors are the sole judges of the facts, you must follow the law stated in my instructions and apply the law to the facts as you find them from the evidence. You must not single out one instruction alone as stating the law, but must consider the instructions as a whole.

Nor are you to be concerned with the wisdom of any rule of law that I give you. Regardless of any opinion you may have about what the law ought to be, it would be a violation of your sworn duty to base a verdict on any view of the law other than what I give you in these instructions. It would also be a violation of your sworn duty, as judges of the facts, to base a verdict on anything but the evidence in the case.

Justice through trial by jury always depends on the willingness of each juror to do two things: first, to seek the truth about the facts from the same evidence presented to all the jurors; and, second, to arrive at a verdict by applying the same rules of law as explained by the judge.

You should consider only the evidence in the case. Evidence includes the witnesses' sworn testimony and the items admitted into evidence. You are allowed to draw reasonable conclusions from the testimony and exhibits, if you think those conclusions are justified in light of common experience. In other words, use your common sense to reach conclusions based on evidence.

You have been chosen and sworn as jurors in this case to decide issues of fact. You must perform these duties without bias for or against any of the parties. The law does not allow you to be influenced by sympathy, prejudice, or public opinion. All the parties and the public expect



that you will carefully and impartially consider all the evidence in the case, follow the law, and reach a just verdict, regardless of the consequences.

In a civil case such as this one, whichever party bears the burden of proof on an issue must carry that burden with proof that establishes each element of the claim or defense by a preponderance of the evidence. As I will explain in a moment, in this case, each party must carry the burden of proof on a particular issue. Proof by a preponderance of the evidence means proof that something is more likely than not. Preponderance of the evidence does not depend on the number of witnesses. If the evidence on any particular point is evenly balanced, the party having the burden of proof has not proven that point by a preponderance of the evidence, and you must find against the party on that point.

In deciding whether any fact has been proved by a preponderance of the evidence, you may, unless I tell you otherwise, consider the testimony of all witnesses regardless of who called them, and all exhibits received into evidence regardless of who produced them.

Generally speaking, there are two types of evidence from which a jury may properly find the facts. One is direct evidence - - such as the testimony of any eyewitness. The other is indirect or circumstantial evidence - - circumstances pointing to certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts from all the evidence in the case: Both direct and circumstantial.

If you find that a witness made an earlier sworn statement that conflicts with the witness's trial testimony, you may consider that contradiction in deciding how much of the trial testimony, if any, to believe. You may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an

important fact or a small detail; whether the witness had an explanation for the inconsistency; and whether that explanation made sense to you.

Your duty is to decide, based on all the evidence and your own good judgment, whether the earlier statement was inconsistent; and if so, how much weight to give to the inconsistent statement in deciding whether to believe the earlier statement or the witness's trial testimony.

A witness may be discredited by evidence contradicting what that witness said, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness's present testimony.

It's up to you to determine whether a witness has been discredited, and if so, to give the testimony of that witness whatever weight that you think it deserves.

You are the sole judges of each witness's credibility. That includes the parties. You should consider each witness's means of knowledge; strength or memory; opportunity to observe; how reasonable or unreasonable the testimony is; whether it is consistent or inconsistent; whether it has been contradicted; the witnesses' biases, prejudices, or interest; the witnesses' manner or demeanor on the witness stand; and all circumstances that, according to the evidence, could affect the credibility of the testimony.

If you find the testimony to be contradictory, you must try to reconcile it, if reasonably possible, so as to make one harmonious story of it all. But if you can't do this, then it is your duty and privilege to believe the testimony that, in your judgment, is most believable and disregard any testimony that, in your judgment, is not believable.

Expert testimony is testimony from a person who has a special skill or knowledge in some science, profession, or business. This skill or knowledge is not common to the average person but has been acquired by the expert through special study or experience.

The plaintiff's claim is that the individual defendants violated what is called a "fiduciary" duty or obligation that they owed to their stockholders. A fiduciary relationship exists in corporations. The stockholders place special trust and confidence in another person – the individual directors – to exercise discretion or expertise in acting for the stockholder and the fiduciary knowingly accepts that trust and confidence and thereafter undertakes to act on behalf of the stockholder by fulfilling that duty to the stockholders of the corporation. In order to recover on this claim, the plaintiff must prove by a preponderance of the evidence that the individual defendants violated that fiduciary duty by (1) failing to act on an informed basis; (2) failing to act in good faith; (3) failing to take action in the honest belief that it was in the best interest of the corporation; and/or (4) putting their own pecuniary interests ahead of the stockholders. If you find that the plaintiff has not met its burden of proving that the individual defendants violated their fiduciary duty, then your answer to Question 1 on the Verdict Sheet should be no and you should return to the courtroom and not answer Questions 2 *or* 3 on the Verdict Sheet.

If, however, you find that the individual defendants have breached their fiduciary duty, then you must determine whether the defendants' actions were justified and you must answer Questions 2 and 3 on the Verdict Sheet. Delaware law provides:

Section 1. A corporation may refuse to enter into a business combination (1) with any person that is controlled by or under common control with a foreign state with material ties to international terrorism or (2) that would pose a threat to national security.

Section 2. For purposes of this section the term "international terrorism" means activities that –

- (A) appear to be intended –
  - (i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and

(B) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

It has been determined that: (1) MESS is controlled by Aladin; (2) the proposed transaction between MESS and DAM is a business combination within the meaning of the law; and (3) MESS is a person within the meaning of the above statute. What you must determine is whether the defendants have proven by a preponderance of the evidence that Aladin has material ties to terrorism or that the proposed business combination poses a threat to national security. If you find that the defendants have proven either of these points, then it may, without regard to the alleged breach of their fiduciary duties, refuse to accept MESS's offer. If you find that the defendants have proven that Aladin has material ties to terrorism, you need to answer Question 2 on the Verdict Sheet yes. If you find that the proposed business combination poses a threat to national security, then you need to answer Question 3 yes. If you answer Questions 2 or 3 yes, your verdict will be for the defendants. If you find that these points have not been proven by a preponderance of the evidence, then answer both Questions 2 and 3 no and your verdict is for the plaintiff.

I have read a number of instructions to you. The fact that some particular point may be covered in the instructions more than some other point should not be regarded as meaning that I intended to emphasize that point. You should consider these instructions as a whole, and you

should not choose any one or more instructions and disregard the others. You must follow all the instructions that I have given you.

Nothing I have said since the trial began should be taken as an opinion about the outcome of the case. You should understand that no favoritism or partisan meaning was intended in any ruling I made during the trial or by these instructions. Further, you must not view these instructions as an opinion about the facts. You are the judges of the facts, not me.

How you conduct your deliberations is up to you. But I would like to suggest that you discuss the issues fully, with each of you having a fair opportunity to express your views, before committing to a particular position. You have a duty to consult with one another with an open mind and to deliberate with a view to reaching a verdict. Each of you should decide the case for yourself, but only after impartially considering the evidence with your fellow jurors. You should not surrender your own opinion or defer to the opinions of your fellow jurors for the mere purpose of returning a verdict, but you should not hesitate to re-examine your own view and change your opinion if you are persuaded by another view.

I have provided you with the verdict sheet to guide you in your deliberations. Please follow the instructions on the sheet and answer the questions based on the evidence.

Your verdict must be unanimous.

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

---

MID-EAST STEVEDORES SERVICES, INC., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 DELAWARE AUTO & MARINE )  
 CORPORATION, et al., )  
 )  
 Defendants. )

---

C. A. No. 09C-01 LH

**VERDICT SHEET**

1. Do you find that the individual Defendants breached their fiduciary duty?

**Yes \_\_\_\_\_ No \_\_\_\_\_**

If you answer Question 1 no, return to the Courtroom. If you answered Question

1 yes, proceed to Question 2 and Question 3.

2. Do you find that Aladin has material ties to international terrorism?

**Yes \_\_\_\_\_ No \_\_\_\_\_**

3. Do you find that the proposed business combination would pose a threat to national security?

**Yes \_\_\_\_\_ No \_\_\_\_\_**

# NATIONAL HIGH SCHOOL MOCK TRIAL CHAMPIONSHIP RULES

The National High School Mock Trial Championship is governed by the Rules of the Competition and the National High School Mock Trial Rules of Evidence. Any clarification of rules or case materials will be issued in writing to all participating teams in a timely manner and no less than two weeks prior to the tournament. The trial coordinator, upon the advice and consent of the Board of Directors of the National High School Mock Trial Championship, will distribute to each team any such clarification.

No state host may alter the language of these rules without the approval of the National High School Mock Trial Championship Board of Directors; however the Rules of Evidence may be reviewed for relevance and rules may be added or deleted, so long as the language inserted is the original text contained in the Federal Rules of Evidence.

All teams are responsible for the conduct of persons associated with their teams throughout the mock trial event.

