



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LVI GROUP INVESTMENTS, LLC,)
)
 Plaintiff,)
)
 v.)
)
 NCM GROUP HOLDINGS, LLC,)
 SUBHAS KHARA, EVERGREEN)
 PACIFIC PARTNERS, L.P.,)
 EVERGREEN PACIFIC PARTNERS)
 GP, LLC, EVERGREEN PACIFIC)
 PARTNERS II, L.P., EVERGREEN)
 PACIFIC PARTNERS II GP, L.P.,)
 EVERGREEN PACIFIC PARTNERS)
 II GP, LLC, EVERGREEN PACIFIC)
 PARTNERS MANAGEMENT)
 COMPANY, INC., TIMOTHY)
 BRILLON, MICHAEL NIBARGER,)
 AND TIMOTHY BERNARDEZ,)
)
 Defendants.)

C.A. No. 12067-VCG

NCM GROUP HOLDINGS, LLC,)
)
 Counter-Plaintiff,)
)
 v.)
)
 LVI GROUP INVESTMENTS, LLC,)
 SCOTT STATE, PAUL CUTRONE and)
 NORTHSTAR GROUP HOLDINGS,)
 LLC,)
)
 Counter-Defendants.)

NCM GROUP HOLDING INC.'S APPLICATION FOR CERTIFICATION OF THE INTERLOCUTORY ORDER ENTERED ON NOVEMBER 1, 2017

I.

Preliminary Statements

Why This Appeal Should Be Heard Now

1. Neither the parties nor this Court could possibly have anticipated or intended that one sentence of a standard form discovery order could result in a full release of alleged wrongdoers who participated in and directed a massive fraud causing over \$223 million in damages. Yet, if allowed to stand, the Court's November 1, 2017 bench ruling (the "Subject Order," Exhibit A hereto) could have that precise result. Appeal from the Subject Order should be heard now because: (a) if the Appeal proceeds in the ordinary course, any reversal could come too late to sue the alleged wrongdoers, thus depriving NCM of its claims forever; and (b) the legal standard applicable to requests to amend protective orders has not yet been established by the Supreme Court, and this Court treated that standard as an issue of first impression.

Rule 42(b) Statement

2. NCM and counsel state that they have determined in good faith that this Application meets the criteria set forth in Rule 42(b) and, in particular, subparagraphs (iii)(A) and (H) thereof. As will be explained below, review of the Subject Order serves considerations of justice and involves a legal issue not yet addressed by the Supreme Court and that this Court described in oral argument as an "issue of first impression." (6/23/17 Transcript, Exhibit B hereto, at 37:22.)

II.

The Subject Order Decided A Substantial Issue Of Material Importance

Background Leading Up To The Subject Order

3. LVI and NCM combined to form NorthStar. Each alleges the other defrauded it. Although NCM was the first to formally assert fraud (D.I. 288, compare p. 19, ¶43 with p. 62, ¶25), LVI was the first to file in this Court so its claims are in its complaint, and NCM's claims are in its counterclaim.

4. While this case was still in its infancy, the Court entered an agreed protective order governing discovery material produced in this case (the "Protective Order," Exhibit C hereto). Paragraph 9 thereof prohibits use of discovery materials produced in this case ("Chancery Discovery") in any other litigation. Paragraph 16 reserved the right for any party to seek modification of the Protective Order.

5. Discovery ensued and many documents were produced. Some contained information showing that four individuals and a related entity ("CHS") (collectively, the "Five Wrongdoers") had also participated in and caused LVI's fraud against NCM. The four individuals were Illinois residents Brian Simmons and Robert Hogan (the "Illinois Wrongdoers"), and John Leonard and Gregory DiCarlo, who reside or work in New York (the "New York Wrongdoers").

6. NCM decided to sue the Five Wrongdoers. However, NCM knew if it sought to bring them into this case as additional counter-defendants, any motion to

amend would be opposed, and if the motion were granted, the four individual Wrongdoers would then challenge personal jurisdiction and all five of them would raise Delaware's three-year statute of limitations as a defense. Thus, suing them in this case would be very costly on these non-merits issues. More importantly, because no one can predict how the Court would rule on those issues--and because those decisions could be reversed on appeal--suing the Five Wrongdoers in this case would be too risky.

7. For example, if this Court granted the motion to amend and denied the motions to dismiss, NCM's claims against these new counter-defendants would be tried and judgment could be entered for NCM. However, the Supreme Court could later reverse on jurisdiction or limitations grounds (*i.e.*, non-merits reasons) and NCM would have to start over in another court--doubling the time and cost of this litigation.

