IN THE COURT OF THE CHANCERY OF THE STATE OF DELAWARE

In re Yahoo! Shareholders Litigation	Cons. C.A. No. 3561-CC

PLAINTIFFS' SURREPLY IN SUPPORT OF UNSEALING THE PROPOSED AMENDED COMPLAINT

Plaintiffs respectfully submit this supplemental reply in support of their application for the unsealing of the proposed Amended Complaint.

PRELIMINARY STATEMENT

1. The public has a fundamental "right to be informed of the operations of government and to an open court system." *Fitzgerald v. Cantor*, 2001 Del. Ch. LEXIS 48, at *2 (Apr. 17, 2001) (Ex. A). "This concept is known as the Common Law Right of Access and is adopted or acknowledged in Court of Chancery Rule 5(g)."[1] *Id.* at *2.

2. Defendants ask the Court to disregard the Common Law Right of Access in favor of a newly-minted proposal that access to information learned in the course of breach of fiduciary duty actions be suppressed when a proxy fight is pending. Defendants cite no authority supporting this proposition and their effort should be rejected. The fact that Plaintiffs seek important relief in this Court that may well affect the price that Yahoo shareholders stand to receive from Microsoft or any other third party

[1] Court of Chancery Rule 5(g)(1) provides:

> Except as otherwise provided in this Rule 5(g), all pleadings and other papers, including deposition transcripts and exhibits, answers to interrogatories and requests for admissions, and affidavits or certificates and exhibits thereto ("documents") filed with the Register in Chancery shall become a part of the public record of the proceedings before this Court.

in a change-of-control transaction, while another Yahoo shareholder is seeking to remove the Board through the ballot box, does not warrant sealing the record from public view.

3. Defendants cannot meet their burden of establishing "good cause" for overriding the public's right of access by relying on conclusory assertions that unsealing the Amended Complaint would provide "an incomplete record" relating to Yahoo's severance plans, or would "create the illusion that the Yahoo! Board was acting contrary to advice from its advisors." (Defs.' Supp. Br. at 12) Such contentions amount to nothing more than that Defendants deny the allegations of the complaint. Defendants may, of course, provide what they believe to be a more complete record in their Answer or other filings. If Defendants are complaining that emails or notes have been selectively excerpted, Plaintiffs have no objection to including the full text of any email or handwritten note referenced in the Amended Complaint. Defendants' contentions also fail to acknowledge that the existing public record is incomplete and misleading by virtue of Defendants' selective and partial disclosures.[2]

4. Unable to satisfy their burden, Defendants repeat unfounded accusations that Plaintiffs' counsel breached the Confidentiality Order. The Confidentiality Order protects against the disclosure of ***the substance of protected information***. Defendants can point to no instance in which any of Plaintiffs' attorneys disclosed the substance of any redacted information. The comments of Plaintiffs' counsel that Defendants seek to hide evidence of breaches of fiduciary duty reveal nothing of the underlying information,

[2] Defendants' misleading selective disclosures are discussed on pages 3-5 of Plaintiffs' letter to the Court of May 20, 2008, and further discussed below. Plaintiffs intend to supplement the Amended Complaint to assert disclosure claims relating to the severance plans. In addition, given the progress of discovery and the evidence adduced to date, Plaintiffs intend to move for a prompt trial date on our *Unitrin* challenge to the severance plans.

and do not violate the Confidentiality Order. They refer merely to the self-evident fact of massive redactions of factual allegations and supporting exhibits.

5. The possibility that shining the light of day on Defendants' conduct will dispose shareholders to vote against the incumbent slate is no basis for concealing the information. None of the information Defendants redacted is of a personal nature. None reveals internal deliberations over business strategies presently under consideration. None reveals information that would confer a business advantage on competitors.

6. The information does, however, reveal the conduct of Yahoo's management and Board on matters of critical importance to shareholders and of critical importance to Plaintiffs' breach of fiduciary duty claims. Of particular import, Yahoo seeks to hide the potential cost of the severance plans, and thus the impact of the plans on the amount Microsoft or any other potential future acquiror might be willing to pay for Yahoo shares. Yahoo shareholders are entitled to know the potential cost of the severance plans, the manner of their creation and adoption, and the factual basis supporting their invalidation, which invalidation would maximize the price of any future acquisition offer.

ARGUMENT

A. Defendants Have Not Carried Their Burden of Showing "Good Cause" to Sustain the Redactions.

7. As Defendants acknowledged during last week's conference, they bear the burden of justifying each redaction they make pursuant to Rule 5(g). Defendants failed to file an initial Rule 5(g)(5) certification and they then declined to offer a substantive

response to Plaintiffs' application. Given another opportunity to meet their burden, Defendants abandoned many of their initial redactions.

8. Defendants' new submission is largely devoted to conclusory assertions that factual allegations in a pleading should be suppressed during the pendency of a proxy fight, ***since they might affect a shareholder's voting decision***. This is not the law.

9. Rule 5(g) authorizes the sealing of documents containing (1) trade secrets, (2) third-party confidential material or (3) nonpublic financial information. *See Romero v. Dowdell*, 2006 Del. Ch. LEXIS 82 at *7 (Del. Ch. Apr. 28, 2006) (Ex. B).[3] "***All other documents are 'deemed available for public disclosure.'***" *Id.* (quoting *One Sky Inc.*, 2005 Del. Ch. LEXIS 72 at *1 (May 12, 2005)) (emphasis added).

10. The Court determines whether good cause exists by "balancing the interests of companies in protecting proprietary commercial, trade secret or other confidential information against the legitimate interests of the public in litigation filed in the courts, as well as shareholder interests in monitoring how directors of Delaware corporations perform their managerial duties." *Stone*, 2005 Del. Ch. LEXIS 146, at *5.

11. Citing *Disney v. The Walt Disney Co.*, 2005 Del. Ch. LEXIS 94 (June 20, 2005) (Ex. E), the *Stone v. Ritter* defendants argued that disclosing excerpts of board minutes in the complaint would have a "chilling effect" on board deliberations. The Court rejected the argument, noting that *Disney* arose in the context of a Section 220 action. *See Stone*, 2005 Del. Ch. LEXIS 146 at *4. The Court explained that once documents are part of a pleading in a plenary action, different considerations apply:

[3] *See also One Sky Inc. v. Katz*, 2005 Del. Ch. LEXIS 72, at *3 (May 12, 2005) (Ex. C) (*quoting Fitzgerald*, 2001 Del. Ch. LEXIS 48, at *8); *Stone v. Ritter*, 2005 Del. Ch. LEXIS 146 at *5 (Sept. 26, 2005) (Ex. D).

> This proceeding is a derivative action in which shareholder plaintiffs assert derivative claims based on information obtained using the "tools at hand" under section 220.… The information obtained in the books and records context is being used affirmatively in this derivative action. Reasonable expectations of confidentiality with respect to documents produced in a section 220 action do not continue unabated in the context of litigation.

Id.

12. The *Stone* Court found no basis for continuing to seal any portion of the complaint, noting that none "of the references in the complaint to minutes of the board of directors and Audit Committee meetings threaten to chill internal deliberations of the board or any of its committees." *Id.* at *5-6. Rather, "the references in the complaint to minutes of meetings refer largely to the alleged failure of the director defendants to act in the face of a known duty to act." *Id* at *6. Here, Defendants are no longer seeking the redaction of references to Board deliberations.

13. In *Romero*, the Court unsealed the amended complaint, rejecting "a barrage of arguments for other standards" offered by the defendants. The Court reviewed the information defendants sought to shield, holding that "[n]one of these details comprises trade secrets, third-party confidential information or nonpublic financial information." *See Romero*, 2006 Del. Ch. LEXIS 82, at *12. The Court explained:

> In *Disney*, this Court expressed concern that the disclosure of documents "of an intrinsically confidential nature," i.e., documents that "relate to private communications among or deliberations of the Company's board of directors," might chill board deliberations. ***The information contained in paragraphs 22 through 27 of the Amended Derivative Complaint does not reflect the private communications or deliberations of the CEC Audit Committee; rather, the paragraphs detail who attended, what the board members discussed and in two instances, the actions the board members decided to take. More significant, however, is what the paragraphs do not reveal: the board members' back and forth discussions or weighing of the options***. In fact, it is impossible to tell

> how the board members decide what action to take because the minutes, as redacted, do not reveal their deliberative process."

See Romero at *13 (emphasis added).

14. Here, none of the information Defendants seek to redact reveals the Yahoo Board's "back and forth discussions" or "weighing of the options." As explained below, the redacted materials concern severance plan information and various options considered by ***Yahoo's management***, not Yahoo's Board. In fact, the redacted materials illustrate the extent to which Yahoo's management, seeking to thwart Microsoft's merger proposal, disregarded and withheld from the Board the advice of Yahoo's compensation consultant. Consequently, the directors blindly accepted management's self-interested severance plans without adequate consideration of their negative implications to Microsoft or any other potential bidder, and the resulting harm those plans pose to Yahoo's shareholders.

15. To a large extent, Defendants defend their redactions on the ground that disclosing the allegations "would prejudice Yahoo! in its upcoming proxy context by providing an incomplete record of the circumstances surrounding the adoption of the Yahoo! severance plans." (Defs.' Supp. Br. at 11-13) No defendant accepts the completeness of the allegations in a complaint. Defendants are free to supplement the record or make their own voluntary disclosures.

1. There is No Proxy Fight Exception to the Right of Public Access.

16. Defendants rely on *Pershing Square, L.P. v. Ceridian Corp.*, 923 A.2d 810 (Del. Ch. 2007) and *Davis Acquisition, Inc. v. NWA, Inc.*, 1989 Del. Ch. LEXIS 39 (Apr. 25, 1989), for the novel and striking proposition that, when facing a proxy contest, incumbent directors have a right to censor public court filings to redact facts that might

call into question their compliance with their fiduciary obligations. Neither case so holds.

17. *Pershing Square* was a Section 220 action in which a proxy contestant sought letters containing outdated but potentially embarrassing personal information. The petitioner apparently learned about the letters through a questionable source and sought to obtain them through the books and records inspection so they could be used in the proxy contest. Finding the documents did not purport to "challenge any board action or inaction" of Ceridian Corporation, the Court refused the inspection. 923 A.2d at 814 n.4. The Court found it improper for Section 220 (and the Court) to be used as a pretext to let the shareholder broadcast "***improperly obtained***" confidential information to sully the directors' reputations in a proxy fight. *Id.* at 819-20 (emphasis added).

