



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LVI GROUP INVESTMENTS, LLC,)

Plaintiff)

v.)

NCM GROUP HOLDINGS, LLC and)
SUBHAS KHARA,)

Defendants.)

C.A. No. 12067-VCG
Public Version
Filed: May 12, 2017

NCM GROUP HOLDINGS, LLC,)
individually and derivatively on behalf)
of NorthStar Group Holdings, LLC,)

Counter-Plaintiff,)

v.)

LVI GROUP INVESTMENTS, LLC,)
SCOTT STATE, PAUL CUTRONE and)
NORTHSTAR GROUP HOLDINGS,)
LLC,)

Counter-Defendants.)

NCM GROUP HOLDINGS, LLC’S
MOTION TO AMEND PROTECTIVE ORDER

Defendant/Counter-Plaintiff NCM Group Holdings, LLC (“NCM”), by and through its counsel, respectfully moves to amend the August 29, 2016 Stipulation and Order for the Production and Exchange of Confidential Information (the “Protective Order” or “Order”) and in support thereof, states as follows:

Summary

1. The Protective Order governs the manner in which discovery is produced and how it may be used in the above-captioned litigation (the “Litigation”). The Protective Order does not generally bar claims against additional parties based on information found in discovery. The language in the Order, however, arguably bars the parties from vindicating their rights in other courts when the claims are based on information learned from Discovery Material in the Litigation. In fact, it is arguably a complete bar to any claims learned in discovery that cannot be brought in this Litigation for lack of jurisdiction or other reasons and prohibits a potential claimant from exercising its right to choose the forum for its claims. Accordingly, pursuant to Paragraph 16 of the Protective Order, NCM respectfully requests a modification of the Order.

Legal Standard

2. The Delaware courts have not adopted a uniform standard for modification of a protective order. Pursuant to the language in the parties’ Protective Order in the case, however, good cause is the standard that this Court should apply. Paragraph 16 of the Protective Order provides that the parties “reserve the right to apply, pursuant to Court of Chancery Rule 5.1 and/or Rule 26(c), upon short notice . . . to modify the terms of this Stipulation.” Rule 26(c)

does not expressly refer to the modification of protective orders, but it does provide that the Court may enter a protective order for “good cause.” By referring to this Rule, the parties agreed to use this same standard for modifying an order. Thus, this Court should apply the “good cause” standard in determining whether modification is appropriate.

3. The Delaware Superior Court adopted a similar standard to rule on a motion to modify a protective order when the parties had not agreed to use the standard in Rule 26(c). See Wolhar v. General Motors Corp., 712 A.2d 464 (Del. Super. 1997). In Wolhar, the court recognized that Delaware had not yet settled on a standard of review for a motion to modify a protective order and then adopted a “balancing test” as articulated by the Third Circuit. Id. at 469. The balancing test adopted by the Wolhar court states that “[t]he appropriate approach in considering motions to modify confidentiality orders is to use the same balancing test that is used in determining whether to grant such orders in the first instance, with one difference: one of the factors the court should consider . . . is the reliance by the original parties on the confidentiality order. The parties’ reliance on an order, however, should not be outcome determinative, and should be only one factor that a court considers” Id. at 469.

4. In deciding to adopt the Third Circuit’s balancing test, the court in *Wolhar* noted that there was also a more “stringent” standard utilized by a minority of courts outside of Delaware -- modification only in extraordinary circumstances or when a compelling need can be shown. *Wolhar*, 712 A.2d at 469. NCM is not aware of Delaware courts adopting this more “stringent” standard. However, even if this Court utilizes that standard, it should modify the Protective Order as denying modification could strip NCM of its ability to bring its proposed claims.

There Is Good Cause To Amend The Protective Order

5. The Protective Order provides that “Discovery Material shall be used solely for purposes of this Litigation and shall not be used for any other purpose, including, without limitation, any business or commercial purpose, or any litigation or proceeding; provided, however, that the foregoing shall not apply to Discovery Material that is or becomes part of the public record.” (Protective Order at ¶ 9.)

6. “Discovery Material” is defined as “documents, deposition testimony, deposition exhibits, deposition transcripts, written discovery requests, interrogatory responses, responses to requests to admit, and responses to requests for documents, and any other information or material produced, given, or exchanged, including any information contained therein or derived therefrom” (*Id.* at p. 2.)

7. The Protective Order also limits the use of confidential information and to whom it can be shown. The limited number of parties that confidential information can be shown to includes this Court, but not other courts of competent jurisdiction. (Protective Order at ¶ 5.)

8. Thus, these few sentences in the Protective Order purport to bar the parties from bringing a lawsuit based on information learned from Discovery Material in any forum other than this litigation and preclude any court but this Court from viewing confidential information. And this is not a hypothetical concern; rather, it is affecting NCM's ability to bring suits in Illinois and New York against tortfeasors whose wrongful conduct was discovered during the course of discovery in this Litigation. In addition, virtually all of the documents produced to NCM in this case were marked "confidential," and this would prejudice NCM's ability to prosecute its claims if they cannot use them in another appropriate forum.

9. During the course of discovery, NCM obtained Discovery Material demonstrating that certain individuals, including without limitation, Brian Simmons and Robert Hogan -- principals of CHS Capital LLC ("CHS"), which is one of three members of LVI -- CHS, and senior members of LVI's management team, including Greg DiCarlo and John Leonard, actively participated in and caused LVI to make fraudulent representations to NCM in connection with the

April 2014 merger between NCM and LVI Group Investments LLC (“LVI”) (a copy of NCM’s proposed complaint in Illinois is attached as Exhibit A).