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## INDEX

### **I. RULES OF THE COMPETITION**

#### ***A. Administration***

Rule 1.1	Rules .....	79
Rule 1.2	Code of Conduct .....	79
Rule 1.3	Emergencies .....	79
Rule 1.4	Student Timekeepers .....	79

#### ***B. The Problem***

Rule 2.1	The Problem .....	80
Rule 2.2	Witnesses Bound by Statements .....	80
Rule 2.3	Unfair Extrapolation .....	80
Rule 2.4	Gender of Witnesses .....	81
Rule 2.5	Voir Dire .....	81

#### ***C. Teams***

Rule 3.1	Team Eligibility .....	81
Rule 3.2	Team Composition .....	81
Rule 3.3	Team Presentation .....	82
Rule 3.4	Team Duties .....	82
Rule 3.5	Team Roster Form .....	82

#### ***D. The Trial***

Rule 4.1	Courtroom Setting .....	83
Rule 4.2	Stipulations .....	83
Rule 4.3	Reading into the Record Not Permitted .....	83

Rule 4.4	Swearing of Witnesses.....	83
Rule 4.5	Trial Sequence and Time Limits.....	83
Rule 4.6	Timekeeping .....	83
Rule 4.7	Time Extensions and Scoring .....	84
Rule 4.8	Motions Prohibited .....	84
Rule 4.9	Sequestration.....	84
Rule 4.10	Bench Conferences .....	84
Rule 4.11	Supplemental Material; Costumes .....	84
Rule 4.12	Trial Communication.....	84
Rule 4.13	Viewing a Trial .....	85
Rule 4.14	Videotaping/Photography .....	85
Rule 4.15	Jury Trial.....	85
Rule 4.16	Standing During Trial .....	85
Rule 4.17	Objections During Opening Statement/Closing Statement.....	85
Rule 4.18	Objections .....	85
Rule 4.19	Reserved .....	86
Rule 4.20	Procedure for Introduction of Exhibits .....	86
Rule 4.21	Use of Notes.....	86
Rule 4.22	Redirect; Re-cross.....	86
Rule 4.23	Scope of Closing Arguments .....	86
Rule 4.24	The Critique .....	87
Rule 4.25	Offers of Proof .....	87

**E. Judging and Team Advancement**

Rule 5.1	Finality of Decisions.....	87
Rule 5.2	Composition of Judging Panels .....	87
Rule 5.3	Score Sheets/Ballots .....	87
Rule 5.4	Completion of Score Sheets.....	88
Rule 5.5	Team Advancement.....	88
Rule 5.6	Power Matching/Seeding.....	88
Rule 5.7	Selection of Sides for Championship Round.....	88
Rule 5.8	Odd Number of Team Participating in Championship .....	88

**F. Dispute Resolution**

Rule 6.1	Reporting a Rules Violation/Inside the Bar .....	88
Rule 6.2	Dispute Resolution Procedure .....	90
Rule 6.3	Effect of Violation on Score .....	90
Rule 6.4	Reporting of Rules Violation/Outside the Bar.....	90

**II. NATIONAL HIGH SCHOOL MOCK TRIAL CHAMPIONSHIP FEDERAL RULES OF EVIDENCE (Mock Trial Version)**

**Article I. General Provisions**

Rule 101	Scope.....	91
Rule 102	Purpose and Construction .....	91

**Article II. Judicial Notice (Not Applicable).....** 91

**Article III. Presumptions in Civil Actions and Proceedings (Not Applicable).....** 91

**Article IV. Relevancy and its Limits.....** 91



Rule 401	Definition of “Relevant Evidence” .....	91
Rule 402	Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.....	92
Rule 403	Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.....	92
Rule 404	Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes .....	92
Rule 405	Methods of Proving Character .....	92
Rule 406	Habit; Routine Practice .....	92
Rule 407	Subsequent Remedial Measures .....	93
Rule 408	Compromise and Offers to Compromise .....	93
Rule 409	Payment of Medical or Similar Expenses.....	93
Rule 410	Inadmissibility of Pleas, Plea Discussions and Related Statements.....	93
Rule 411	Liability Insurance (civil case only) .....	93
 <b>Article V. Privileges</b>		
Rule 501	General Rule .....	94
 <b>Article VI. Witnesses</b>		
Rule 601	General Rule of Competency.....	94
Rule 602	Lack of Personal Knowledge.....	94
Rule 607	Who May Impeach.....	94
Rule 608	Evidence of Character and Conduct of Witness .....	94
Rule 609	Impeachment by Evidence of Conviction of Crime (this rule applies only to witnesses with prior convictions.).....	95
Rule 610	Religious Beliefs or Opinions.....	95
Rule 611	Mode and Order of Interrogation and Presentation .....	95
Rule 612	Writing Used to Refresh Memory.....	96
Rule 613	Prior Statements of Witnesses .....	96
 <b>Article VII. Opinions and Expert Testimony</b>		
Rule 701	Opinion Testimony by Lay Witness .....	96
Rule 702	Testimony by Experts .....	96
Rule 703	Bases of Opinion Testimony by Experts .....	97
Rule 704	Opinion on Ultimate Issue .....	97
Rule 705	Disclosure of Facts or Data Underlying Expert Opinion.....	97
 <b>Article VIII. Hearsay</b>		
Rule 801	Definitions .....	97
Rule 802	Hearsay Rule.....	98
Rule 803	Hearsay Exceptions, Availability of Declarant Immaterial .....	98
Rule 804	Hearsay Exceptions, Declarant Unavailable.....	99
Rule 805	Hearsay within Hearsay .....	100
 <b>Article IX. Authentication and Identification (Not Applicable).....</b>		
<b>Article X. Contents of Writings, Recordings, and Photographs (Not Applicable) 100</b>		
 <b>Article XI. Other</b>		
Rule 1103	Title.....	100

# NATIONAL HIGH SCHOOL MOCK TRIAL CHAMPIONSHIP

## I. RULES OF THE COMPETITION

### A. ADMINISTRATION

#### **Rule 1.1. Rules**

All trials will be governed by the Rules of the National High School Mock Trial Championship and the National High School Mock Trial Championship Rules of Evidence.

Questions or interpretations of these rules are within the discretion of the Board of Directors of the National High School Mock Trial Championship, Inc. (“National Board”), whose decision is final.

#### **Rule 1.2. Code of Conduct**

The Rules of Competition, as well as proper rules of courthouse and courtroom decorum and security, must be followed. The National Board possesses discretion to impose sanctions, including but not limited to disqualification, immediate eviction from the Championship, and forfeiture of all fees and awards (if applicable) for any misconduct occurring while a team is present for the National Championship, for flagrant rule violations, and for breaches of decorum which affect the conduct of a trial or which impugn the reputation or integrity of any team, school, participant, court officer, judge, or the mock trial program.

#### **Rule 1.3. Emergencies**

During a trial, the presiding judge shall have discretion to declare an emergency and adjourn the trial for a short period of time to address the emergency.

In the event of an emergency that would cause a team to be unable to continue a trial or to participate with less than six members, the team must notify the National Board as soon as is reasonably practical. If the Board, or its designee(s), in its sole discretion, agrees that an emergency exists, the Board, or its designee(s), shall declare an emergency and will decide whether the team will forfeit or may direct that the team take appropriate measures to continue any trial round with less than six members. A penalty may be assessed.

A forfeiting team will receive a loss and points totaling the average number of the ballots and points received by the losing teams in that round. The non-forfeiting team will receive a win and an average number of ballots and points received by the winning teams in that round.

Final determination of emergency, forfeiture, reduction of points, or advancement, will be made by the Board.

#### **Rule 1.4 Student Timekeepers**

Each team attending the National High School Mock Trial Championship is responsible for providing one student as an official timekeeper equipped with two stopwatches. The official timekeeper may be a student who is not one of the official eight team members. In trial, each team is to use a set of “Time Remaining” cards with the following designations to signal time: 20:00, 15:00, 10:00, 5:00, 4:00, 3:00, 2:00, 1:00, 0:40, 0:20, and STOP. Modification of intervals

is not permitted. The host committee will provide “Time Remaining” cards and timekeeper instruction materials. Throughout the duration of the trial, timekeepers may not communicate with his/her team in any way other than to display lime remaining cards, unless directed by the presiding judge.

Each team’s official timekeeper is **required** to attend the scheduled on-site timekeeper orientation, which will be held on Thursday afternoon before the competition rounds begin. If a team does not send an official timekeeper to the required orientation meeting, that team will defer to its opponents’ official timekeepers in all rounds of the competition. The host committee, at its discretion, may schedule a make-up timekeeper orientation for Friday morning before rounds begin solely for teams that register for the tournament after the Thursday orientation session.

If a team desires to assign more than one student to the timekeeper role, then all students who will be assigned to the timekeeper role must attend the timekeeper orientation. If a team does not designate a timekeeper or the designated timekeeper does not attend the timekeeper orientation, the team must defer to its opponent’s official timekeeper in all rounds of the competition. The team’s official student timekeeper will keep time for both sides during all competition rounds.

## **B. THE PROBLEM**

### **Rule 2.1. The Problem**

The problem will be an original fact pattern which may contain any or all of the following: statement of facts, indictment, stipulations, witness statements/affidavits, jury charge, and exhibits. Stipulations may not be disputed at trial. Witness statements may not be altered.