18. This case, in stark contrast, is a breach of fiduciary duty action, not a books and records case. The redacted allegations and documents, which are part of a pleading, were obtained through expedited discovery acceded to by Defendants and are directly relevant to the breaches of duty at the core of the Amended Complaint. The allegations were asserted independently of any proxy contest. Indeed, the Motion to Amend and its request for public filing of the Amended Complaint pre-dates by several days the announcement, by another shareholder, of a competing director slate. Public disclosure of the redacted information logically follows from application of the Common Law Right of Access.

19. *Pershing Square* does not create a proxy contest exception to the presumption that pleadings are open to public inspection. To the contrary, in a subsequent breach of fiduciary duty action brought by another Ceridian shareholder

during the pendency of the same proxy fight, the Court permitted the public filing of an amended complaint that contained information obtained during discovery. The Court then scheduled a trial on certain of the breach of fiduciary duty allegations in advance of the annual meeting, *Minneapolis Fire Fighters Relief Ass'n v. Ceridian Corp.*, C.A. Nos. 2996-CC & 3012-CC, Chandler, C., let. op. (Del. Ch. July 10, 2007) (Ex. G), thereby negating any suggestion that breach of fiduciary duty actions should be shielded from public view during a proxy contest.

20. Nor does *Davis Acquisition, Inc. v. NWA, Inc.*, 1989 Del. Ch. LEXIS 39 (Apr. 25, 1989), support Defendants' claim of a proxy fight exception. Rather, that decision cautions about making judicial pronouncements on preliminary injunction applications during the pendency of a proxy contest, when there is no "time for an authoritative determination of the claims of right asserted." *Id.* at *18. *Davis* says nothing about redacting a litigant's pleadings, which carry no judicial imprimatur. Moreover, the very same issue litigated in *Davis* was subsequently the subject of an public trial during a proxy contest, *Quickturn Design Systems v. Shapiro*, 721 A.2d 1281 (Del. 1998), futher negating any suggestion that public airing of breach of fiduciary duty claims is incompatible with a proxy contest.

21. In sum, there is no legal support for suppressing the factual basis of a breach of fiduciary duty action during a proxy contest. Defendants' proposed proxy fight exception to the Common Law Right of Access would inhibit disclosure of factual information at a time when stockholders are entitled to full disclosure of matters pertinent to their voting decision. Defendants' proposed exception would represent bad law and bad policy, and is without foundation.

2. Defendants' Selective and Misleading Disclosures Make Their Application Particularly Inappropriate.

22. While Defendants seek to prevent Plaintiffs from publicly communicating the merits of their claims, Defendants reserve for themselves the power to present their own version of events, based on misleading partial disclosures and selective disclosure of internal information. Plaintiffs' letter to the Court of May 20, 2008, sets forth how Defendants chose to make selective disclosure of cherry-picked (and unfounded) cost calculations respecting the severance plans.

23. Yahoo's preliminary proxy materials, filed on May 22, disclose that "Compensia advised the Company and F.W. Cook & Co. advised the Compensation Committee with respect to the terms of the [severance] plans." They do not disclose how senior management ignored the advice of Compensia and how F.W. Cook & Co. was left in the dark until after senior management had proposed expansive plan terms.

24. Defendants argue in their supplemental brief that the Amended Complaint "create[s] the illusion that the Yahoo! Board was acting contrary to advice from its advisors." (Defs.' Supp. Br. at 12) In fact, the deposition last Wednesday of Timothy Sparks of Compensia confirms that Compensia's advice ***was*** inconsistent with the Board's action, that management disregarded that advice, and that the advice was withheld from the Board. Having chosen to highlight the fact of Compensia's advisory role in their preliminary proxy materials, Defendants are under an obligation to ***disclose*** the substance of Compensia's advice, not to ***suppress*** it.

25. The crux of Plaintiffs' challenge to the Yahoo severance plans rests on the combination of clauses allowing any of Yahoo's over 13,000 employees to quit and

obtain massive severance benefits based on a "substantial adverse alteration" of the employee's duties and responsibilities within two years after a change of control. Compensia's Sparks testified that he specifically advised Yahoo management from the outset that he was "generally opposed to duties and responsibilities provisions," and that in his experience "those provisions have troubling administrative elements to them" posing difficulties to an acquiror. (Sparks 66; *see also id.* at 70, 71) (Ex. H).

26. Sparks testified that rather than fight individual claims premised on changes to an employee's duties and responsibilities, it is not uncommon for acquirors to "take the path of least resistance" and pay the severance. (Sparks 68) Yahoo management ignored Sparks and proposed imposing on Microsoft the incredibly expensive problem of an entire workforce incentivized to walk out and claim severance benefits. Yet the Board and Compensation Committee were apparently unaware of Sparks' advice on this critical plan provision.

27. Sparks further advised that the severance plans compensate senior executives "very aggressively" by accelerating all of their abundant unvested equity. (Sparks 298-300)

28. Sparks also provided Yahoo management with a chart showing that the cash severance benefits under the proposed Yahoo plans were significantly more generous than those in three severance plans identified by Yahoo senior management. (Ex. I) This chart – the only written assessment of the severance plans not controlled by Jerry Yang and his lieutenants – was never provided to any director. (Compl. ¶ 69)

29. Defendants' public disclosures relating to the severance plans are a tacit admission that the Board's adoption of the measures is an issue of importance to

shareholders. An unsealed Amended Complaint is critical, in light of Defendants' selective and misleading public disclosures, the current contested election, and the possibility of a new acquisition proposal by Microsoft.

3. Defendants Do Not Show "Good Cause" for the Specific Redactions.

30. Until the filing of their supplemental brief, Defendants' declined to explain or justify any of their wholesale redactions, as required by Rule 5(g). Their belated effort to establish "good cause" does not satisfy their burden.[4]

31. Defendants seek to justify the redaction of paragraphs 38 and 39, which quote from notes taken by an unidentified Yahoo employee of a conversation between Yahoo CEO Jerry Yang and Microsoft CEO Steven Balmer regarding the unsolicited merger proposal. Given the adversarial relationship between the two companies, there was no expectation of privacy regarding what was said. Yahoo did not claim a business strategy privilege over the notes of the conversation. Moreover, as stated above, either Defendants or Plaintiffs can readily supplement the record with the entire set of notes.

32. Defendants seek to conceal paragraph 50, which quotes an internal Yahoo email revealing that a senior executive advised Yang that there was no immediate need for a broad retention plan. The document is important because it reflects on Yang's basis for pursuing an expansive severance plan. If selective quotation is the supposed problem, we have no objection to appending the entire document to the Amended Complaint.

33. Defendants' remaining redactions bear on Compensia's advice. As discussed above, Mr. Sparks' deposition testimony, taken after the Amended Complaint

[4] Defendants repeatedly state in their papers that their redactions were made "in good faith." Good faith, however, is not the test. Good cause is.

was filed, supports the allegations that the Board adopted the severance plans in contravention of Compensia's advice.

34. Paragraph 56 describes the version of the severance plan that reflects Compensia's initial advice and was presented to Yahoo senior management. There is no "good cause" for hiding the initial plan that senior management rejected in favor of a plan with much greater equity acceleration and cash benefits. The initial, less-expensive plan crafted by Yahoo's HR personnel, with the assistance of Compensia, was never the subject of discussion by the Board or Compensation Committee (or the independent consultant to the Compensation Committee) because Jerry Yang kept them from considering it.

35. Paragraph 58 describes "pushback" from Compensia. There is no good cause for hiding this tension between the plan favored by senior management and the advice of Yahoo's compensation consultant.

36. Paragraph 59 describes an email making clear that the impetus for expanding the scope of the severance plans came from senior management.

37. Paragraph 60 describes Compensia's initial surprise that Yahoo management favored accelerating all unvested equity.

38. Paragraph 61 and Exhibits A and B describe and set forth emails showing Compensia's reaction to the potential cost associated with full acceleration of equity. Sparks's testimony about what he meant by Exhibit B is simply inconsistent with the document itself, as well as later emails (such as Exhibit C to the Amended Complaint) and Exhibit B is itself consistent with Sparks's own reservations about accelerating so much equity for the benefit of senior management.

39. Paragraph 62 and Exhibit C describes how Yahoo management pushed Compensia to present a scenario based on full acceleration of all equity and how Compensia resisted that suggestion. Nothing warrants maintaining this exchange secret.

40. Paragraphs 66, 67 and Exhibit D describe how the person at Yahoo with the most expertise in dealing with integrating new employees following acquisitions – who had not been consulted before the Board approved the severance plans – reacted regarding the effect of triggering severance benefits based on changes to employee duties or responsibilities. This *ex post* observation is most notable because the author appears to be in complete agreement with the concerns expressed by Compensia's Sparks and Plaintiffs' compensation expert – the Yahoo plans create administrative problems for acquirors, who will find it difficult to fight large-scale employee severance claims. Paying severance benefits to all employees preemptively is thus a possible outcome, as Sparks admits. (Sparks 69)

41. Paragraphs 70, 142 and Exhibit E set forth the data about the potential cost of the severance plan if all employees are paid severance benefits. Defendants have no good cause for hiding the full potential cost, given the pressures on an acquiror to pay the full cost, and given that Defendants voluntarily disclosed lower cost estimates that have no reliable foundation. Sparks did not offer any opinion as to those lower estimates. (Sparks 255-56) Disclosure of the 100% cost simply puts the other estimates in perspective and allows shareholders to make an independent judgment about what offer price or valuation for Yahoo is sensible in light of the potential cost of the severance plans at various deal prices and the prospect of their potential invalidation.

42. Paragraph 73 and Exhibit F reflect Compensia's last-second advice that 1% of the deal value is a "market" level of coverage, "assuming the cost assumptions are reasonable." As set forth at page 4 of our May 20 letter, Defendants have already publicly argued that costs of more than 1% are reasonable. The public should know that Yahoo did not receive any guidance or opinion supporting a cost in excess of 1% (and should know the actual cost at various price-per-share levels under alternative cost assumptions).