8. Worse still, regardless of how this Court ruled on the motions to amend and dismiss, if the ultimate appellate decision were adverse to NCM on jurisdiction and/or limitations, that appellate decision may come too late for NCM to sue the Five Wrongdoers elsewhere.

9. Thus, NCM determined to sue CHS and the Illinois Wrongdoers in Illinois and the New York Wrongdoers in New York, where there would be no jurisdiction or limitations issues. The problem, however, was that NCM then

believed it could not plead sufficient facts against the Five Wrongdoers without relying on Chancery Discovery, which, because of the Protective Order, NCM could not do. Thus, NCM sought an amendment of the Protective Order permitting NCM to use Chancery Discovery in the new litigation (subject to appropriate confidentiality safeguards). So, on May 5, 2017, NCM filed its Motion to Amend Protective Order (the “Protective Order Motion,” D.I. 280).

10. While the Protective Order Motion was pending, NCM determined that it could sue the New York Wrongdoers in New York without relying on Chancery Discovery, and it did so. Accordingly, throughout the remainder of this Application, the term “Wrongdoers” shall mean CHS and the Illinois Wrongdoers.

11. By October 13, 2017, the clock was still ticking on the Delaware statute of limitations. However, the Court had not yet ruled on the Protective Order Motion, so NCM had no choice but to file its Motion for Leave to Amend its Counterclaim to add the Wrongdoers (D.I. 454). On October 27, 2017, NCM amended that motion (D.I. 480), adding another proposed counter-defendant, LVI Parent Corporation (as amended, the “Amendment Motion”).

12. Had this Court granted the Protective Order Motion, NCM would have withdrawn its Amendment Motion as to the Wrongdoers and sued in Illinois. NCM intends to do that if the Supreme Court accepts this interlocutory appeal and reverses.

The Subject Order's Substantial Effect

13. After NCM filed its Protective Order Motion, NorthStar filed a cross-motion seeking an order that included provisions similar to Paragraph 9 (“NorthStar’s Motion,” D.I. 291).

14. The Subject Order denied NCM’s Protective Order Motion and granted NorthStar’s Motion. As now shown, the Subject Order is extremely significant.

15. Critically, there are at least three ways that NCM’s claims against the Wrongdoers could in this case be barred--either by this Court or on appeal--for reasons unrelated to the merits: (1) if NCM were not allowed to amend its counterclaim to add the Wrongdoers (all adverse parties object to the Amendment Motion); (2) if it were found that there is no jurisdiction over the Illinois Wrongdoers; and (3) if it were found that NCM’s claims against the Wrongdoers were barred by Delaware’s statute of limitations.

16. These non-merits rulings would not bar a refiling in Illinois, which would have jurisdiction over the Wrongdoers and which has a longer limitations period than Delaware. *See People v. Vari*, 48 N.E.3d 265, 269 (Ill. App. Ct. 2016) (dismissal for lack of personal jurisdiction not an adjudication on the merits; *Reinke v. Boden*, 45 F.3d 166, 172-73 (7th Cir. 1995) (dismissal in another state court under a different statute of limitations doesn’t bar the same later suit in Illinois).

17. However, if allowed to stand, the Subject Order would prevent refileing in Illinois because, based on NCM's present knowledge, it must use Chancery Discovery to refile in Illinois, and the Subject Order would prohibit that.

18. Thus, under any of the three scenarios described in paragraph 15 above, if the Subject Order were not reversed, NCM would be deprived of the opportunity to have its claims against the Wrongdoers decided on the merits, and the Wrongdoers would get away with their fraud scot-free. Thus, the issue decided by this Subject Order could not be more material.

III.

Without Interlocutory Appeal, Any Reversal Of The Subject Order Could Come Too Late For NCM To Sue In Illinois

19. Based on the foregoing, NCM must have the opportunity to appeal the Subject Order. Yet, if NCM is required to wait until final judgment to appeal, that appeal may not conclude until after the Illinois limitations period runs, thus depriving NCM of its right to appeal.

20. And here's why. In an Illinois suit against the Wrongdoers, Illinois' limitations law would apply. *Belleville Toyota, Inc. v. Toyota Motors Sales, U.S.A., Inc.*, 770 N.E.2d 177, 194 (Ill. 2002) (Illinois applies the limitations law of the forum). Although Illinois has a borrowing statute that can require using the statutes of limitation of other states, 735 ILCS 5/13-210, it does not apply where--as

here--one or more parties resided in Illinois when the cause of action arose. *Coan v. Cessna Aircraft*, 293 N.E.2d 588, 589 (Ill. 1973).