The problem shall consist of three witnesses per side, all of whom shall have names and characteristics that would allow them to be played by either males or females. All three of the witnesses must be called.

### **Rule 2.2. Witnesses Bound by Statements**

Each witness is bound by the facts contained in his/her own witness statement, the Statement of Facts, if present, and/or any necessary documentation relevant to his/her testimony. Fair extrapolations may be allowed, provided reasonable inference may be made from the witness’ statement. If, in direct examination, an attorney asks a question which calls for extrapolated information pivotal to the facts at issue, the information is subject to objection under Rule 2.3, “unfair extrapolation.”

A witness is not bound by facts contained in other witness statements.

### **Rule 2.3. Unfair Extrapolation**

A fair extrapolation is one that is neutral. Unfair extrapolations are best attacked through impeachment and closing arguments and are to be dealt with in the course of the trial.

If a witness is asked information not contained in the witness’ statement, the answer must be consistent with the statement and may not materially affect the witness’ testimony or any substantive issue of the case.

Attorneys for the opposing team may refer to Rule 2.3 in a special objection, such as “unfair extrapolation,” or “This information is beyond the scope of the statement of facts.”

Possible rulings by a judge include:

- a) No extrapolation has occurred;
- b) An unfair extrapolation has occurred;
- c) The extrapolation was fair; or,
- d) Ruling is taken under advisement.

The decision of the presiding judge regarding extrapolations or evidentiary matters is final.

When an attorney objects to an extrapolation, the judge will rule in open court to clarify the course of further proceedings.

#### **Rule 2.4. Gender of Witnesses**

All witnesses are gender neutral. Personal pronoun changes in witness statements indicating gender of the characters may be made. Any student may portray the role of any witness of either gender.

#### **Rule 2.5. Voir Dire**

Voir dire examination of a witness is not permitted.

### **C. TEAMS**

#### **Rule 3.1. Team Eligibility**

Teams competing in the National High School Mock Trial Championship must be comprised of students who participated on the current state championship team. The state coordinator may designate an alternate team should the state championship team be unable to participate, so long as all students on the team are from the same original team.

States may not enter an “all-star” team. The National Board shall determine what is an “all-star” team. The Board’s determination will be final.

#### **Rule 3.2. Team Composition**

Teams consist of **eight** official members assigned to attorney and witness roles representing the prosecution/plaintiff and defense/defendant sides. Only **six** of the eight official members will participate in any given round as attorneys and witnesses. (See Rule 3.3 for further explanation referring to team participation.) Additionally, a person will be designated as the official timekeeper. The official timekeeper must meet the requirements of Rule 1.4 as the team’s **official timekeeper**, and may be (but need not be) one of the eight official members. At no time may any team for any reason substitute other persons for official team members. The Team Roster will become official at the time of **on site** registration.

**Rule 3.3. Team Presentation**

Teams must present both the Prosecution/Plaintiff and Defense/Defendant sides of the case, using six team members in each trial round. For each trial round, teams shall use three students as attorneys and three students as witnesses.

**Rule 3.4. Team Duties**

Team members are to evenly divide their duties. Each of the three attorneys will conduct one direct examination and one cross-examination; in addition, one will present the opening statement and another will present the closing arguments. In other words, the eight attorney duties for each team will be divided as follows:

1. Opening Statement
2. Direct Examination of Witness #1
3. Direct Examination of Witness #2
4. Direct Examination of Witness #3
5. Cross Examination of Witness #1
6. Cross Examination of Witness #2
7. Cross Examination of Witness #3
8. Closing Argument (including Rebuttal) [See Rule 4.5]

Opening Statements must be given by both sides at the beginning of the trial.

The attorney who examines a particular witness on direct examination is the only person who may make the objections to the opposing attorney’s questions of that witness’ cross-examination, and the attorney who cross-examines a witness will be the only one permitted to make objections during the direct examination of that witness.

Each team must call all three of its assigned witnesses. Witnesses must be called only by their own team during their case-in-chief and examined by both sides. Witnesses may not be recalled by either side.

**Rule 3.5. Team Roster Form**

Copies of the Team Roster Form must be completed and duplicated by each team prior to arrival at the courtroom for each round of competition. Teams must be identified by the code assigned at registration. No information identifying team origin should appear on the form.

Before beginning a trial, the teams must exchange copies of the Team Roster Form. The Form should identify the gender of each witness so that references to such parties will be made in the proper gender. Copies of the Team Roster Form should also be made available to the judging panel and presiding judge before each round. Teams shall not knowingly disclose their place of origin to any member of the judging panel or to the presiding judge.

**D. THE TRIAL**

**Rule 4.1. Courtroom Setting**

The Prosecution/Plaintiff team shall be seated at the table closer to the jury box. No team shall rearrange the courtroom without prior permission of the judge.

**Rule 4.2. Stipulations**

Stipulations will be considered a part of the record and already admitted into evidence.

**Rule 4.3. Reading into the Record Not Permitted**

Stipulations, the indictment, or the Charge to the Jury will not be read into the record.

**Rule 4.4. Swearing of Witnesses**

The following oath may be used before questioning begins:

“Do you promise that the testimony you are about to give will faithfully and truthfully conform to the facts and rules of the mock trial competition?”

The swearing of witnesses will occur in one of two ways. Either the presiding judge will indicate that all witnesses are assumed to be sworn, or the above oath will be conducted by (a) the presiding judge, (b) a bailiff, provided by the host state; or (c) the examining attorney. The host state will indicate which method will be used during all rounds of the current year’s tournament. Witnesses may stand or sit during the oath.

**Rule 4.5. Trial Sequence and Time Limits**

The trial sequence and time limits are as follows:

1. Opening Statement (5 minutes per side)
2. Direct and Redirect (optional) Examination (25 minutes per side)
3. Cross and Re-cross (optional) Examination (20 minutes per side)
4. Closing Argument (5 minutes per side)

The Prosecution/Plaintiff gives the opening statement first. The Prosecution/Plaintiff gives the closing argument first; the Prosecution/Plaintiff may reserve a portion of its closing time for a rebuttal. The Prosecution/Plaintiff’s rebuttal is limited to the scope of the Defendant’s closing argument.

Attorneys are not required to use the entire time allotted to each part of the trial. Time remaining in one part of the trial may not be transferred to another part of the trial.

**Rule 4.6. Timekeeping**

Time limits are mandatory and will be enforced. Each team is required to provide one student who will serve as the official timekeeper for that team. Timekeepers in each trial (a) will work together to ensure that accurate time for both teams is being kept; (b) will show “time-remaining” cards simultaneously to both teams; and (c) will notify the presiding judge that “TIME” has expired at the end of the trial by showing the “STOP” time card. Each team’s timekeeper must meet the requirements of Rule 1.4

Timing starts only when each attorney begins to speak (i.e. when the attorney actually says the first word of his or her opening, closing, or examination question – examples include but are not limited to. “May it please the court...,” or “Your Honor, Ladies and Gentlemen of the jury... “ [for openings/closings] or, “Please state your name for the court...” [for examination question]).

Timing will not start when an attorney (a) responds to a presiding judge's inquiry as to whether or not that side is ready to proceed, (b) asks for permission to reserve time for a rebuttal, or (c) asks permission to use/move a podium.

Timing stops during objections. Timing stops at the moment an attorney says, "I object..." Timing begins again after the ruling by the presiding judge and the examining attorney says the first word to continue examination.

Time for objections, questioning from the judge, or administering the oath will not be counted as part of the allotted time during examination of witnesses and opening and closing statements.

Time does not stop for the introduction of exhibits.

At the end of each task during the trial presentation (i.e., at the end of each opening, at the end of each witness examination, at the end of each cross examination, and at the end of each closing argument), if there is more than a 15-second discrepancy between the teams' timekeepers, the timekeepers must notify the presiding judge of the discrepancy. The presiding judge will then rule on the discrepancy, the timekeepers will synchronize their stopwatches accordingly, and the trial will continue. No time disputes will be entertained after the trial concludes. The decisions of the presiding judge regarding the resolution of time disputes are final.

#### **Rule 4.7. Time Extensions and Scoring**

The presiding judge has sole discretion to grant time extensions. If time has expired and an attorney continues without permission from the Court, the scoring judges may determine individually whether or not to discount points in a category because of over-runs in time.

#### **Rule 4.8. Motions Prohibited**

No motions may be made.

#### **Rule 4.9. Sequestration**

Teams may not invoke the rule of sequestration.

#### **Rule 4.10. Bench Conferences**

Bench conferences may be granted at the discretion of the presiding judge, but should be made from the counsel table in the educational interest of handling all matters in open court.

#### **Rule 4.11. Supplemental Material; Costumes**

Teams may refer only to materials included in the trial packet. No illustrative aids of any kind may be used, unless provided in the case packet. No enlargements of the case materials will be permitted. Absolutely no props or costumes are permitted unless authorized specifically in the case materials. Costuming is defined as hairstyles, clothing, accessories, and make-up which are case-specific.