B. Plaintiffs Did Not Violate The Confidentiality Order.

43. Unable to show "good cause" for redactions on the merits, Defendants continue their offensive against Plaintiff's counsel. Defendants continue to complain that our May 16, 2008 letter to the Court "summarized the categories of redacted confidential information." (Defs.' Supp. Br. ¶ 1) Defendants also criticize counsel's characterization of Defendants' wholesale redactions – 24 entire paragraphs of the Amended Complaint, portions of 12 others, and all six exhibits – as an attempt to "whitewash embarrassing documents" or "hid[e] evidence of breaches of fiduciary duty." (Defs.' Supp. Br. ¶¶ 2, 3)[5]

44. Paragraph 5 of the Confidentiality Order provides that confidential information may not be publicly "disclosed, summarized, described, characterized or otherwise communicated or made available in whole or in part[.]" There is no contention that Plaintiffs' counsel "communicated or made available" any confidential information.

[5] During last week's conference, Yahoo's counsel represented that Defendants were not seeking affirmative relief from the claimed breach of the Confidentiality Order, but asked leave to supplement the record with additional statements claimed be a breach. Defendants did not add additional statements, but do seek relief for a spurious breach claim.

There is no prohibition against summarizing categories of information in a manner that does not communicate the content of the underlying discovery material.[6]

45. It is impossible to read the May 16, 2008 letter side-by-side with any paragraph of the Amended Complaint or any exhibit to the Amended Complaint and conclude that the underlying contents of any email, document or deposition were communicated in any way, shape or form.

46. Similarly, Defendants do not cite a shred of confidential information that was revealed in the characterizations made in public statements.[7] The unredacted portions of the Amended Complaint make it clear that the redacted allegations relate to Yahoo's Board's response to Microsoft's unsolicited premium offer – in particular, its adoption of the unprecedented severance plans. To state that that the redacted allegations relate to that subject reveals nothing. Nor is it improper for counsel to state publicly that the complaint is viable or that the discovery supports its claims. In the absence of a gag order, counsel may identify the claim being litigated. Del. R. Prof. Conduct 3.6(b).

---

[6] Although Defendants do not call their motion one for a finding of contempt, it is exactly that. Such a remedy, however, requires a determination that the claimed violation is not "a mere technical one, but must constitute a failure to obey the Court in a 'meaningful way'." *Dickerson v. Castle* 1991 WL 208467 at * 4 (Oct. 15, 1991). Moreover, before the Court's coercive power is brought to bear, it must "first find by clear and convincing evidence that a violation of the court order has taken place." *Id*; *see also Harris v. City of Philadelphia*, 47 F.3d 1342, 1350 (3rd Cir. 1994) ("The resolution of ambiguities ought to favor the party charged with contempt. In other words, a contempt citation should not be granted if there is grounds to doubt the wrongfulness of the defendant's conduct."). Defendants cannot show a violation of the Order at all, let alone one sufficiently egregious to meet that standard.

[7] The full quote objected to by Defendants is:

> "These redactions are hiding neither trade secrets nor state secrets," said Mark Lebovitch, a partner at law firm Bernstein Litowitz Berger & Grossmann LLP who represents the plaintiffs. "They are hiding evidence of the Yahoo board's improper actions in response to Microsoft's offer. They are hiding evidence of breaches of fiduciary duty."

(Defs.' Opp. Ex. 2)

47. Defendants' allegations of improper disclosure are an effort to chill counsel's exercise of our First Amendment right to comment on subjects of clear public interest. That effort is particularly troubling given that our clients consist of thousands of public investors whose principal sources of information are counsel's website and the media, and the fact that Defendants have publicized misleading partial and selective disclosures.

48. Defendants further contend that Plaintiffs violated the Confidentiality Order by failing to follow "dispute resolution procedures" relating to vacating a confidentiality designation. (Defs.' Supp. Br. ¶ 1) It was established during last week's teleconference – and agreed to by Defendants' counsel during that conference – that Chancery Court Rule 5(g)(6) creates an independent procedure for Plaintiffs to seek the unsealing of our pleading. We advised Defendants *via* the motion to amend that we believe there is no justification for sealing any portion of the Amended Complaint. Defendants responded with wholesale redactions. Although required to provide a Rule 5(g) certification of good cause for the redactions, Defendants did not do so. Plaintiffs had every right to make an immediate application to the Court.[8]

CONCLUSION

Defendants have failed to show "good cause" as to why Yahoo shareholders should be kept in the dark regarding the factual basis of Plaintiffs' breach of fiduciary

[8] Until late yesterday, weeks after the deadline for doing so under the Confidentiality Order, no defendant purported to designate as confidential two of the deposition transcripts (those of Yahoo's Director of Compensation and the consultant to the Compensation Committee). The Confidentiality Order contains no prohibition on the free dissemination of those two depositions. Nonetheless, Plaintiffs have voluntarily refrained from doing so and will continue not to. It is striking that Defendants are pursuing a baseless contempt application at the same time that they seek leniency from plaintiffs for their own failure to assert timely confidentiality designations.

duty claims. Under the Common Law Right of Access, the Amended Complaint should be open to the public.

/s/ Joel Friedlander

OF COUNSEL:

Mark Lebovitch
Jonathan Harris
Brett M. Middleton
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 554-1400

Andre G. Bouchard (Bar No. 2504)
David J. Margules (Bar No. 2254)
Joel Friedlander (Bar No. 3163)
Evan O. Williford (Bar No. 4162)
BOUCHARD MARGULES & FRIEDLANDER, P.A.
222 Delaware Avenue, Suite 1400
Wilmington, Delaware 19801
(302) 573-3500

Co-Lead Counsel for Plaintiffs

Dated: May 27, 2008

Exhibit

A

Analysis
As of: May 27, 2008

Fitzgerald v. Cantor, et. al.

C.A. No. 16297-NC

COURT OF CHANCERY OF DELAWARE, KENT

2001 Del. Ch. LEXIS 48

March 15, 2001, Submitted
April 17, 2001, Decided

CASE SUMMARY:

PROCEDURAL POSTURE: Following the court's post-trial decision in an action between petitioner limited partnership and defendants regarding partnership and settlement agreements, limited partnership petitioned the court pursuant to Del. Ch. Ct. R. 5(g) to preserve the confidentiality of certain documents filed under seal in the action.

OVERVIEW: Limited partnership sought to keep five categories of documents under seal: its non-public financial documents; drafts of the applicable partnership agreement, settlement agreement, and private placement memoranda; its third-party agreements; its employment agreements; and its discovery responses containing certain confidential information. The documents were already subject to a court-approved stipulated protective order. Defendants argued that limited partnership's position was inconsistent with the protective order, Rule 5(g), and the common law right of access, but did not object to maintaining the confidentiality of trade secrets, third-party confidential material, and non-public financial information. The court ruled that (1) the motion was procedurally proper and not untimely and (2) balancing the need to protect sensitive information with the public's right of access, limited partnership had shown good cause for maintaining the protective order as to trade secrets, third-party confidential information, non-public financial information, and the draft versions of the partnership agreement, settlement agreements, and the private placement memoranda.

OUTCOME: The court ordered (1) that, to the extent documents showed trade secrets; third-party confidential material; non-public financial information; or drafts of the partnership agreement, settlement agreement, or private placement memoranda, they would stay sealed and (2) the parties to submit a list of any items still in dispute after the ruling or, alternatively, an order showing the result of their good faith resolution of any dispute.

CORE TERMS: Chancery Rule, good cause, confidential, sealed, non-public, seal, financial information, partnership agreement, settlement agreement, trade secrets, confidentiality, designation, private placement, good faith, Common Law Right, documents filed, confidential information, public record, judicial determination, written notice, setting forth, objecting party, appropriate relief, procedurally, deposition, designated, requesting, encompass, redacted

LexisNexis(R) Headnotes

Governments > Courts > Court Records
[HN1]Citizens of the United States have a fundamental right to be informed of the operations of government and to an open court system. This right translates into a presumption that the press and public have a right of access to judicial documents and records. This concept is known as the common law right of access and is adopted or acknowledged in Del. Ch. Ct. R. 5(g).

Civil Procedure > Discovery > Methods > Admissions > Responses

Governments > Courts > Court Records
[HN2]See Del. Ch. Ct. R. 5(g)(1).

Civil Procedure > Discovery > Protective Orders
Contracts Law > Types of Contracts > General Overview
Governments > Courts > Court Records
[HN3]Del. Ch. Ct. R. 5(g)(6) provides a mechanism for challenging the continued restriction on public access to records that have been filed under seal in the Delaware Court of Chancery. Under that provision, the party seeking to have the records unsealed shall give written notice of such party's objection to the person who designated the document for filing under seal. If the other party wishes to keep the record sealed, that party must serve and file an application within seven days after receipt of such written notice setting forth the grounds for such continued restriction and requesting a judicial determination whether good cause exists therefore.

Civil Procedure > Discovery > Protective Orders
Contracts Law > Types of Contracts > General Overview
Evidence > Inferences & Presumptions > General Overview
[HN4]The burden is on the party seeking to maintain the restrictions on sealed documents, to prove they should remain under seal. The Delaware Chancery Court Rules require the application to set forth the grounds for such continued restriction and to request a judicial determination whether good cause exists therefore. Del. Ch. Ct. R. 5(g)(6). Thus, the court will grant such a petition if the petitioning party shows that good cause exists for keeping the records at issue sealed.

Civil Procedure > Discovery > Protective Orders
Governments > Courts > Court Records
[HN5]In determining whether there is good cause to keep records sealed, the court must balance the general principal that items filed in the court become a part of the public record with the need to protect the sensitive information of parties to litigation.

COUNSEL: [*1] Stephen E. Jenkins, Richard I.G. Jones, Jr., Ashby & Geddes, Wilmington, DE.

Rodman Ward, Jr., Thomas J. Allingham II, Karen Valihura, Rosemary S. Goodier, Skadden, Arps, Slate, Meagher & Flom, Wilmington, DE.

JUDGES: Myron T. Steele, Justice.

OPINION BY: Myron T. Steele

OPINION

Following the Court's post-trial decision of March 13, 2000, in this case, Cantor Fitzgerald, L.P. ("CFLP") petitioned pursuant to Court of Chancery Rule 5(g) to preserve the confidentiality of certain documents filed under seal in this action. Both parties identify the specific documents at issue in a June 29, 2000, letter to the Court. CFLP seeks to maintain five general categories of documents under seal: (1) CFLP's non-public financial documents; (2) drafts of the applicable partnership agreement, settlement agreement, and private placement memoranda; (3) CFLP's agreements with third parties; (4) CFLP's employment agreements; and (5) CFLP's discovery responses that contain certain confidential or highly confidential information. The documents CFLP seeks to protect are of the type currently subject to a Court-approved Stipulated Protective Order. [1]

1 *See* Stipulated Protective Order Regarding Confidential Information ("Protective Order"), Nov. 3, 1998, amended by Order of the Court on Dec. 18, 1998.