10. NCM seeks to pursue claims against Simmons and Hogan in Illinois because, among other reasons, Simmons and Hogan are citizens of Illinois and NCM’s lead counsel is in Illinois. Thus, litigating these new claims in Illinois would be more convenient for Simmons and Hogan, as well as NCM. Furthermore, Simmons and Hogan are arguably not subject to personal jurisdiction in Delaware and NCM can avoid motion practice over personal jurisdiction by filing in Illinois.

11. In addition, while NCM believes it would prevail on any motion to dismiss based on statute of limitations grounds filed in this Court because the Delaware statute was tolled by the proposed defendants’ concealment of their fraud, Illinois’ longer limitations period removes the statute of limitations as a defense in any action filed in Illinois. Thus, NCM can file its claims in Illinois against Hogan and Simmons, both of whom are Illinois residents, and CHS, whose principal place of business is in Illinois, and avoid a statute of limitations fight.

12. Plaintiffs have a right to choose the forum state in which to redress their rights -- and here, NCM is choosing to pursue its rights against Simmons, Hogan and CHS in Illinois. Arcoria v. RCC Assocs, Inc., No: K13L-06-058 RBY,

2014 WL 620361, at *3 (Del. Super, Jan. 8, 2014); Eisenbud v. Omnitech Corporate Solutions, Inc., C.A. No. 14695-NC, 1996 WL 162245, at *1 (Del. Chan. Ct., March 21, 1996) (only “extraordinary circumstances can supersede a plaintiff’s right to select its choice of forum.”). For similar reasons, NCM will seek to enforce its rights against DiCarlo and Leonard in New York, where they work and are subject to personal jurisdiction. Like claims against Simmons and Hogan in Illinois, by filing its claims in New York NCM can avoid prolonged personal jurisdiction and statute of limitations disputes.

13. Document production in this case is not complete and NCM’s investigation of claims is continuing, but the complaints NCM currently intends to file in New York and Illinois are attached hereto as Exhibits A and B.

14. NCM should not be precluded from bringing its legitimate claims by the happenstance that it learned of them in discovery in this litigation. This is not a case where NCM is attempting to use information such as trade secrets or confidential information it obtained in discovery for an improper business purpose. While gathering evidence of LVI’s fraud, NCM learned that Simmons, Hogan, DiCarlo and Leonard participated in and caused that fraud. NCM would not be precluded from bringing its claims in another forum if it had discovered them outside of discovery in this case -- nor would it have been precluded from

obtaining the Discovery Material in discovery in such other case -- and there is no reason NCM should be precluded from bringing those claims in other courts or using the information marked confidential in those courts simply because they learned of them in discovery in this case.

15. Yet, the Protective Order prevents NCM from using information learned from Discovery Material as the basis of claims in any forum outside of “this litigation” and precludes NCM from using “confidential” material in any other court. If not modified, these prohibitions would shield the alleged wrongdoers from lawsuits in other appropriate forums. Worse still, it would effectively give tortfeasors who are arguably not subject to personal jurisdiction in Delaware, including Hogan, Simons, DiCarlo and Leonard, a release for their wrongdoing. As such, good cause exists to modify the Protective Order and this Court should exercise its authority to do so. See, e.g., Tanyous v. Banoub, C.A. No. 3402-VCN, 2010 WL 692615, at *1 (Del. Chan. Ct., Feb. 19, 2010) (court modified protective order); Wolhar, 712 A.2d at 469 (modification of protective order within the sound discretion of the court). Accordingly, NCM respectfully requests that this Court allow the parties to use Discovery Material received in this case as the basis of claims that may be filed in other forums and to use

“confidential” information in the other forums subject to appropriate safeguards as determined by those forums.

16. On April 28, 2017, counsel for NCM sent an email to all other counsel that: (a) informed them that NCM seeks to bring claims against certain third-parties, including Simmons and Hogan in Illinois, and DiCarlo and Leonard in New York, in their home state; and (b) asked counsel if they would agree to modify the Protective Order to allow NCM to bring its claims elsewhere. Specifically, NCM’s counsel asked opposing counsel if they would agree to remove the prohibition against bringing claims in other forums to modify paragraph 9 to provide as follows: “Discovery Material shall not be used for any business or commercial purpose; provided, however, that the foregoing shall not apply to Discovery Material that is or becomes part of the public record.”

17. NCM’s counsel requested a response to its proposed modification of the Protective Order by the close of business on Tuesday, May 2, 2017. The only party to respond was LVI, through its counsel. LVI opposes NCM’s proposed modification claiming that LVI relied on the original Protective Order. LVI, however, has not articulated how it relied or how it would have acted differently if the new language proposed by NCM was in the original order. LVI cannot claim that it would have withheld discoverable documents. Nor can it claim that it

produced documents based on a belief that NCM could not bring claims against additional parties, as NCM could file claims against additional parties subject to jurisdiction in Delaware in this litigation even under the terms of the existing Protective Order. Indeed, LVI itself recently filed additional claims against new parties in Delaware based on information it obtained in discovery. For LVI to now claim that NCM should not be permitted to bring its own claims -- in forums where they can avoid costly statute of limitations and personal jurisdiction fights, the proposed defendants are located and, in the case of Illinois, where NCM's principal counsel is located -- is not only hypocritical, but unjust and unreasonable.

18. Thus, as shown herein, and contrary to LVI's claims, good cause exists to modify the Protective Order.

WHEREFORE, NCM respectfully requests that this Court (1) grant its motion to modify the Protective Order; (2) modify the Protective Order as proposed herein; and (3) grant such other and further relief as is just and appropriate.

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