The only documents which the teams may present to the presiding judge or scoring panel are the individual exhibits as they are introduced into evidence and the team roster forms. Exhibit

notebooks are not to be provided to the presiding judge or scoring panel.

**Rule 4.12. Trial Communication**

Coaches, teachers, alternates, and observers shall not talk to, signal, communicate with, or coach their teams during trial. This rule remains in force during any emergency recess, which may occur. Team members may, among themselves, communicate during the trial; however, no disruptive communication is allowed. Signaling of time by the teams' timekeepers shall not be considered a violation of this rule.

Coaches, teachers, alternates, and observers must remain outside the bar in the spectator section of the courtroom. Only team members participating in this round may sit inside the bar and communicate with each other.

**Rule 4.13. Viewing a Trial**

Team members, alternates, attorney coaches, teacher sponsors, and any other persons directly associated with a mock trial team, except for those authorized by the National Board, are not allowed to view other teams' performances in the National competition, so long as their team remains in the competition. No person shall display anything that identifies their place of origin while in the courtroom.

**Rule 4.14. Videotaping/Photography**

Any team has the option to refuse participation in videotaping, tape recording, and still photography by opposing teams. Media coverage will be allowed. Media representatives authorized by the host committee or the National Board will wear identification badges.

**Rule 4.15. Jury Trial**

The case will be tried to a jury; arguments are to be made to judge and jury. Teams may address the scoring judges as the jury.

**Rule 4.16 Standing During Trial**

Unless excused by the judge, attorneys will stand while giving opening and closing statements, during direct and cross examinations, and for all objections.

**Rule 4.17. Objections During Opening Statement/Closing Statement**

No objections may be raised during opening statements or during closing arguments. If a team believes an objection would have been proper during the opposing team's opening statement or closing argument, one of its attorneys may, following the opening statement or closing argument, stand to be recognized by the judge and may say, "If I had been permitted to object during opening/closing arguments, I would have objected to the opposing team's statement that \_\_\_\_\_." The presiding judge will not rule on this "objection." Presiding and scoring judges will weigh the "objection" individually. No rebuttal by the opposing team will be heard.

**Rule 4.18. Objections**

1. Argumentative Questions: An attorney shall not ask argumentative questions.
2. Lack of Proper Predicate/Foundation. Attorneys shall lay a proper foundation prior to moving the admission of evidence. After the exhibit has been offered into evidence, the exhibit may still be objected to on other grounds.



3. **Assuming Facts Not in Evidence:** Attorneys may not ask a question that assumes unproved facts. However, an expert witness may be asked a question based upon stated assumptions, the truth of which is reasonably supported by evidence (sometimes called a “hypothetical question”).
4. **Questions Calling for Narrative or General Answer:** Questions must be stated so as to call for a specific answer. (Example of improper question: “Tell us what you know about this case.”)
5. **Non-Responsive Answer:** A witness’ answer is objectionable if it fails to respond to the question asked.
6. **Repetition:** Questions designed to elicit the same testimony or evidence previously presented in its entirety are improper if merely offered as a repetition of the same testimony or evidence from the same or similar source.

Teams are not precluded from raising additional objections that are available under the National High School Mock Trial Rules of Evidence.

**Rule 4.19      Reserved**

**Rule 4.20.      Procedure for Introduction of Exhibits**

As an example, the following steps effectively introduce evidence:

1. All evidence will be pre-marked as exhibits.
2. Ask for permission to approach the witness. “Your honor, may I approach the witness with what has been marked for identification purposes as Exhibit No. \_\_\_?”
3. Show the exhibit to opposing counsel.
4. Ask the witness to identify the exhibit. “I now hand you what has been marked for identification as Exhibit No. \_\_\_\_\_. Would you identify it please?” Witness should answer to identify only.
5. Ask the witness a series of questions that are offered for proof of the admissibility of the exhibit. These questions lay the foundation or predicate for admissibility, including questions of the relevance and materiality of the exhibit.
6. Offer the exhibit into evidence. “Your Honor, we offer Exhibit No. \_\_\_ into evidence.”
7. Court: “Is there an objection?” (If opposing counsel believes a proper foundation has not been laid, the attorney should be prepared to object at this time.)
8. Opposing Counsel: “No, Your Honor,” OR “Yes, Your Honor.” If the response is “yes”, the objection will be stated for the record. Court: “Is there any response to the objection?”
9. Court: “Exhibit No. \_\_\_ (is/is not) admitted.” If admitted, questions on content may be asked.

**Rule 4.21.      Use of Notes**

Attorneys may use notes in presenting their cases. Witnesses are not permitted to use notes while testifying during the trial. Attorneys may consult with each other at counsel table verbally or through the use of notes.

**Rule 4.22. Redirect/Re-cross**

Redirect and Recross examinations are permitted, provided they conform to the restrictions in Rule 611(d) in the National High School Mock Trial Rules of Evidence.

**Rule 4.23. Scope of Closing Arguments**

Closing Arguments must be based upon the actual evidence and testimony presented during the trial.

**Rule 4.24. The Critique**

The judging panel is allowed 10 minutes for debriefing. The timekeepers will monitor the critique following the trial. Presiding judges are to limit critique sessions to a combined total of ten (10) minutes. There is no critique in the fourth round.

Judges shall not make a ruling on the legal merits of the trial. Judges may not inform the students of score sheet results.

**Rule 4.25 Offers of Proof**

No offers of proof may be requested or tendered.

**E. JUDGING and TEAM ADVANCEMENT**

**Rule 5.1. Finality of Decisions**

All decisions of the judging panel are **FINAL**.

**Rule 5.2. Composition of Judging Panels**

The judging panel will consist of at least three individuals. The composition of the judging panel and the role of the presiding judge will be at the discretion of the host director, with the same format used throughout the competition, as follows:

1. One presiding judge with two scoring judges (all three of whom complete score sheets); or,
2. One presiding judge and two scoring judges (scoring judges only complete score sheets); or,
3. One presiding judge and two scoring judges (scoring judges only complete score sheets and presiding judge completes a form which selects only the winner and does not assign point totals for either team).
4. The scoring judges may be persons with substantial mock trial coaching or scoring experience or attorneys.

Each scoring panel shall include at least one attorney. The presiding judge shall be an attorney. At the discretion of the host director, the Championship round may have a larger panel. All presiding and scoring judges receive the mock trial manual, a memorandum outlining the case, orientation materials, and a briefing in a judges' orientation.

**Rule 5.3. Score Sheets/Ballots**

The term “ballot” will refer to the decision made by a scoring judge as to which team made the best presentation in the round. The term “score sheet” is used in reference to the form on which speaker and team points are recorded. Score sheets are to be completed individually by the scoring judges. Scoring judges are not bound by the rulings of the presiding judge. The team that earns the highest points on an individual judge’s score sheet is the winner of that ballot. The team that receives the majority of the three ballots wins the round. The ballot votes determine the win/loss record of the team for power-matching and ranking purposes. While the judging panel may deliberate on any special awards (i.e., Outstanding Attorney/Witness) the judging panel should not deliberate on individual scores.

**Rule 5.4. Completion of Score Sheets**

Each scoring judge shall record a number of points (1-10) for each presentation of the trial. At the end of the trial, each scoring judge shall total the sum of each team’s individual points, place this sum in the Column Totals box, and enter the team (“P” for prosecution/plaintiff or “D” for defense/defendant) with the higher total number of points in the Tiebreaker Box. NO TIE IS ALLOWED IN THE COLUMN TOTALS BOXES.

In the event of a mathematical error in tabulation by the scoring judges which, when corrected, results in a tie in the column Totals box, the Tiebreaker Box shall determine award of the ballot.

**Rule 5.5. Team Advancement**

Teams will be ranked based on the following criteria in the order listed:

1. Win/Loss Record – equals the number of rounds won or lost by a team;
2. Total Number of Ballots – equals the number of scoring judges’ votes a team earned in preceding rounds;
3. Total Number of Points Accumulated in Each Round;
4. Point Spread against Opponents – the point spread is the difference between the total points earned by the team whose tie is being broken less the total points of that team’s opponent in each previous round. The greatest sum of these point spreads will break the tie in favor of the team with the largest cumulative point spread.

**Rule 5.6. Power Matching/Seeding**

A random method of selection will determine opponents in the first round. A power-match system will determine opponents for all other rounds. The two teams emerging with the strongest record from the four rounds will advance to the final round. The first-place team will be determined by ballots from the championship round only.

Power matching will provide that:

1. Pairings for the first round will be at random;
2. All teams are guaranteed to present each side of the case at least once;
3. Brackets will be determined by win/loss record. Sorting within brackets will be determined in the following order: (1) win/loss record; (2) ballots; (3) speaker points; then (4) point spread. The team with the highest number of ballots in the bracket will be matched with the team with the lowest number of ballots in the bracket; the next highest

- with the next lowest, and so on until all teams are paired;
4. If there is an odd number of teams in a bracket, the team at the bottom of that bracket will be matched with the top team from the next lower bracket;
  5. Teams will not meet the same opponent twice;
  6. To the greatest extent possible, teams will alternate side presentation in subsequent rounds. Bracket integrity in power matching will supersede alternate side presentation.