[*2] The defendants, Iris Cantor, *et al.*, believe that CFLP's position is inconsistent with the Protective Order, Court of Chancery Rule 5(g), and what is known as the Common Law Right of Access. Accordingly, they argue that the Court should deny the application. The defendants do not, however, object to maintaining the confidentiality of the following limited categories of documents and deposition testimony; (1) trade secrets, (2) third-party confidential material, and (3) non-public financial information.

For the reasons discussed below, I deny CFLP's application in part and find that only those documents and testimony relating to (1) trade secrets, (2) third-party confidential material, and (3) non-public financial information are entitled to continued protection under the parties' Protective Order adopted pursuant to Rule 5(g).

ANALYSIS

[HN1]United States' citizens have a fundamental "right to be informed of the operations of government and to an open court system." [2] This right translates into a presumption that the press and public have a right of access to judicial documents and records. [*3] [3] This concept is known as the Common Law Right of Access and is adopted or acknowledged in Court of Chancery Rule 5(g). [4]

2 ***In the matter of 2 Sealed Search Warrants***, Del. Super., 710 A.2d 202, 210 (1997).

3 *See Id.*

4 Court of Chancery Rule 5(g)(1) provides:

> [HN2]Except as otherwise provided in this Rule 5(g), all pleadings and other papers, including deposition transcripts and exhibits, answers to interrogatories and requests for admissions, and affidavits or certificates and exhibits thereto ("documents") filed with the Register in Chancery shall become a part of the public record of the proceedings before this Court.

Because this right is included in Rule 5(g), I will not analyze the common law rule as a separate concept. These are not non-parties seeking access to judicial records. Both CFLP and the defendants are subject to the Protective Order and the Court of Chancery Rules. Thus, the discussion will be limited to the parties' rights and responsibilities under the Protective Order and the Court's Rules.

[*4] The parties' rights and responsibilities with regard to sealed documents in this action are defined by both Court of Chancery Rule 5(g) and the Stipulated Protective Order approved by the Court. [5] Accordingly, the provisions of both of these sources of authority set forth the procedural and substantive law governing this petition.

5 Paragraph 16 of the Protective Order states that "nothing in this Stipulated Protective Order shall abrogate Rule 5(g) of the Rules of the Court of Chancery of the State of Delaware."

[HN3]Rule 5(g)(6) provides a mechanism for challenging the continued restriction on public access to records that have been filed under seal in the Court of Chancery. Under that provision, the party seeking to have the records unsealed "shall give written notice of such party's objection to the person who designated the document for filing under seal." [6] If the other party wishes to keep the record sealed, that [*5] party must "serve and file an application within 7 days after receipt of such written notice setting forth the grounds for such continued restriction and requesting a judicial determination whether good cause exists therefore." [7]

6 **Court of Chancery Rule 5(g)(6).**

7 *Id.*

The Protective Order also addresses this situation. The Protective Order provides:

> In the event that any party to this litigation disagrees at any stage of these proceedings with the designation by a producing party of materials designated "Confidential" or "Highly Confidential," the parties shall first try to resolve such dispute in good faith on an informal basis. If the dispute cannot be resolved, the objecting party may seek appropriate relief from the Court, and the party asserting confidentiality shall have the burden of proving same. [8]

8 Protective Order at P5.

[*6] Both parties have raised procedural objections. CFLP argues that the defendants' challenge to the designation of documents lacks the requisite specificity because they have challenged whole categories of documents and not "specific documents" as required by Rule 5(g)(6). I am not convinced that in this case, with thousands of pages of documents in the record, the defendants' challenge to categories of documents is insufficient. To find otherwise, would elevate form over substance.

The defendants argue that CFLP's petition is procedurally improper because it was filed more than seven days after the defendants' letter of April 13, 2000, which they contend was the "notice" required by Rule 5(g). By Court Order dated February 25, 2000, the parties were to finalize their designations of their documents and file redacted versions of the items in the record by April 17, 2000. Because that is the day the parties designations were set, I find that the seven day period for filing runs from that day. Thus, CFLP's filing on April 27, 2000, was timely. [9] For these reasons, I find that this petition is procedurally proper.

9 There is some question about which party must make the filing. Under Rule 5(g)(6) it is clearly CFLP, the party seeking to keep the confidentiality of the records. The Protective Order, however, states that the objecting party (here the defendants) "*may* seek appropriate relief from the Court." I find that the mandatory language of the Rule trumps the precatory language of the Protective Order. Thus, it was CFLP's obligation to petition the Court, and it has done so.

[*7] Under both the Rules and the Protective order, [HN4]the burden is on CFLP, as the party seeking to maintain the restrictions, to prove they should remain under seal. While the Protective Order is silent as to a standard of review, the Rules require application "setting forth the grounds for such continued restriction and requesting a judicial determination *whether good cause exists* therefore." [10] Thus, this Court will grant CFLP's petition if it has shown "good cause" exists for keeping the records at issue sealed.

10 **Court of Chancery Rule 5(g)(6)** (emphasis added).

[HN5]In determining "good cause," I must balance the general principal that items filed in this Court become a part of the public record with the need to protect the sensitive information of parties' to litigation. Here, I find that CFLP's petition and argument [*8] in support of that petition do not set forth sufficient particularized allegations of harm that would flow from unsealing some of the categories of documents at issue. In general, it is quite apparent that trade secrets, third-party confidential materials, and non-public financial information are matters deserving of protection. Despite the broad categories established by CFLP, to the extent that an individual item in the record falls within the three categories listed in the preceding sentence, I find that CFLP has shown "good cause' for maintaining the restrictions of the Protective Order.

One category of documents that needs to be addressed specifically encompasses draft versions of the Partnership Agreement, the Settlement Agreement, and Private Placement Memoranda. CFLP has agreed to release unredacted versions of the 1992 and 1996 Partnership Agreements. It has also agreed to release a redacted version of the Settlement Agreement. Because the draft versions of these documents implicate the private give and take among parties (usually through the advice of counsel) I find that there exists good cause for keeping the draft versions sealed under the Stipulated Protective Order. [*9] I note that the defendants, as parties to the action, have access to these sealed items and can freely use them in the continuing litigation. They are not prejudiced by any inability to use the information outside the litigation.

CONCLUSION

I find that CFLP has shown "good cause" for maintaining the restrictions of the Stipulated Protective Order for the following categories of documents: (1) trade secrets, (2) third-party confidential material, and (3) non-public financial information. Thus, to the extent that individual documents on the list of disputed items fall within those categories, they remain sealed under the Protective Order. I also find that good cause has been shown to warrant affirming that the Protective Order continues to encompass the draft versions of the Partnership Agreement, the Settlement Agreement, and the Private Placement Memoranda.

I realize that this decision sets the stage for additional litigation concerning which individual documents fit within the three categories listed above. I trust, however, that both sides will remain true to their obligation under the Protective Order to approach this process in "good faith" and only involve the Court [*10] where absolutely necessary. With this admonishment in mind, should it be necessary, I direct the parties to submit to this Court, within 30 days of this decision, a list of individual record items from the list of June 29, 2000, if any, that remain in dispute after this ruling. In the alternative, the parties should submit an order definitively identifying the result of their "good faith" resolution of this dispute.

IT IS SO ORDERED.

Myron T. Steele

Justice

Exhibit

B

Positive
As of: May 27, 2008

Diane Romero v. Robert E. Dowdell, et al.

Civil Action No. 1398-N

COURT OF CHANCERY OF DELAWARE, NEW CASTLE

2006 Del. Ch. LEXIS 82

April 20, 2006, Submitted
April 28, 2006, Decided

NOTICE:

[*1] THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff shareholder sought to inspect the books and records of nominal defendant corporation pursuant to § 220 of the Delaware General Corporation Law, Del. Code Ann. tit. 8, § 220. The shareholder and the corporation entered into a Confidentiality Agreement for the production. The shareholder filed a derivative suit under seal. The shareholder moved to strip some documents of their "Highly Confidential" designation and to unseal the complaint.

OVERVIEW: The shareholder sought to strip the minutes of the corporation's audit committee meetings of their "Highly Confidential" designation. The trial court held that the proper standard was the good cause standard. The complaint was unsealed as most of the allegations were drawn from publicly available documents. No trade secrets, third-party confidential information, or nonpublic financial information were contained in the complaint. The information contained in the audit committee minutes was insufficient to justify sealing them as third-party confidential information or to justify their designation as Highly Confidential under the agreement. The shareholder's standing in the derivative action was irrelevant. Under 15 U.S.C.S. § 77p(f)(2)(B) (2006), the Private Securities Litigation Reform Act of 1995, 15 U.S.C.S. § 78u-4(b)(3)(B) (2006), did not apply to individual or derivative suits, while under 15 U.S.C.S. § 77z-1(b)(4), the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998), merely allowed a federal court to stay state discovery proceedings and the federal court had not done so. Finally, the corporation's equity argument was rejected.

OUTCOME: The shareholder's motion to unseal the complaint and to strip the minutes of the audit committee meetings of their "Highly Confidential" designation was granted.

CORE TERMS: derivative, confidential, minutes, discovery, seal, disclosure, designation, derivative action, good cause, stockholder, information contained, confidentiality, board members, confidential information, confidentiality agreement, trade secrets, deliberations, financial information, proprietary, nonpublic, unseal, redacted, information obtained, private action, publicly, sealing, teleconference, disadvantage, competitive, captioned

LexisNexis(R) Headnotes

Securities Law > Liability > Private Securities Litigation > Stays of Discovery
[HN1]See 15 U.S.C.S. § 78u-4(b)(3)(B) (2006).

Governments > Courts > Court Records
Trade Secrets Law > Civil Actions > Sealed Records

[HN2]The Court of Chancery of Delaware, New Castle, repeatedly has held that good cause exists pursuant to Del. Ch. Ct. R. 5(g) to seal documents containing: (1) trade secrets, (2) third-party confidential material or (3) nonpublic financial information. All other documents are "deemed available for public disclosure."

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > Inspection Rights > Shareholders
Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Derivative Actions > Procedures
Governments > Courts > Court Records
Trade Secrets Law > Civil Actions > Sealed Records
[HN3]There is a reasonable expectation that confidential information produced in the books and records context will be treated as confidential unless and until disclosed in the course of litigation or pursuant to some other legal requirement. Where the information obtained in the books and records context is being used affirmatively in a derivative action, reasonable expectations of confidentiality with respect to documents produced in a Del. Code Ann. tit. 8, § 220 action do not continue unabated. The test becomes that under Del. Ch. Ct. R. 5(g) and the trial court must determine whether good cause exists for the complaint and other related documents to continue to be filed under seal.