21. Thus, the statute of limitations applicable to NCM's claims against the Wrongdoers is Illinois' five-year statute, 735 ILCS 5/13-205. *Pearl v. Waibel*, 688 N.E.2d 336, 340 (Ill. App. Ct. 1997) (five-year statute applies to common law fraud claims). The five-year period commences when the plaintiff knew or should have known that an injury has occurred and that it was wrongfully caused. *Henderson Square Condominium Ass'n v. LAB Townhomes, LLC*, 46 N.E.3d 706, 720-21 (Ill. 2015).

22. We understand the Wrongdoers will contend that the limitations period commenced upon the closing of the merger on April 23, 2014. While NCM disagrees, to be safe, NCM must sue before then.

23. But, there is no assurance that an appeal in the ordinary course could be concluded by then. After all, the parties must complete fact discovery, expert discovery, pre-trial proceedings, a full trial, post-trial briefing and argument, possible post-judgment motion practice and appeal. Even if trial commences on April 30, 2018 (as presently scheduled), a final decision on appeal may not be made prior to April 2019.

24. Our opponents may argue that even if reversal occurs after Illinois' limitations period has run, NCM could avoid the problem based on Illinois' savings

statute or equitable tolling. NCM would gladly accept a stipulation from the Wrongdoers that those principles would render NCM's claims timely. But, absent that, there is no assurance that this would solve the problem.

25. The savings statute provides that a plaintiff whose claims are dismissed on jurisdictional grounds by a *federal* court may refile in Illinois state court within one year of the dismissal, notwithstanding the limitations period may have otherwise run. However, we are unaware of any case directly dealing with that provision in the context of a *state* court dismissal.

26. Equitable tolling, too, is an uncertain area of Illinois law. *Fidelity National Title Insurance Co. of New York v. Howard Savings Bank*, 436 F.3d 836, 839 (7th Cir. 2006); *Indep. Tr. Corp. v. Kansas Bankers Sur. Co.*, 64 N.E.3d 1109, 1121 (Ill. App. Ct. 2016) (equitable tolling applies only in "rare occasions").

27. Since there is real risk that reversal in the ordinary course may not occur in time to help NCM, this Court should certify for interlocutory appeal and the Supreme Court should accept such appeal.

IV.

**The Subject Order Involves An Issue Not Yet
Addressed By The Supreme Court, Which This
Court Described As An Issue Of First Impression**

Wrong Legal Standard

28. The Supreme Court has not yet established a legal standard governing requests to amend protective orders. In deciding what this Court deemed to be an

issue of first impression (Exhibit B at 37:22), this Court held that the legal standard in determining whether to amend an agreed protective order is a balancing test, pursuant to which reliance by those opposing the motion is balanced against the need for the party seeking modification to use the discovery material in question (Subject Order at 9:2-16). But that is not--and should not be--the standard.

29. NCM believes that this Court was correct in looking to *Wolhar v. GM Corporation*, 712 A.2d 464 (Del. Super. 1997). NCM respectfully submits, however, that this Court's standard leaves out the most important part of *Wolhar's* test, which is "whether [the requested] modification would prejudice substantial rights of [the party opposing modification]." *Id.* at 469. Although reliance is a factor to be balanced in making that determination, any such reliance must be detrimental, resulting in "substantial prejudice." *Id.* at 470.

30. Thus, in fashioning and applying this standard, the Court made a number of errors, including the following:

No Prejudice

31. In finding that LVI and NorthStar showed "substantial reliance on the terms of the [P]rotective [O]rder" (Subject Order at 12:14-16), the Court found only that they applied broader search terms than they otherwise would have resulting in producing irrelevant documents. But that's not enough. LVI and NorthStar should have been required to show that doing so "substantially prejudiced" them. However,

despite two chances to do so--their initial and supplemental briefs--LVI and NorthStar did not contend, and the Court did not find, that they suffered any prejudice, let alone substantial prejudice.

32. Nor could they have shown prejudice. For starters, everyone agrees the Protective Order allows Chancery Discovery to be used as a basis for claims against additional tortfeasors who are subject to this Court's jurisdiction. Thus, LVI and NorthStar produced the documents knowing they could form the basis of additional claims against new defendants.