**Rule 5.7. Selection of Sides For Championship Round**

In determining which team will represent which side in the Championship Round, the following procedure shall be used:

1. The team with the letter/numerical code which comes first alphabetically or numerically will be considered the “Designated Team.”
2. The coin will be tossed by a designee of the host state coordinator.
3. If the coin comes up heads, the Designated Team shall represent the plaintiff/prosecution in the Championship Round. If the coin comes up tails, the Designated Team shall represent the defendant.

**Rule 5.8. Odd Number of Teams Participating in Championship**

A “bye” becomes necessary when an odd number of teams are present for any given round of the tournament. It is the intent of the National High School Mock Trial Championship to avoid byes where possible. To avoid having an odd number of teams to start the national championship, the host state, upon determining that an odd number of teams have registered, will have a second team from its own state participate.

In the event of a circumstance resulting in an odd number of competing teams, the following procedure will apply:

1. The team drawing the “bye” (no opponent for a single trial round) in rounds two through four will, by default, receive a win and three ballots for that round. For the purpose of power-matching, the team will temporarily be given points equal to the average of its own points earned in its preceding trials. At the end of the fourth round, the average from all three actual trial rounds participated in by the team will be used for the final points given for that team’s bye round.

For example, a team receiving a bye in round three would receive three ballots and an average of its points earned in rounds one and two. At the end of the fourth round, however, the points actually awarded to the team for the bye round will be adjusted to take into consideration the fourth round performance of the team.

2. A team receiving a bye in round one will be awarded a win, three ballots and the average number of points for all round one winners, which total will be adjusted at the end of each round to reflect the actual average earned by that team.

## **F. DISPUTE RESOLUTION**

### **Rule 6.1. Reporting a Rules Violation/Inside the Bar**

Disputes which occur within the bar must be filed immediately following the conclusion of that trial round. Disputes must be brought to the attention of the presiding judge at the conclusion of the trial. If any team believes that a substantial rules violation has occurred, one of its student attorneys must indicate that the team intends to file a dispute. The scoring panel will be excused from the courtroom, and the presiding judge will provide the student attorney with a dispute form, on which the student will record in writing the nature of the dispute. The student may communicate with counsel and/or student witnesses before lodging the notice of dispute or in preparing the form. At no time in this process may team sponsors or coaches communicate or consult with the student attorneys. Only student attorneys may invoke the dispute procedure.

### **Rule 6.2. Dispute Resolution Procedure**

The presiding judge will review the written dispute and determine whether the dispute should be heard or denied. If the dispute is denied, the judge will record the reasons for this, announce her/his decision to the Court, retire to complete his/her score sheet (if applicable), and turn the dispute form in with the score sheets. If the judge feels the grounds for the dispute merit a hearing, the form will be shown to opposing counsel for their written response. After the team has recorded its response and transmitted it to the judge, the judge will ask each team to designate a spokesperson. After the spokespersons have had time (not to exceed three minutes) to prepare their arguments, the judge will conduct a hearing on the dispute, providing each team's spokesperson three minutes for a presentation. The spokespersons may be questioned by the judge. At no time in this process may team sponsors or coaches communicate or consult with the student attorneys. After the hearing, the presiding judge will adjourn the court and retire to consider her/his ruling on the dispute. That decision will be recorded in writing on the dispute form, with no further announcement.

### **Rule 6.3. Effect of Violation on Score**

If the presiding judge determines that a substantial rules violation has occurred, the judge will inform the scoring judges of the dispute and provide a summary of each team's argument. The scoring judges will consider the dispute before reaching their final decisions. The dispute may or may not affect the final decision, but the matter will be left to the discretion of the scoring judges.

### **Rule 6.4. Reporting of Rules Violation/Outside the Bar**

Disputes which occur outside the bar only during a trial round may be brought by teacher or attorney-coaches exclusively. Such disputes must be made promptly to a trial coordinator or a member of the National Board, who will ask the complaining party to complete a dispute form. The form will be taken to the tournament's communication's center, whereupon a dispute resolution panel will (a) notify all pertinent parties; (b) allow time for a response, if appropriate; (c) conduct a hearing; and (d) rule on the charge. The dispute resolution panel may notify the judging panel of the affected courtroom of the ruling on the charge or may assess an appropriate penalty.

The dispute resolution panel will be designated by the National Board.

## **II. NATIONAL HIGH SCHOOL MOCK TRIAL CHAMPIONSHIP FEDERAL RULES OF EVIDENCE** (Mock Trial Version)

In American trials, complex rules are used to govern the admission of proof (i.e., oral or physical evidence). These rules are designed to ensure that all parties receive a fair hearing and to exclude evidence deemed irrelevant, incompetent, untrustworthy, unduly prejudicial, or otherwise improper. If it appears that a rule of evidence is being violated, an attorney may raise an objection to the judge. The judge then decides whether the rule has been violated and whether the evidence must be excluded from the record of the trial. In the absence of a properly made objection, however, the judge will probably allow the evidence. The burden is on the mock trial team to know the National High School Mock Trial Rules of Evidence and to be able to use them to protect their client and fairly limit the actions of opposing counsel and their witnesses.

For purposes of mock trial competition, the Rules of Evidence have been modified and simplified. They are based on the Federal Rules of Evidence and its numbering system. Where rule numbers or letters are skipped, those rules were not deemed applicable to mock trial procedure. Text in italics or underlined represent simplified or modified language.

Not all judges will interpret the Rules of Evidence (or procedure) the same way, and mock trial attorneys should be prepared to point out specific rules (quoting, if necessary) and to argue persuasively for the interpretation and application of the rule they think appropriate.

The Mock Trial Rules of Competition and these National High School Mock Trial Rules of Evidence govern the National High School Mock Trial Championship.

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### **ARTICLE I. GENERAL PROVISIONS**

#### **Rule 101. Scope**

*These National High School Mock Trial Rules of Evidence govern the trial proceedings of the National High School Mock Trial Championship.*

#### **Rule 102. Purpose and Construction**

*These Rules are intended to secure fairness in administration of the trials, eliminate unjust delay, and promote the laws of evidence so that the truth may be ascertained.*

### **ARTICLE II. JUDICIAL NOTICE -- Not Applicable**

### **ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS -- Not Applicable**

### **ARTICLE IV. RELEVANCY AND ITS LIMITS**

#### **Rule 401. Definition of “Relevant Evidence”**

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**Rule 402. Relevant Evidence Generally Admissible: Irrelevant Evidence Inadmissible**

Relevant evidence is admissible, except as otherwise provided in these Rules. *Irrelevant evidence is not admissible.*

**Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**

Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, *if it confuses the issues, if it is misleading, or if it causes undue delay, wastes time, or is a needless presentation of cumulative evidence.*

**Rule 404. Character Evidence Not Admissible to Prove Conduct, Exceptions; Other Crimes**

(a) Character Evidence. - Evidence of a person's character or *character trait*, is not admissible to prove *action regarding* a particular occasion, except:

- (1) Character of accused. - Evidence of a pertinent character trait offered by an accused, or by the Plaintiff to rebut same;
- (2) Character of victim. - Evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the Plaintiff to rebut same, or evidence of a character trait of peacefulness of the victim offered by the Plaintiff in a homicide case to rebut evidence that the victim was the aggressor;
- (3) Character of witness. - Evidence of the character of a witness as provided in Rules 607, 608 and 609.

(b) Other crimes, wrongs, or acts. - Evidence of other crimes, wrongs, or acts is not admissible to prove character of a person in order to show an action conforms to character. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

**Rule 405. Methods of Proving Character**

(a) Reputation or opinion. - In all cases where evidence of character or a *character trait* is admissible, proof may be made by testimony as to reputation or in the form of an opinion. On cross-examination, *questions may be asked regarding relevant, specific conduct.*

(b) Specific instances of conduct. - In cases where character or a character trait is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

**Rule 406. Habit, Routine Practice**

Evidence of the habit of a person or the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization, on a particular occasion, was in conformity with the habit or routine practice.

**Rule 407. Subsequent Remedial Measures**

When measures are taken after an event which, if taken before, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose - such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

**Rule 408. Compromise and Offers to Compromise**

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

**Rule 409. Payment of Medical or Similar Expenses**

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

**Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements**

Except as otherwise provided in this Rule, evidence of the following is not, in any civil or criminal proceeding, admissible against a defendant who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of *nolo contendere*;
- (3) any statement made in the course of any proceeding under Rule 11 of the Federal Rules of Criminal Procedure or comparable state proceeding regarding either of the foregoing pleas; or
- (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or which results in a plea of guilty which is later withdrawn.

However, such a statement is admissible (1) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought, in fairness, be considered with it, or (2) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

**Rule 411. Liability Insurance (*civil case only*)**

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as



proof of agency, ownership, or control, or bias or prejudice of a witness.