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > Inspection Rights > Shareholders
[HN4]Delaware law recognizes circumstances in which a stockholder is entitled to use information obtained by making a Del. Code Ann. tit. 8, § 220 demand in ways that will lead to public disclosure. Most notably, Delaware law encourages stockholders to utilize § 220 as one of the tools at hand in conducting pre-suit investigation of suspected mismanagement or corporate waste. When such investigation reveals a good faith basis for suit, the stockholder will be able to use information covered by such a confidentiality order in formulating a complaint, and, in many cases, that information will become publicly available in the course of that litigation, even if it is initially filed under seal.

Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Derivative Actions > General Overview
Securities Law > Liability > Private Securities Litigation > General Overview
Securities Law > Liability > Private Securities Litigation > Stays of Discovery
[HN5]The Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C.S. § 78u-4(b)(3)(B) (2006), does not apply to individual or derivative suits, 15 U.S.C.S. § 77p(f)(2)(B) (2006), while the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227 (1998), merely allows a court to stay discovery proceedings in any private action in a State court as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to the PSLRA. 15 U.S.C.S. § 77z-1(b)(4). SLUSA, like the PSLRA, does not automatically stay discovery in a state court action. Rather, SLUSA allows a federal court, upon a proper showing, to stay discovery in a state court action.

COUNSEL: Jessica Zeldin, Esquire, Rosenthal Monhait Gross & Goddess, P.A., Wilmington, Delaware.

Arthur L. Dent, Esquire, Potter Anderson & Corroon LLP, Wilmington, Delaware.

JUDGES: Donald F. Parsons, Jr., Vice Chancellor.

OPINION BY: Donald F. Parsons , Jr.

OPINION

Plaintiff moves this Court for an order stripping certain documents of their "Highly Confidential" designation and unsealing the Amended Derivative Complaint. For the reasons set forth below, the Court grants Plaintiff's motion.

I. BACKGROUND

In early 2004, Plaintiff Diane Romero sought inspection of certain books and records of nominal defendant Career Education Corp. ("CEC") pursuant to Section 220 of the Delaware General Corporation Law. [1] In August 2004, Romero and CEC entered into a Confidentiality Agreement (the "Agreement") to govern the treatment of CEC's production. [2] The Agreement allows CEC to designate material as either "Confidential" or "Highly Confidential." [3] Paragraph six of the Agreement allows Romero to use anything provided by CEC in a subsequent derivative action, but requires any pleading containing [*2] Confidential or Highly Confidential material to be filed under seal pursuant to Court of Chancery Rule 5(g). [4] Paragraph twelve provides a mechanism by which Romero may challenge CEC's designation of material as Confidential or Highly Confidential. [5] Finally, the parties agreed that "the provisions of [paragraph twelve] are not intended to shift the burden of establishing confidentiality." [6]

1

Aff. of Eric L. Zagar in Support of Pl.'s Mot. to Unseal the Am. Derivative Compl. ("Zagar Aff.") P 2.

2

Zagar Aff. Ex. A ("Confidentiality Agreement"); *see also* Romero v. Career Educ. Corp., 2005 Del. Ch. LEXIS 112, *4, No. 793-N (Del. Ch. July 19, 2005).

3

Confidentiality Agreement P 2. The Agreement defines "Confidential Material" as "proprietary or sensitive business, financial, operational, or personal information subject to a legally protected right of privacy." *Id. P* 7.A. The Agreement defines "Highly Confidential Material" as "highly sensitive proprietary, financial or trade secret information, the disclosure of which could cause competitive disadvantage to the Company." *Id. P* 8.A.

[*3]

4

Id. P 6.

5

Id. P 12 ("The stockholder can object to the designation of any Material as Confidential or Highly Confidential and after making a good faith effort to resolve any such objection, may move promptly for an order vacating or modifying the designation.").

6

Id. The Court interprets this clause of paragraph twelve as a reference to Rule 5(g)(2), which places the burden of establishing confidentiality, *i.e.*, the right to file a document under seal, on the party seeking such treatment.

CEC subsequently provided Romero with some of the documents she requested. Believing CEC's production was inadequate, Romero brought suit in this Court pursuant to Section 220 in November 2004. [7] CEC moved to dismiss Romero's Section 220 complaint for failure to state a claim, but the Court denied that motion on July 19, 2005. [8] Meanwhile, in June 2005, Romero filed this derivative action. On October 12, 2005, Romero filed an Amended Derivative Complaint. Pursuant to the terms of the Agreement, and with the Court's permission, Romero filed both the [*4] original complaint and the subsequent Amended Derivative Complaint under seal. The latter document is the currently operative pleading and the document Romero seeks to unseal.

7

Romero, 2005 Del. Ch. LEXIS 112, *4, No. 793-N.

8

2005 Del. Ch. LEXIS 112 at *9. On November 4, 2005, the Court denied CEC's Motion for Reargument of the Court's July 19 Memorandum Opinion. *Romero v. Career Educ. Corp.*, 2005 Del. Ch. LEXIS 172, No. 793-N, slip op. (Del. Ch. Nov. 4, 2005).

The Amended Derivative Complaint relies in part on minutes of CEC Audit Committee meetings provided to Romero and marked "Highly Confidential." [9] The copies provided to Romero are heavily redacted. Romero asks

this Court to strip these documents of their "Highly Confidential" designation pursuant to paragraph twelve of the Agreement.

9

Zagar Aff. Ex. B.

II. PROCEEDINGS IN OTHER COURTS

[*5] In the two months preceding Romero's initial request for inspection, a number of federal securities class actions were filed against CEC. These actions were consolidated in the U.S. District Court for the Northern District of Illinois and captioned *Taubenfeld v. Career Education Corp.* [10] Discovery in *Taubenfeld*, which is now captioned *In re Career Education Corp. Securities Litigation*, remains stayed pursuant to the Private Securities Litigation Reform Act of 1995 (the "PSLRA" [11]). [12] CEC has twice moved for dismissal of the putative class's complaint in *In re Career Education Corp.* and the court has twice granted that motion. [13] In its most recent opinion, the court gave the putative class one more opportunity to amend its complaint. [14] As of April 20, 2006, the class had yet to file its amended complaint.

10

2005 U.S. Dist. LEXIS 5564, 2005 WL 350339 (N.D. Ill. Feb. 11, 2005); *see also Romero*, 2005 Del. Ch. LEXIS 112, *4, No. 793-N.

11

15 U.S.C. § 78u-4(b)(3)(B) (2006) [HN1]("In any private action arising under this title [15 U.S.C. §§ 78a-78nn], all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.").

[*6]

12

In re Career Educ. Corp. Securities Litig., 2006 U.S. Dist. LEXIS 25252, 2006 WL 999988 (N.D. Ill. Mar. 28, 2006).

13

Id.; *Taubenfeld*, 2005 U.S. Dist. LEXIS 5564, 2005 WL 350339.

14

2006 U.S. Dist. LEXIS 25252 at *34 n.14.

In addition to *In re Career Education Corp.*, a derivative action involving similar allegations and captioned *McSparran v. Larson* is proceeding in the U.S. District Court for the Northern District of Illinois. [15] On January 27, 2006, that court denied the individual defendants' motion to dismiss. [16] Presumably, then, the parties have begun discovery in the *McSparran* case.

15

2006 U.S. Dist. LEXIS 3787, 2006 WL 250698 (N.D. Ill. Jan. 27, 2006). Two other derivative actions remain stayed in deference to *McSparran. See, e.g., Nicholas v. Dowdell*, No. 819-N (Del. Ch. Mar. 17, 2005) (order staying proceedings).

16

Id.

III. ANALYSIS

A. The Applicable Legal Standard

[*7] Romero argues that the legal standard applicable to this dispute is the "good cause" standard found in

Rule 5(g). [HN2]This Court repeatedly has held that good cause exists pursuant to Rule 5(g) to seal documents containing (1) trade secrets, (2) third-party confidential material or (3) nonpublic financial information. [17] All other documents are "deemed available for public disclosure." [18]

17

One Sky Inc. v. Katz, 2005 Del. Ch. LEXIS 72, 2005 WL 1300767, at *1 (Del. Ch. May 12, 2005) (quoting *Fitzgerald v. Cantor*, 2001 Del. Ch. LEXIS 48, at *8 (Del. Ch. Apr. 17, 2001)); *In re Walt Disney Co. Derivative Litig.*, 2004 WL 368938, at *1 (Del. Ch. Feb. 24, 2004); *Stone v. Ritter*, 2005 Del. Ch. LEXIS 146 *5, No. 1570-N (Del. Ch. Sept. 26, 2005).

18

One Sky Inc., 2005 Del. Ch. LEXIS 72, 2005 WL 1300767, at *1.

CEC responds with a barrage of arguments for other standards. First, it argues that Plaintiff's motion is a pretext to avoid dismissal of its derivative claims for want of standing. [*8] In essence, then, CEC asks the Court to sidestep the confidentiality issue and deny Plaintiff's motion as futile or because Plaintiff brought it for an improper purpose. Second, CEC contends that the heavily redacted minutes, and the information drawn therefrom in the Amended Derivative Complaint, are "intrinsically confidential" as Vice Chancellor Lamb defined that term in *Disney v. Walt Disney Co.* [19] Third, CEC argues that both the information contained in the Amended Derivative Complaint and the underlying documents are confidential pursuant to the PSLRA. Fourth, CEC argues that equity favors confidentiality in the circumstances of this case.