33. Furthermore, as the Subject Order makes clear, the only other cases in which NCM wants to use the Chancery Discovery are cases against those who are alleged to have participated in and caused the very fraud by LVI that is already the subject of NCM's counterclaim in this case. (Subject Order at 6:24-7:6, 8:17-19.) Thus, the documents NCM would rely on in suing the Wrongdoers are, by definition, relevant to this case, and would have to have been produced herein regardless of any other overbroad search terms. So, LVI and NorthStar have not been harmed by producing any other irrelevant documents.

34. Finally, the additional claims NCM is seeking to bring would be against the Wrongdoers, not LVI or NorthStar, so NCM's use of the documents will not prejudice LVI or NorthStar at all.

35. Thus, there is no detrimental or prejudicial reliance to balance against NCM's need for the Chancery Discovery. At bottom, LVI and NorthStar would not suffer substantial prejudice if the Protective Order were modified.

NCM's Need To Use Chancery Discovery

36. Balanced against the failed reliance/prejudice argument, NCM showed that, as just explained in the foregoing paragraphs: (a) NCM's claims against the Wrongdoers must be pursued in Illinois rather than in this case; and (b) based upon its present knowledge, NCM must use Chancery Discovery to sue the Wrongdoers. Thus, when properly applied, the balance weighs overwhelmingly in favor of a finding of good cause and granting the requested amendment. Respectfully, the Court's finding to the contrary was mistaken. Indeed, the Court made a number of errors in this regard.

37. *First*, although the Court basically agreed with NCM that if not modified the effect of Paragraph 9 could be to release the Wrongdoers from any and all liability, it found that this was NCM's own fault, because such an unjust and inequitable outcome was "foreseeable." (Subject Order at 11:17-24.) Yet, for this to have been foreseeable, NCM would have had to foresee--at the very outset of the case--that: (a) it would uncover in discovery that a non-party directed LVI to commit fraud; (b) the non-party would not be subject to Delaware jurisdiction; and (c) if (a)

and (b) happened, the Court would not amend the Protective Order to avoid this unjust result. Respectfully, NCM should not be charged with such prescience.

38. Nor does the fact that NCM's existing counterclaim mentions Hogan and Simmons change this. Their admissions were alleged only to support the allegation that *LVI* had committed fraud, not that *they* had participated in and caused *LVI*'s fraud.

39. *Second*, the Court relied on its finding that NCM "has given me no reason to think that it must sue [the Wrongdoers] in order to be made whole for any damages." (Subject Order at 12:8-10.) Yet, there is no requirement that a party desirous of suing one tortfeasor can do so only if other tortfeasors could not make them whole. Indeed, whether a wrongdoer can make a party whole often cannot be known for years, after judgment is rendered, any appeals resolved and all execution efforts exhausted. The relevant inquiry is whether NCM had good cause for modification based on its need to use Chancery Discovery to sue the Wrongdoers, and NCM proved that.

40. In all events, this issue was raised for the first time by the Court in the Subject Order, when it was too late for NCM to address it. *LVI* and NorthStar made no such argument, nor did the Court raise it or ask any questions about it during oral argument. Indeed, although the Court asked for supplemental briefing on a number of points, it did not ask for input on this issue. (Exhibit B at 38:4-40:24.) Had it

been asked, NCM would have said LVI already appears to be judgment-proof as its primary (if not only) asset--its interest in NorthStar--has become worthless since NorthStar was sold for less than its debt. And that negates the Court's entire premise for this point.

41. *Finally*, appeal from the Subject Order is critical as a matter of general importance. For one thing, the issue of which legal standard to apply to requests to amend agreed protective orders should be resolved by the Supreme Court. Moreover, it would be important for attorneys practicing in Delaware courts to know whether a form protective order--appearing on the Court of Chancery's website--will not be amended even if that results in losing meritorious claims against anyone not subject to jurisdiction in the same Court. It surely cannot be that this was this Court's--or the parties' intent--when the Protective Order was entered. No one could have anticipated or intended that a form discovery order could result in a full release. And it is certainly against all sense of justice for that to be the result here. Thus, review of the Subject Order would serve considerations of justice.

V.

Conclusion

42. NCM respectfully requests that this Court certify the Subject Order for interlocutory appeal and that the Supreme Court accept the requested interlocutory appeal.

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Dated: November 13, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2017 a copy of the foregoing was caused to be served via File & Serve*Xpress* upon the following counsel of record:

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