## **ARTICLE V. PRIVILEGES**

### **Rule 501. General Rule**

There are certain admissions and communications excluded from evidence on grounds of public policy. Among these are:

- (1) communications between husband and wife;
- (2) communications between attorney and client;
- (3) communications among grand jurors;
- (4) secrets of state; and
- (5) communications between psychiatrist and patient.

## **ARTICLE VI. WITNESSES**

### **Rule 601. General Rule of Competency**

Every person is competent to be a witness.

### **Rule 602. Lack of Personal Knowledge**

A witness may not testify to a matter unless the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, related to opinion testimony by expert witnesses. (See Rule 2.2)

### **Rule 607. Who May Impeach**

The credibility of a witness may be attacked by any party, including the party calling the witness.

### **Rule 608. Evidence of Character and Conduct of Witness**

(a) Opinion and reputation evidence of character. - The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence, or otherwise.

(b) Specific instances of conduct. - Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the Court, if probative of truthfulness or untruthfulness, be asked on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross examined has testified.

Testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination with respect to matters related

only to credibility.

**Rule 609. Impeachment by Evidence of Conviction of Crime** *(This rule applies only to witnesses with prior convictions.)*

(a) **General Rule.** - For the purpose of attacking the credibility of a witness, evidence that a witness other than the accused has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination, but only if the crime was punishable by death or imprisonment in excess of one year, and the Court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused. Evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) **Time Limit.** - Evidence of a conviction under this Rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the Court determines that the value of the conviction substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) **Effect of pardon, annulment, or certificate or rehabilitation.** - Evidence of a conviction is not admissible if (1) the conviction has been the subject of a pardon or other equivalent procedure based on a finding of the rehabilitation of the person convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, other equivalent procedure based on a finding of innocence.

(d) **Juvenile adjudication.** Evidence of juvenile adjudication is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) **Not Applicable**

**Rule 610. Religious Beliefs or Opinions**

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

**Rule 611. Mode and Order of Interrogation and Presentation**

(a) **Control by Court.** - The Court shall exercise reasonable control over questioning of witnesses and presenting evidence so as to:

1. make the questioning and presentation effective for ascertaining the truth,
2. avoid needless use of time, and

3. protect witnesses from harassment or undue embarrassment.

(b) Scope of cross examination. - *The scope of the cross examination shall not be limited to the scope of the direct examination, but may inquire into any relevant facts or matters contained in the witness' statement, including all reasonable inferences that can be drawn from those facts and matters, and may inquire into any omissions from the witness statement that are otherwise material and admissible.*

(c) Leading questions. - Leading questions should not be used on direct examination of a witness (except as may be necessary to develop the witness' testimony). Ordinarily, leading questions are permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, leading questions may be used.

(d) Redirect/Re-cross. - *After cross examination, additional questions may be asked by the direct examining attorney, but questions must be limited to matters raised by the attorney on cross examination. Likewise, additional questions may be asked by the cross examining attorney or re-cross, but such questions must be limited to matters raised on redirect examination and should avoid repetition.*

#### **Rule 612. Writing Used to Refresh Memory**

If a written statement is used to refresh the memory of a witness either while testifying or before testifying, the Court shall determine that the adverse party is entitled to have the writing produced for inspection. The adverse party may cross examine the witness on the material and introduce into evidence those portions, which relate to the testimony of the witness.

#### **Rule 613. Prior Statements of Witnesses**

Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate.

### **ARTICLE VII. OPINIONS AND EXPERT TESTIMONY**

#### **Rule 701. Opinion Testimony by Lay Witness**

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

#### **Rule 702. Testimony by Experts**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by

knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise.

**Rule 703. Bases of Opinion Testimony by Experts**

The facts or data upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the field in forming opinions or inferences, the facts or data need not be admissible in evidence.

**Rule 704. Opinion on Ultimate Issue**

- (a) Opinion or inference testimony otherwise admissible is not objectionable because it embraces an issue to be decided by the trier of fact.
- (b) *In a criminal case, an expert witness shall not express an opinion as to the guilt or innocence of the accused.*

**Rule 705. Disclosure of Facts or Data Underlying Expert Opinion**

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the Court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination.

**ARTICLE VIII. HEARSAY**

**Rule 801. Definitions**

The following definitions apply under this article:

- (a) Statement. - A “statement” is an oral or written assertion or nonverbal conduct of a person, if it is intended by the person as an assertion.
- (b) Declarant. - A “declarant” is a person who makes a statement.
- (c) Hearsay. – “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
- (d) Statements which are not hearsay. - A statement is not hearsay if:
  - (1) Prior statement by witness. - The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement and the statement is (A) inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

- (2) Admission by a party-opponent. - The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity of (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of relationship, or (E) a statement by a co-conspirator of a party during the course in furtherance of the conspiracy.

**Rule 802. Hearsay Rule**

Hearsay is not admissible, except as provided by these rules.

**Rule 803. Hearsay Exceptions, Availability of Declarant Immaterial**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. - A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. - A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical conditions. - A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. - Statements made for the purpose of medical diagnosis or treatment.

(5) Recorded Recollection. - A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

(6) Records of regularly conducted activity. - A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(18) Learned treatises. - To the extent called to the attention of an expert witness upon

cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

(21) Reputation as to character. - Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction. - Evidence of a judgment finding a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal Plaintiff for purposes other than impeachment, judgments against persons other than the accused.

#### **Rule 804. Hearsay Exceptions, Declarant Unavailable**

(a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant -

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A Declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay exceptions:** The following are not excluded by the hearsay rule if the Declarant is unavailable as a witness:

- (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
- (2) Statement under belief or impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a Declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the Declarant believed to be impending death.

- (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the Declarant to civil or criminal liability, or to render invalid a claim by the Declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the Declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
- (4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though Declarant had no means of acquiring personal knowledge of the matter stated; (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as likely to have accurate information concerning the matter declared.
- (5) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

**Rule 805. Hearsay within Hearsay**

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statement conforms with an exception to the hearsay rule provided in these rules.

**ARTICLE IX. AUTHENTICATION AND IDENTIFICATION – Not Applicable**

**ARTICLE X. CONTENTS OF WRITING, RECORDINGS AND PHOTOGRAPHS – Not Applicable**

**ARTICLE XI. OTHER**

**Rule 1103. Title**

*These rules may be known and cited as the National High School Mock Trial Federal Rules of Evidence.*

*Host states have the discretion to eliminate rules that do not pertain to the trial at hand.*

**2008 NATIONAL HIGH SCHOOL MOCK TRIAL CHAMPIONSHIP**

**T E A M R O S T E R – DEFENDANT**

Team roster forms are to be duplicated and completed by each team prior to each round and presented to the Presiding Judge(1), Scoring Judges (3) and opposing counsel (1) before the round begins (5 per trial). Your team must be identified only by your TEAM CODE.

**TEAM CODE:** \_\_\_\_\_

**Round (circle one):    I        II        III        IV        Final**

<b>NAME of STUDENT ATTORNEYS</b>	<b>TASKS</b>	<b>WITNESSES EXAMINED</b>
1) _____ (Student's Name)	Opening/Dir/C-X	Direct: _____ (Witness)
		Cross _____ (Witness)
2) _____ (Student's Name)	Closing/Dir/C-X	Direct: _____ (Witness)
		Cross _____ (Witness)
3) _____ (Student's Name)	Dir/C-X	Direct: _____ (Witness)
		Cross _____ (Witness)

<b>NAME of STUDENT ATTORNEYS</b> (Number in order of appearance)	<b>GENDER of WITNESS</b>	<b>ROLE to be PORTRAYED</b>
4) _____	M      F	Pat Kent
5) _____	M      F	Chris Read
6) _____	M      F	Jamie Newcastle
7) _____	Timekeeper (may not communicate with team)	

**Team Member(s) Not Participating in this Round:**

8) \_\_\_\_\_ 9) \_\_\_\_\_  
(only if team is using a 9<sup>th</sup> member exclusively as timekeeper)

**NOTE:** Team members not participating must sit behind the bar and may not communicate with participating team members during round.



**2008 NATIONAL HIGH SCHOOL MOCK TRIAL CHAMPIONSHIP**

**T E A M R O S T E R – P L A I N T I F F**

Team roster forms are to be duplicated and completed by each team prior to each round and presented to the Presiding Judge(1), Scoring Judges (3) and opposing counsel (1) before the round begins (5 per trial). Your team must be identified only by your TEAM CODE.