19

2005 Del. Ch. LEXIS 94, No. 234-N, slip op. (Del. Ch. June 20, 2005) (Opinion on Remand).

Romero is correct that the proper standard is the good cause standard found in Rule 5(g). In fact, this dispute is on all fours with this Court's recent decision in *Stone v. Ritter*. [20] In *Stone*, the plaintiffs obtained books and records from the corporate defendant subject to [*9] a confidentiality agreement they entered into in connection with a Section 220 demand they had made. After the plaintiffs filed a derivative complaint under seal relying in part on documents produced by the corporate defendant pursuant to the parties' confidentiality agreement, the Court ordered the defendants to "show cause . . . as to why the sealed portions of the complaint should not be publicly disclosed." [21] The defendants argued, citing *Disney*, that disclosure of the excerpts of board minutes in the plaintiffs' complaint would have a chilling effect on board deliberations. In rejecting that argument, the Chancellor noted that *Disney* arose in the context of a Section 220 action, while, as here, *Stone* involved a derivative action "in which stockholder plaintiffs assert derivative claims based on information obtained using the tools at hand' under § 220." [22]

20

2005 Del. Ch. LEXIS 146, No. 1570-N, slip op.

21

2005 Del. Ch. LEXIS 146 at *1.

22

2005 Del. Ch. LEXIS 146, *4-5, No. 1570-N.

The Chancellor then [*10] explained the difference between *Disney* and *Stone* (and between *Disney* and this case) and set out the applicable standard:

> As Vice Chancellor Lamb recognized in the *Disney* decision, [HN3]there is a reasonable expectation that confidential information produced in the books and records context will be treated as confidential unless and until disclosed in the course of litigation or pursuant to some other legal requirement. That is precisely the situation here. The information obtained in the books and records context is

being used affirmatively in this derivative action. Reasonable expectations of confidentiality with respect to documents produced in a § 220 action do not continue unabated in the context of litigation. The test now is under Court of Chancery Rule 5(g) and the Court must determine whether good cause exists for the complaint and other related documents to continue to be filed under seal. [23]

Accordingly, this Court must determine whether good cause exists to continue to seal the Amended Derivative Complaint and related documents, "balancing the interests of companies in protecting proprietary commercial, trade secret or other confidential information [*11] against the legitimate interests of the public in litigation filed in the courts, as well as stockholder interests in monitoring how directors of Delaware corporations perform their managerial duties." [24]

23

2005 Del. Ch. LEXIS 94 at *15.

24

2005 Del. Ch. LEXIS 94 at *15.

B. The Sealing of the Amended Derivative Complaint

Having reviewed all 76 paragraphs of the 40 page Amended Derivative Complaint, the Court finds no basis for continuing to seal any portion of it. The vast majority of the allegations in it are drawn from publicly available documents. [25] Further, none of the paragraphs in the Amended Derivative Complaint contains trade secrets, third-party confidential information or nonpublic financial information. The only paragraphs in the Amended Derivative Complaint even drawn from nonpublic information appear to the Court to be paragraphs 22 through 27. The information contained in these paragraphs does not justify sealing the entire document or even these paragraphs. At most, those paragraphs reveal when [*12] members of CEC's Audit Committee learned of certain problems at CEC, when the Audit Committee held meetings, who else besides certain board members attended these meetings and, in a very general way, what the board members discussed at these meetings. [26] None of these details comprises trade secrets, third-party confidential information or nonpublic financial information. In addition, at least some of the information is simply historical in nature.

25

See, e.g., Am. Derivative Compl. PP 39, 41-42, 45, 47-49, 52-54, 60-62.

26

See, e.g., Am. Derivative Compl. PP 25 ("The Audit Committee held another teleconference meeting on April 14, 2003. Participating were defendants. . . . During the April 14, 2003 teleconference, defendant Ogata indicated that he called the meeting to further discuss the misconduct at Brooks. During the . . . teleconference, the Audit Committee determined that it was desirable to engage Katten to investigate further the misconduct at Brooks. . . ."), 26 ("On May 19, 2003, the Audit Committee met again to discuss the wrongdoing at Brooks. In attendance were defendants. . . . During the May 19, 2003 meeting, Ogata reviewed the results of the Katten Investigation, which confirmed that there had been widespread falsification of student records at Brooks. Ogata recommended that the Company take additional actions to address the wrongdoing at Brooks. The Audit Committee decided that other than the actions recommended by Ogata, no further action was necessary.").

[*13] Further, the disclosure of this information is not likely to chill internal deliberations of the CEC board or any of its committees. [27] In *Disney*, this Court expressed concern that the disclosure of documents "of an intrinsically confidential nature," *i.e.*, documents that "relate to private communications among or deliberations of the Company's board of directors," might chill board deliberations. [28] The information contained in paragraphs

22 through 27 of the Amended Derivative Complaint does not reflect the private communications or deliberations of the CEC Audit Committee; rather, the paragraphs detail who attended, what the board members discussed and, in two instances, the actions the board members decided to take. More significant, however, is what the paragraphs do not reveal: the board members' back and forth discussions or weighing of the options. In fact, it is impossible to tell how the board members decided what action to take because the minutes, as redacted, do not reveal their deliberative process.

27

The Court assumes without deciding that it should consider this question in the context of derivative litigation. *Cf. Disney*, 2005 Del. Ch. LEXIS 94, *18-19, No. 234-N ("there is little doubt that those who participated in these communications had a reasonable expectation that they would remain private *unless disclosed in the course of litigation* or pursuant to some other legal requirement.") (emphasis added) (internal quotation omitted); *Disney v. Walt Disney Co.*, 857 A.2d 444, 448 (Del. Ch. 2004) [HN4]("Our law recognizes circumstances in which a stockholder is entitled to use information obtained by making a Section 220 demand in ways that will lead to public disclosure. Most notably, our law encourages stockholders to utilize Section 220 as one of the tools at hand' in conducting pre-suit investigation of suspected mismanagement or corporate waste. When such investigation reveals a good faith basis for suit, the stockholder will be able to use information covered by such a confidentiality order in formulating a complaint, and, in many cases, *that information will become publicly available in the course of that litigation, even if it is initially filed under seal.")* (emphasis added), *remanded*, No. 380, 2004 (Del. Mar. 31, 2005).

[*14]

28

Disney, 2005 Del. Ch. LEXIS 94, *18, No. 234-N (internal quotation omitted).

C. The Minutes' Designation as Highly Confidential

CEC also contends that it properly designated the redacted board minutes as

Highly Confidential because the minutes refer to confidential third-party information. [29] The information contained in the minutes of the board meetings is insufficient to justify sealing them as third-party confidential information. The minutes of the April 13, 2003 meeting of the CEC Audit Committee reference nothing more than a phone call from a named employee regarding problems at one of CEC's business units. The minutes do not, as CEC contends, reveal a dispute with the employee or any matter that the employee could reasonably expect to remain confidential. Similarly, the minutes of the October 2, 2003 meeting of the Audit Committee state that "Ogata indicated that he had called the Meeting to discuss certain matters raised by a former employee of the Company at the time of his resignation from the Company." [30] The employee is not named in the minutes and no further information [*15] is provided about the employee's concerns. In fact, there has been no showing that the minutes provide information that could lead one to identify the employee. The only other item of substance contained in the minutes is the Audit Committee's decision to have legal counsel conduct an investigation concerning the matters raised by the employee. Again, CEC has not shown that this information is sufficiently confidential to warrant protection under Rule 5(g).

29

Presumably, CEC's argument also applies to paragraph 27 of the Amended Derivative Complaint, which references a letter received from a former employee of CEC. *See* Am. Derivative Compl. P 27 ("On or about September 8, 2003, the Company and the Individual Defendants received a letter from a former registrar at Brooks (the Registrar'), containing certain additional information and allegations pertaining to regulatory

compliance and falsification of student records. . . .").

30

Zagar Aff. Ex. B. at RCEC0000005.

The other minutes [*16] of Audit Committee meetings at issue here contain information similar to that in the Amended Derivative Complaint, *i.e.*, who met when and why. Thus, the same Rule 5(g) analysis applies to those minutes.

Furthermore, the information contained in the minutes is insufficient to justify their designation as Highly Confidential under the parties' agreed upon definition of that term. Paragraph 8.A of the Agreement defines Highly Confidential Material as "highly sensitive proprietary, financial or trade secret information, the disclosure of which could cause competitive disadvantage to the Company." None of the who-met-with-who-and-when information contained in the minutes meets this definition. There is nothing even remotely related to trade secrets or financial information in the minutes. And, it is difficult to fathom how the disclosure of long-past investigations could cause competitive disadvantage to CEC.

In summary, CEC has failed to meet its burden to show good cause for continuing to seal the Amended Derivative Complaint or the minutes of certain meetings of its Audit Committee. CEC also has failed to show that the minutes even satisfy the parties' own agreed upon definition [*17] of Highly Confidential.

D. CEC's Other Arguments

CEC's other arguments for why this Court should continue to seal the Amended Derivative Complaint merit only brief mention.

CEC.asserts that Romero lacks standing to pursue this derivative action because she did not own stock at the time(s) of the challenged conduct. This may be so, but it is irrelevant for purposes of determining whether good cause exists to keep a document from the public pursuant to Rule 5(g).

CEC next argues that the PSLRA and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") [31] bar disclosure of the Amended Derivative Complaint and the Audit Committee minutes. [HN5]The PSLRA does not apply to individual or derivative suits, [32] while SLUSA merely *allows* a court to "stay discovery proceedings in any private action in a State court as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to [the PSLRA]." [33] SLUSA, like the PSLRA, does not automatically stay discovery in a state court action like this one. Rather, SLUSA allows a federal court, upon a proper showing, to stay discovery in a state court action. [*18] To date, no federal court has stayed discovery in this action.

31

Pub. L. No. 105-353, 112 Stat. 3227 (1998).

32

15 U.S.C. § 77p(f)(2)(B) (2006).

33

15 U.S.C. § 77z-1(b)(4); *see also* 15 U.S.C. § 78u-4(b)(3)(D) ("Upon a proper showing, a court may stay discovery proceedings in any private action in a State court, as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this paragraph.").

Finally, CEC's equity argument merely rehashes its standing and PSLRA/SLUSA contentions. Like those arguments, it is less than convincing, especially when the public has a legitimate interest in litigation filed in the Delaware courts and stockholders of Delaware corporations have an interest in monitoring their directors' performance of their managerial duties.

IV. CONCLUSION

For the reasons stated, Plaintiff Romero's motion [*19] to unseal the Amended Derivative Complaint and to strip the minutes of the Audit Committee meetings (documents numbered RCEC0000001 to RCEC0000005) of their Highly Confidential designation is GRANTED.

The Register in Chancery shall unseal the Amended Derivative Complaint forthwith.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

Exhibit

C

One Sky, Inc. v. Samuel P. Katz, et al.

Civil Action No. 1030-N

COURT OF CHANCERY OF DELAWARE, NEW CASTLE

2005 Del. Ch. LEXIS 72

April 27, 2005, Submitted
May 12, 2005, Decided
May 12, 2005, Filed

NOTICE:

[*1] THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

CASE SUMMARY:

PROCEDURAL POSTURE: After defendants moved for sanctions under Del. Ch. Ct. R. 11, it sought to file certain documents under seal, under Del. Ch. Ct. R. 5(g), in anticipation of plaintiff's answering brief.

OVERVIEW: Defendants represented that certain documents were confidential pursuant to a confidentiality agreement between the parties. Plaintiff did not oppose the motion, deferring to the court's discretion. Based on defendants' representations that the documents reflected confidential information, the motion to file them under seal was granted, except for news articles, a grant deed, and a tribal gaming code and commercial obligations court ordinance, which appeared to be within the public sphere. If the plaintiff submitted additional documents in connection with its answering brief, the parties were responsible to ensure that only documents for which a good faith claim of confidentiality was made were filed under seal, and the same responsibility applied to any redacted version of plaintiff's brief. Plaintiff's agreement to keep the financial terms of transactions in issue under seal, but names of non-parties previously made public in the context of such transactions should not be redacted.

OUTCOME: Defendants motion was granted except as to certain documents.

CORE TERMS: seal, confidential, good faith, answering, redacted, public's right, public disclosure, good cause, confidentiality, sphere

LexisNexis(R) Headnotes

Civil Procedure > Discovery > Protective Orders
Contracts Law > Types of Contracts > General Overview
[HN1]See Del. Ch. Ct. R. 5(g)(2).

Civil Procedure > Discovery > Protective Orders
Contracts Law > Types of Contracts > General Overview
Trade Secrets Law > Civil Actions > Sealed Records
[HN2]The default position of Del. Ch. Ct. R. 5(g), providing for filing documents under seal, maintains public accessibility of filed documents. The Rule also provides a court flexibility in balancing the need to protect sensitive material from public disclosure and the public's right of access. A party has good cause for keeping documents under seal if they can be categorized as: (1) trade secrets, (2) third-party confidential material, or (3) non-public financial information. But, if trial courts permit the sealing of a judicial proceeding simply because the parties take an unreasonably broad view of what matters are truly confidential, they risk injuring the public's right of

access. Any documents or information that do not fit the above criteria, cannot harm the parties or third parties, or previously have entered the public sphere should be deemed available for public disclosure.

COUNSEL: Joseph R. Biden, III, Esquire, Ian Connor Bifferato, Esquire, Joseph K. Koury, Esquire, Bifferato Gentilotti & Biden, P.A., Wilmington, DE.

Vincent J. Poppiti, Esquire, Elizabeth A. Wilburn, Esquire, Blank Rome, LLP, Wilmington, DE.

OPINION

Pending before the Court is Defendants' Motion for Protective Order (the "Motion"), which seeks to seal documents submitted as Exhibit D to the Motion (the "Documents") pursuant to Chancery Court Rule 5(g). Defendants' Motion resulted from Plaintiff, One Sky, Inc.'s ("One Sky"), then anticipated answering brief in response to Defendants' motion for sanctions under Chancery Court Rule 11. Defendants have represented that the Documents are confidential pursuant to the Confidentiality Agreement between the parties. For the reasons stated below, the Court grants the Motion in part and denies it in part.

Before turning to Defendants' Motion, however, the Court notes that it also received a letter from One Sky's counsel Mr. Koury, dated May 9, 2005, enclosing several inches of documents "for the Court's in camera review and determination [*2] as to whether any portions should be redacted prior to public filing." The Court declines to do the work of responsible parties and their counsel. Accordingly, I will not consider the request in Mr. Koury's letter. If after a good faith application of the principles of Chancery Court Rule 5(g), the relevant legal precedent, and informed professional judgment, counsel are unable to resolve any disagreements relating to whether or not certain information should be filed under seal, they may submit the dispute to the Court. Any such submission, however, shall be accompanied by:

(1) a certification that counsel have made a good faith effort to resolve the dispute without court intervention; and

(2) a letter not to exceed four pages in length stating the grounds for the requested relief.

I would hope that there would be few, if any, such applications.

Defendants' Motion

Chancery Court Rule 5(g)(2) provides:

> [HN1]Documents shall not be filed under seal unless and except to the extent that the person seeking such filing under seal shall have first obtained, for good cause shown, an order of this Court specifying those documents or categories of documents which should be filed [*3] under seal.

[HN2]The default position of Rule 5(g) maintains public accessibility of filed documents. The Rule also provides the court flexibility in balancing the need to protect sensitive material from public disclosure and the public's right of access. A party has good cause for keeping documents under seal if they can be categorized as: "(1) trade secrets, (2) third-party confidential material, [or] (3) non-public financial information." [1] "But, if trial courts permit the sealing of . . . a judicial proceeding simply . . . because the parties take an unreasonably broad view of what matters are truly confidential, they risk injuring the public's right of access." [2] Any documents or information that do not fit the above criteria, cannot harm the parties or third parties, or previously have entered the public sphere should be deemed available for public disclosure.

1 *Fitzgerald v. Cantor*, 2001 Del. Ch. LEXIS 48, at *8 (Del. Ch. Apr. 17, 2001).
2 *Kronenberg v. Katz*, 872 A.2d 568, 2004 Del. Ch. LEXIS 77, at *104 (Del. Ch. Apr. 23, 2004).

[*4] In this case, One Sky does not oppose Defendants' Motion and essentially defers to the discretion of the Court in determining whether any of the documents submitted with its answering brief on Defendants' motion under Rule 11 should not be sealed. Based on Defendants' representations that the documents attached as Exhibit D to their Motion reflect confidential information, the Court grants the Motion as to those documents, with the following exceptions: Bates numbers D0077 through D0114 (news articles); D0176 (Grant Deed); and D0210 through D0278 (Tribal Gaming Code and Commercial Obligations Court Ordinance). The excluded documents appear to be within the public sphere. To the extent One Sky submitted additional documents in connection with its answering brief, the parties are responsible for ensuring that only documents for which a good faith claim of confidentiality is made are filed under seal. The same responsibility applies to any redacted version of One Sky's brief. In that regard, the Court accepts One Sky's agreement to keep the financial terms of transactions in issue under seal. Names of non-parties that have previously been made public in the context of such transactions, [*5] however, should not be redacted from the motion.

For the foregoing reasons and subject to the stated conditions, Defendants' motion to seal documents pursuant to Rule 5(g) is DENIED IN PART and GRANTED IN PART.

IT IS SO ORDERED.

/s/ Donald F. Parsons, Jr.

Vice Chancellor

Exhibit

D

LEXSEE

Positive
As of: May 27, 2008

Stone, et al. v. Ritter, et al.

Civil Action No. 1570-N

COURT OF CHANCERY OF DELAWARE, SUSSEX

2005 Del. Ch. LEXIS 146

September 15, 2005, Submitted
September 26, 2005, Decided

NOTICE:

[*1] THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

SUBSEQUENT HISTORY: Complaint dismissed at Stone v. Ritter, 2006 Del. Ch. LEXIS 20 (Del. Ch., Jan. 26, 2006)

CASE SUMMARY:

PROCEDURAL POSTURE: Defendants, corporate directors and others, sought continued sealing of certain portions of a shareholder derivative complaint. Plaintiff stockholders opposed the continued sealing of any portion of the complaint.

OVERVIEW: The stockholders insisted that much of the complaint's information came from public sources. The court found no basis for continuing to seal any portion of the complaint. The various paragraphs with respect to compliance of the Bank Secrecy Act and the Anti-Money Laundering Act were historical in nature. Nothing in the identified paragraphs appeared to threaten ongoing compliance with those statutes or the integrity of internal controls and compliance programs, nor did any of the references to minutes of the board of directors and Audit Committee meetings threaten to chill internal deliberations of the board or any of its committees. The references to minutes did not reveal board members' preliminary discussions, opinions, or assessments, but referred largely to the directors' alleged failure to act in the face of a known duty to act. Such allegations would not chill the board or committee's deliberative processes and did not rise to the level of good cause under Del. Ch. Ct. R. 5(g), in particular, when weighed against the public's legitimate interests in litigation filed in the courts, as well as stockholder interests in monitoring directors of Delaware corporations.

OUTCOME: Defendants' motion was denied and the court directed that the sealing of the complaint and any related documents be vacated immediately.

CORE TERMS: minutes, sealing, confidential, Bank Secrecy Act, good cause, stockholder, derivative, seal, derivative action, information obtained, legitimate interests, confidentiality, deliberations, inspection, disclosure, monitoring, publicly, chill, certain portions, then-current

LexisNexis(R) Headnotes

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > General Overview
Civil Procedure > Class Actions > Derivative Actions > General Overview
[HN1]There is a reasonable expectation that confidential corporate information produced in the books and records context will be treated as confidential unless and until disclosed in the course of litigation or pursuant to some other legal requirement.

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > General Overview

[HN2]Reasonable expectations of confidentiality with respect to documents produced in a Del. Code Ann. tit. 8, § 220 action do not continue unabated in the context of litigation.

COUNSEL: For Seth Rigrodsky, Milberg Weiss Bershad & Schulman LLP, Wilmington, DE.

For Jesse A. Finkelstein, Raymond J. DiCamillo, Lisa M. Zwally, Richards, Layton & Finger, P.A., Wilmington, DE.

OPINION

Defendants seek continued sealing of certain portions of the derivative complaint filed in this case. Finding no good cause for the continued sealing, I deny defendants' motion.

Five days after plaintiffs sought permission to file their derivative complaint under seal, the Court granted that request, but ordered plaintiffs to file a public version of the complaint within five days in accordance with Court of Chancery Rule 5(g). Plaintiffs have done so. The Court also directed defendants to show cause within twenty days of service of the complaint as to why the sealed portions of the complaint should not be publicly disclosed. Defendants now seek continued sealing with respect to all or parts of paragraphs 8, 9, 103, 106, 107, 110-120, 126, 132 and 133 of the complaint. The information in these paragraphs is derived from three documents that were produced to the plaintiffs as part [*2] of the books and records inspection, and they include: (1) the February 25, 2004 meeting minutes of AmSouth's Audit Committee; (2) the July 15, 2004 meeting minutes of AmSouth's board; and (3) the December 10, 2004 Anti-Money Laundering Due Diligence Assessment prepared by KPMG Forensic Services for AmSouth (the "KPMG Report"). These three documents were designated as confidential under the stipulation of confidentiality entered into between plaintiffs and AmSouth as part of the books and records inspection.