**TEAM CODE:** \_\_\_\_\_

**Round (circle one):    I        II        III        IV        Final**

<b>NAME of STUDENT ATTORNEYS</b>	<b>TASKS</b>	<b>WITNESSES EXAMINED</b>
1) _____ (Student's Name)	Opening/Dir/C-X	Direct: _____ (Witness)
		Cross _____ (Witness)
2) _____ (Student's Name)	Closing/Dir/C-X	Direct: _____ (Witness)
		Cross _____ (Witness)
3) _____ (Student's Name)	Dir/C-X	Direct: _____ (Witness)
		Cross _____ (Witness)

<b>NAME of STUDENT ATTORNEYS</b> (Number in order of appearance)	<b>GENDER of WITNESS</b>	<b>ROLE to be PORTRAYED</b>
4) _____	M    F	Devereux Terry
5) _____	M    F	Erin Sussex
6) _____	M    F	Sammy Rodney
7) _____	Timekeeper (may not communicate with team)	

**Team Member(s) Not Participating in this Round:**

8) \_\_\_\_\_ 9) \_\_\_\_\_  
(only if team is using a 9<sup>th</sup> member exclusively as timekeeper)

**NOTE:** Team members not participating must sit behind the bar and may not communicate with participating team members during round.





May 7 - 11, 2008  
*National High School Mock Trial Championship*

## CRITERIA FOR SCORING A TRIAL PRESENTATION

### **PLEASE PRINT AND BRING THESE MATERIALS TO THE COMPETITION**

*The following criteria should be considered during the course of a team's trial presentation. Consider "5" as average. This list is designed to serve as a guideline. All points accessed in a round are subjective.*

#### **Opening Statement**

- Provided a case overview
- The theme/theory of the case was identified
- Mentioned the key witnesses
- Provided a clear and concise description of their team's side of the case
- Stated the relief requested
- Discussed the burden of proof
- Presentation was non argumentative
- Points may be deducted for use of notes, at the Scoring Judge's discretion

#### **Direct Examinations**

- Properly phrased questions
- Used proper courtroom procedure
- Handled objections appropriately and effectively and did not overuse objections
- Did not ask questions that called for an unfair extrapolation from the witness
- Demonstrated an understanding of the Modified Federal Rules of Evidence
- Handled physical evidence appropriately and effectively (Rule 4.20)

#### **Cross Examinations**

- Properly phrased questions
- Effective questioning
- Properly impeached witnesses
- Handled objections appropriately and effectively
- Did not overuse objections
- Used various techniques, as necessary, to handle a non-responsive witness
- Demonstrated an understanding of the Modified Federal Rules of Evidence
- Handled physical evidence appropriately and effectively (Rule 4.20)

#### **Witness Performance**

- Did not use notes (as is required)
- Credible portrayal of character
- Showed understanding of the facts
- Sounded spontaneous, not memorized
- Demonstrated appropriate courtroom decorum

- Avoided unnecessarily long and/or non-responsive answers on cross-examination
- Use of unfair extrapolations, for which points should be deducted

**Closing Statement**

- Theme/theory continued in closing argument
- Summarized the evidence
- Emphasized the supporting points of their own case and damaged the opponent's case
- Concentrated on the important, not the trivial
- Applied the applicable law
- Discussed burden of proof
- Responded to judge's questions with poise
- Overall, the closing statement was persuasive
- There should be only a minimal reliance on notes during the closing statement
- Points should be deducted if closing argument exceeds time limit

**Tiebreaker**

The team with the higher number of points shall win the ballot. We do not want ties! Place a "P" or "D" in the Tiebreaker Box on the ballot to indicate which side has the higher number of points; the team winning the majority of the ballots shall win the round.

**PLEASE PRINT AND BRING THESE MATERIALS TO THE COMPETITION**

**EXPLANATION OF THE PERFORMANCE RATINGS  
USED ON THE SCORESHEET**

Individual participants will be rated on a scale of 1 – 10 speaker points, according to their roles in the trial. The Scoring Judge is scoring **individual performance** in each speaker category. The scoring judge is NOT scoring the legal merits of the case.

Scoring Judges may recognize outstanding individual presentations by selecting one OUTSTANDING ADVOCATE and one OUTSTANDING WITNESS per round. Each Scoring Judge determines individually which student will receive his/her vote; however, the entire judging panel may confer on this matter.

Scoring Judges may individually consider penalties for violation of the Rules of the Competition. Penalties would reduce point awards in the appropriate performance categories below. Penalties will not be indicated separately on the score sheet.

<u>POINTS</u>	<u>PERFORMANCE</u>	<u>CRITERIA FOR EVALUATING STUDENT PERFORMANCE</u>
1 – 2	Not Effective	Unsure of self, illogical, uninformed, not prepared, speaks incoherently, and ineffective in communication
3 – 4	Fair	Minimally informed and prepared. Performance is passable, but lacks depth in terms of knowledge of task and materials; communications lack clarity and conviction
5 – 6	Good	Good, solid, but less than spectacular performance; can perform outside of written notes, but with less confidence than when using written notes; logic and organization are adequate, but does not convey mastery of same; communications are clear and understandable, but could be stronger in fluency and persuasiveness
7 – 8	Excellent	Fluent, persuasive, clear and understandable; well organized materials and thoughts; exhibits mastery of the case and materials; thinks quickly and spontaneously; does not read from notes
9-10	Outstanding	Exceptional presentation; flawless; superior in qualities listed for performance meriting 7-8 points

The team with the higher number of points shall win the ballot (and shall be entered in the Tiebreaker Box on the ballot; the team winning the majority of the ballots shall win the round.

Scoring Judges are reminded to tally all scores, check totals closely, and sign the score sheet before returning the score sheet to the appropriate committee member.



**TEAM DISPUTE FORM**  
**Inside the Bar [Rule 6.1]**  
*(please print.)*

Date: \_\_\_\_\_

Round *(circle one)*:  
1      2      3      4

**TEAM LODGING DISPUTE:** \_\_\_\_\_ *(Enter Team Code)*

Grounds for Dispute: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

INITIALS OF TEAM SPOKESPERSON: \_\_\_\_\_

HEARING DECISION OF PRESIDING JUDGE *(circle one)*:      **Grant**      **Deny**

Reason(s) for Denying Hearing or Response of Opposing Team: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

INITIALS OF OPPOSING TEAM'S SPOKESPERSON: \_\_\_\_\_

Judge's Notes from Hearing:  
\_\_\_\_\_  
\_\_\_\_\_

DECISION OF JUDGE REGARDING DISPUTE *(circle one)*:      **Refer to Panel**      **Not Refer to Panel**

Comments: \_\_\_\_\_  
\_\_\_\_\_

*This form must be returned to the trial coordinator along with the scoresheets of all the evaluators.*

\_\_\_\_\_  
*Signature of Presiding Judge*

**NATIONAL  
MOCK TRIAL  
CHAMPIONSHIP**

**TEAM DISPUTE FORM**  
**Outside the Bar [Rule 6.4]**  
*(Please print.)*

Date: \_\_\_\_\_ Time Submitted: \_\_\_\_\_

**PERSON LODGING DISPUTE:** \_\_\_\_\_

**AFFILIATED WITH:** \_\_\_\_\_ *(Enter Team Code)*

Grounds for Dispute: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

INITIALS OF TRIAL COORDINATOR: \_\_\_\_\_ TIME DISPUTE PRESENTED TO COORD: \_\_\_\_\_

HEARING DECISION OF DISPUTE PANEL *(circle one)*:      **Grant**      **Deny**

Reason(s) for Denying Hearing: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Notes from Hearing: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Decision/Action of Dispute Panel: \_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
*Signature of Trial Coordinator*

\_\_\_\_\_  
*Date/time of Decision*

**NATIONAL HIGH SCHOOL MOCK TRIAL CHAMPIONSHIP**  
**TIMEKEEPING PROCEDURES**  
*(See Rules 4.5, 4.6, and 4.7)*

**Timekeeper's Responsibilities**

- Each team is responsible for reviewing the following procedural information and Rules 4.5 and 4.6, outlining the timekeeper's responsibilities for keeping time accurately and fairly throughout the National tournament.
  - **WORKING TOGETHER as a "neutral timing team"**, timekeepers from both teams (a) will ensure that accurate time for both teams has been kept; (b) will show "time-remaining" cards simultaneously to both teams; and (c) will notify the presiding judge that "TIME" has expired at the end of the trial by showing the "STOP" time card.
  - Each team is responsible for training at least one team member to serve as the team's official timekeeper.
  - **ALL TEAMS** are to bring to the National tournament
    - ◆ Two (2) **STOP WATCHES** (one for keeping time for the Plaintiff side and one for keeping time for the Defense side, regardless of which side your team is presenting in a given round) –**required**
    - ◆ A trained **OFFICIAL TIMEKEEPER** – **required**
    - ◆ Clipboard for the timekeeper – **optional**
    - ◆ Two pencils
- No stop watches, clipboards, or pencils** will be available from the Host Committee at the competition site.
- During the required on-site timekeeper orientation on Thursday afternoon, the Host Committee will provide teams with
    - ◆ One set of Time-Remaining Cards
    - ◆ Timekeeper's Responsibilities Sheet
    - ◆ Time Card Use Table
- All teams must use the "Time Remaining" cards provided by the Host Committee and NO others. Time intervals may not be altered in any way. Team members serving as timekeeper are to be so noted on the "Team Roster" form completed for each round.
- During the round, the timekeeper will need this Timekeeping Procedures Sheet, the Time Card Use Table, and the Time-Remaining Cards, provided by the Host Committee, along with the required stop watches, optional clipboard, and pencils.
  - Teams and their official timekeeper(s) are responsible for being proficient in the timekeeping responsibilities. The team's timekeeper must be familiar with the trial sequence chart and have practiced completing the timekeeping sheet before the tournament begins. In each trial, both teams' timekeepers will sit in the jury box and keep time for both teams. In each trial, both timekeepers will turn in the completed and signed timing sheet to the presiding judge.



## Timekeeping Procedures

### I. BEFORE THE TRIAL

- A. Be sure to have in your Timekeeper's Packet (official packet will be distributed at tournament)
  - \_\_\_\_\_ Five (5) Timekeeping Sheets
  - \_\_\_\_\_ One (1) Time Card Use Table
  - \_\_\_\_\_ One (1) set of Time Cards
- B. Be able to recognize each part of the trial before the tournament begins; label your stop watches "P" for Plaintiff and "D" and keep the stop watch marked "P" at your left hand and the stop watch marked "D" at your right hand.
- C. Enter the courtroom; take your position at the end of the jury box closest to spectators and away from the all judging panel members. Both timekeepers should sit together in a place easily seen by counsel and presiding judge. Rise when the judge and jury enter the courtroom. Be seated when the judge grants permission for all to be seated.

### II. DURING THE TRIAL

- A. Timekeepers play an essential role during a mock trial competition round and therefore must work together as a **neutral** "timekeeping team" to ensure that time is kept accurately and fairly for both sides in the round.
- B. Enter the Round Number and Team Codes in the spaces provided at the top of the Timekeeping Sheet. Arrange your stopwatches, time cards and Time Card Use Table.
- C. Keep time during the trial, remembering the following.
  - 1. Use one stopwatch for each side – PLAINTIFF on your left and DEFENSE on your right.
  - 2. RESET stopwatch to zero **ONLY** at the following times:
    - a) at the beginning of each side's opening statement;
    - b) at the beginning of each side's direct examination;
    - c) at the beginning of each side's cross examination; and,
    - d) at the beginning of each side's closing argument.
  - 3. **DO NOT** reset stopwatch to zero at any other time.
    - a) **DO NOT** reset stopwatch to zero at the end of direct and cross examinations (you will need to resume direct examination timing for redirect questioning, and cross examination time for re-cross questioning);
    - b) **DO NOT** reset stopwatch to zero at the end of the Plaintiff's closing argument (you will need to resume the Plaintiff's closing argument timing for the Plaintiff's **rebuttal**).
  - 4. **START** timing only when each attorney starts to speak, (i.e. when the attorney actually speaks the first word of his or her opening, closing, or examination question – examples include but are not limited to, "May it please the court...", or, "Your Honor, Ladies and Gentlemen of the jury..." [for openings/closings] or, "Please state your name for the court..." [for examination question] – **NOT** when an attorney responds to a presiding judge's inquiry as to whether or not that side is ready to proceed, asks for permission to reserve time for a rebuttal, asks for permission to use/move a podium, or to swear a witness, etc.)
  - 5. **STOP** timing during objections, responses to objections, questioning by the judge, and when the attorney says his or her last word on completion of a given task.
  - 6. Remember: **DO NOT** count time

- From the time the witness is called until he or she takes the witness stand (including the administration of the oath);
- From the time an objection is raised until after the ruling by the presiding judge and the examining attorney says the first word to continue the examination; and
- During the time a judge may raise questions to a team, the panel, or the court administrator.

7. Time **DOES NOT STOP** for the introduction of evidence.

- D. Display time cards **simultaneously** throughout the round to **both teams** (attorneys and witnesses) and the presiding judge only at the intervals set out in the Time Card Use Table. Display the **STOP** card to both teams, the presiding, and the scoring judges.
- E. Timekeeping each trial is a function of both teams' timekeepers working together. Timekeepers *may not* display any increments of time (not outlined on the Time Card Use Table) to their own team independently of the opposing team's timekeeper at any time during the trial.
- F. At the conclusion of the trial, if either side informs the court that it wishes to file a dispute and a dispute hearing is granted, both timekeepers are to time the additional three-minute argument per side.

### III. DISCREPANCIES IN TIME BETWEEN TEAM TIMEKEEPERS DURING A TRIAL

- A. If timing variations of **15 seconds or more** occur at the completion of any *task* (i.e. at the end of each opening, at the end of each witness examination, at the end of each cross examination, and at the end of each closing argument) during the trial, the timekeepers are to notify the presiding judge that a time discrepancy has occurred. In this event, one timekeeper will politely address the presiding judge and say, "Your Honor, under Rule 4.6(b), there is a time discrepancy of more than 15 seconds."
- B. The presiding judge will ask the nature of the discrepancy and then rule on the discrepancy before the trial continues.
- C. Timekeepers will synchronize their stop watches to match the ruling of the presiding judge (as an example, if Plaintiff's stop watch indicates that the Plaintiff team has 2 minutes left in the direct examination block of time and the Defense stop watch indicates time has expired in the direct examination block for the Plaintiff team, the presiding judge *might* decide to split the difference in the timing variation and give the Plaintiff team 1 minute to conclude the direct examination. The Defense timekeeper would adjust timing to allow for the 1 minute timing decision.)
- D. Any discrepancies between timekeepers less than 15 seconds will not be considered a violation.
- E. No time disputes will be entertained after the trial concludes.
- F. The decisions of the presiding judge regarding the resolution of timing disputes are final.

### IV. AFTER THE TRIAL

- A. Add up the time used for each side and sign the timekeeping sheet.
- B. The presiding judge will ask if there is a dispute to be raised by either side; if a dispute is raised, the presiding judge may request that timekeepers keep the allotted time for each side during the dispute procedure.
- C. Before the presiding judge retires to the jury room, each timekeeper is to politely turn in his or her timekeeping sheet. No matter how confusing the courtroom might be at the end of the trial, timekeepers must immediately hand their timekeeping sheets to the presiding judge.

**V. AFTER THE RECESS**

- A. Reset your stopwatch to zero and start time for the debriefing.
- B. Politely remind the judges that both timekeepers will be timing the debriefing and that a maximum of 10 minutes is allotted to that portion of the round.
- C. Signal the presiding judge with the STOP card when the 10 minutes allowed for debriefing have elapsed.
- D. When court is adjourned, help the teams straighten up the courtroom for the next round.

**NATIONAL HIGH SCHOOL MOCK TRIAL CHAMPIONSHIP**  
Time Card Use Table

For **Direct** Examination

When your stopwatch says	Hold up the timecard that says
5:00	20:00
10:00	15:00
15:00	10:00
20:00	5:00
21:00	4:00
22:00	3:00
23:00	2:00
24:00	1:00
24:20	0:40
24:40	0:20
25:00	STOP

For **Cross** Examination

When your stopwatch says	Hold up the timecard that says
5:00	15:00
10:00	10:00
15:00	5:00
16:00	4:00
17:00	3:00
18:00	2:00
19:00	1:00
19:20	0:40
19:40	0:20
20:00	STOP

For **Opening** Statements & **Closing** Arguments

When your stopwatch says	Hold up the timecard that says
1:00	4:00
2:00	3:00
3:00	2:00
4:00	1:00
4:20	0:40
4:40	0:20
5:00	STOP

**NATIONAL HIGH SCHOOL MOCK TRIAL CHAMPIONSHIP**  
Time Card Use Table

Round Number \_\_\_\_\_ Plaintiff Team Code \_\_\_\_\_ Defense Team Code \_\_\_\_\_

**Opening Statements (5 minutes each)**

Plaintiff \_\_\_\_\_  
Defense \_\_\_\_\_

**Cross/Recross Examination of Three Plaintiff Witnesses (20 total minutes)**

FIRST WITNESS (ending time) \_\_\_\_\_  
SECOND WITNESS (cumulative ending time) \_\_\_\_\_  
THIRD WITNESS (cumulative ending time: >20 = time violation) \_\_\_\_\_

**Direct/Redirect Examination of Three Defense Witnesses (25 total minutes)**

FIRST WITNESS (ending time) \_\_\_\_\_  
SECOND WITNESS (cumulative ending time) \_\_\_\_\_  
THIRD WITNESS (cumulative ending time: >25 = time violation) \_\_\_\_\_

**Cross/Recross Examination of Three Defense Witnesses (20 total minutes)**

FIRST WITNESS (ending time) \_\_\_\_\_  
SECOND WITNESS (cumulative ending time) \_\_\_\_\_  
THIRD WITNESS (cumulative ending time: >20 = time violation) \_\_\_\_\_

**Closing Arguments (5 minutes each)**

Plaintiff \_\_\_\_\_  
Defense \_\_\_\_\_

**REMEMBER: CLOCK STOPS FOR OBJECTIONS**

**TIMEKEEPER'S SIGNATURE and Team Code** \_\_\_\_\_