Plaintiffs now oppose the continued sealing of any portion of the complaint. They insist that much of the information contained in the complaint comes from public sources. Those aspects of the complaint that derive from nonpublic information are based on historical information and do not pose any threat of harm to AmSouth if publicly disclosed. None of the disputed information, according to the plaintiffs, reveals any of AmSouth's current procedures or controls for Bank Secrecy Act or Anti-Money Laundering compliance. Rather, the complaint contains allegations regarding former procedures and controls in place at a time when AmSouth, according to plaintiffs, played a role in numerous [*3] allegedly fraudulent schemes, resulting in tens of millions of dollars in losses to its customers. Plaintiffs also note that AmSouth has been required, in accordance with a cease and desist order entered into with the Federal Reserve Board and the Alabama Department of Banking, to submit a program designed to ensure compliance with applicable provisions of the Bank Secrecy Act and other written procedures designed to strengthen the bank's internal controls. Thus, plaintiffs insist that the complaint, since it does not concern these newly devised and submitted procedures, threatens no demonstrable harm by revealing historical information regarding procedures and internal controls that have been revised. Next, many of the allegations in the complaint about which defendants seek continued sealing concern the KPMG Report, which was presented to AmSouth on December 10, 2004. The KPMG Report, however, does not reveal current Bank Secrecy Act or Anti-Money Laundering compliance controls. Rather, the KPMG Report reflects an independent assessment of AmSouth's "then-current" policies, procedures and practices.

The other information in the complaint that defendants deem highly confidential [*4] and seek to protect from public disclosure include references to AmSouth's board minutes. Defendants contend that disclosure in the complaint of board minutes would have a chilling effect on board deliberations, citing Vice Chancellor Lamb's recent decision in *Disney v. The Walt Disney Co.*, 2005 Del. Ch. LEXIS 94 (June 20, 2005). That decision, however, arose in the context of a § 220 action. This proceeding is a derivative action in which stockholder plaintiffs assert derivative claims based on information obtained using the "tools at hand" under § 220. As Vice Chancellor Lamb recognized in the *Disney* decision, [HN1]there is a reasonable expectation that confidential information produced in the books and records context will be treated as confidential unless and until disclosed in the course of litigation or pursuant to some other legal requirement. That is precisely the situation here. The information obtained in the books and records context is being used affirmatively in this derivative action. [HN2]Reasonable expectations of confidentiality with respect to documents produced in a § 220 action do not continue unabated in the context of litigation. The test now is [*5] under Court of Chancery Rule 5(g) and the Court must determine whether good cause exists for the complaint and other related documents to continue to be filed under seal. That is an inquiry that this Court routinely undertakes, balancing the interests of companies in protecting proprietary commercial, trade secret or other confidential information against the legitimate interests of the public in litigation filed in the courts, as well as stockholder

interests in monitoring how directors of Delaware corporations perform their managerial duties.

Having reviewed all 143 paragraphs of the fifty-two-page complaint, I find no basis for continuing to seal any portion of the complaint. The various paragraphs of the complaint detailing the findings of the KPMG Report and the then-current practices of AmSouth with respect to compliance of the Bank Secrecy Act and the Anti-Money Laundering Act are historical in nature. Nothing in the paragraphs identified by AmSouth would appear to threaten its ongoing compliance with those statutes or the integrity of its present and continuing internal controls and compliance programs. Nor do any of the references in the complaint to minutes of the board [*6] of directors and Audit Committee meetings threaten to chill internal deliberations of the board or any of its committees. Based on my review of the complaint, the references to AmSouth minutes do not reveal preliminary discussions, opinions or assessments of board members. Rather, the references in the complaint to minutes of meetings refer largely to the alleged failure of the director defendants to act in the face of a known duty to act. As just one example, paragraph 106 of the complaint, alleges as follows:

> The minutes that were produced, however, confirm the finding of the USAO, FinCEN, AmSouth's outside auditor, and others. Specifically, prior to the time AmSouth learned it was the subject of a federal criminal investigation and entered into the Deferred Prosecution Agreement, *inter alia*, there is very little that reflects attempts at Bank Secrecy Act compliance.
> . . .

I do not understand how allegations of this sort would chill the board or committee's deliberative processes and certainly it does not rise to the level of good cause under Chancery Rule 5(g), in particular, when weighed against the legitimate interests of the public in litigation filed in the courts, [*7] as well as stockholder interests in monitoring directors of Delaware corporations.

For all of the above reasons, I deny defendants' motion to continue sealing certain portions of the complaint filed in this action. I direct that the sealing of the complaint and any related documents be vacated immediately.

IT IS SO ORDERED.

William B. Chandler III

Exhibit

E

LEXSEE

Caution
As of: May 27, 2008

ROY E. DISNEY, Plaintiff, v. THE WALT DISNEY COMPANY, Defendant.

C.A. No. 234-N

COURT OF CHANCERY OF DELAWARE, NEW CASTLE

2005 Del. Ch. LEXIS 94

June 20, 2005, Decided
June 20, 2005, Filed

NOTICE:

[*1] THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

PRIOR HISTORY: On Appeal Del. Supr., No. 380, 2004.
Disney v. Walt Disney Co., 857 A.2d 444, 2004 Del. Ch. LEXIS 120 (Del. Ch., 2004)

CASE SUMMARY:

PROCEDURAL POSTURE: On remand from the Delaware Supreme Court in plaintiff shareholder's action against defendant corporation pursuant to Del. Code Ann. tit. 8, § 220, the trial court was ordered to make specific findings as to whether 10 documents, which had a confidentiality designation, were confidential, to address the benefits and harm from disclosing the documents, and to decide whether the confidentiality designation should be removed or reduced.

OVERVIEW: All of the documents at issue were communications among or deliberations of the corporation's board of directors. The documents related directly to preliminary deliberations of the board. Under the corporation's confidentiality policy, which the shareholder, as a board member, helped adopt, those who participated in the communications had a reasonable expectation that they were to remain private. The release requested by the shareholder placed the company in an untenable position as it would have allowed the shareholder to disclose portions of e-mails without including context, thereby forcing the corporation to release even more nonpublic information in order to provide the missing context. This was not in the best interests of the corporation or its shareholders. The potential benefit of disclosure, honoring the shareholders' interests in monitoring how boards perform their duties and monitoring the impact of executive compensation on their investments, was outweighed by the potential harm, which would have prevented the board from deliberating openly, honestly, and in good faith for fear that directors' communications would later be made public.

OUTCOME: The trial court made the findings as instructed.

CORE TERMS: confidential, disclosure, stockholder, email's, confidentiality, disputed, deliberations, shareholder, disclose, target, board of directors, public disclosures, disclosing, potential harm, potential benefits, copied, senior, designation, non-public, redacted, legitimate interests, best interests, participated, releasing, redacting, resisted, minutes, bonus, confidentiality agreement, reasonable expectation

LexisNexis(R) Headnotes

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > General Overview

[HN1]The provision of nonpublic corporate books and records to a stockholder making a demand pursuant to Del. Code Ann. tit. 8, § 220 will normally be conditioned upon a reasonable confidentiality order.

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > General Overview
[HN2]Delaware courts have repeatedly placed reasonable restrictions on shareholders' inspection rights in the context of suit brought under Del. Code Ann. tit. 8, § 220, and have made disclosure contingent upon the shareholder first consenting to a reasonable confidentiality agreement.

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > Inspection Rights > Shareholders
[HN3]The Delaware Court of Chancery is empowered to protect the corporation's legitimate interests and to prevent possible abuse of the shareholder's right of inspection by placing such reasonable restrictions and limitations as it deems proper on the exercise of the right.

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > General Overview
Civil Procedure > Discovery > Methods > Requests for Production & Inspection
[HN4]A comprehensive discovery order under Del. Ch. Ct. R. 34 and an order under Del. Code Ann. tit. 8, § 220 are not the same and should not be confused. A § 220 proceeding should result in an order circumscribed with rifled precision, while Del. Ch. Ct. R. 34 production orders may often be broader in keeping with the scope of discovery under Del. Ch. Ct. R. 26(b).

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > General Overview
[HN5]In the context of Del. Code Ann. tit. 8, § 220, information is confidential where the company believes in good faith that the information constitutes confidential, proprietary, or commercially or personally sensitive information that needs the protection of confidential treatment.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > General Overview
Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > General Overview
[HN6]Stockholders have a legitimate interest in monitoring how the boards of directors of Delaware corporations perform their managerial duties.

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > General Overview
[HN7]Stockholders have a legitimate interest in discussing decisions of a board that could affect the value of their investments, such as executive compensation.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > General Overview
Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > General Overview
[HN8]If any shareholder can make public the preliminary discussions, opinions, and assessments of board members and other high-ranking employees, it would surely have a chilling effect on board deliberations. At the foundation of Delaware General Corporation Law is the presumption that, in making a business decision, the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company and that, absent an abuse of discretion, the courts will respect that judgment. Concomitant to this grant of deference to the directors of a corporation is the need to allow the directors the ability to deliberate openly and candidly with each other. The preliminary deliberations of a corporate board of directors generally are non-public and should enjoy a reasonable expectation that they will remain private.

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > General Overview
[HN9]In the context of inspection rights of a shareholder, there is nothing in the language of Del. Code Ann. tit. 8, § 220 to differentiate its use in relation to compensation issues from any other subject relating to the management of the corporation.

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > General Overview
[HN10]The policy of Del. Code Ann. tit. 8, § 220 allows a stockholder, even one owning a single share, access to

the corporation's books and records. There is nothing in the language of § 220 that gives a large shareholder greater access to the corporate books and records and a greater ability to share those documents with other shareholders.

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > Inspection Rights > Shareholders

[HN11]The right to inspect and copy documents is not conditioned on any minimum threshold investment on the part of the stockholder.

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > General Overview
Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Exigent Circumstances
Estate, Gift & Trust Law > Wills > Beneficiaries > Elections

[HN12]In the context of the circumstances in which a stockholder is entitled to use information obtained by making a Del. Code Ann. tit. 8, § 220 demand in ways that will lead to public disclosure of that information, chief among these, of course, is the use of the information to bring a derivative suit in the case of corporate waste or mismanagement, or to bring a suit attacking some aspect of a company's public disclosures. However, there are also other instances, where a lawsuit was not prosecuted, in which it might be proper to publicly disclose confidential information obtained after a § 220 demand. Specifically, the court will entertain an application for relief from a § 220 confidentiality agreement in the context of an active proxy solicitation, or under other exigent circumstances (e.g., an active election contest) in which time constraints will not allow a stockholder to draft and file a complaint and then deal with issues of confidentiality in the ordinary course.

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights > General Overview

[HN13]In the context of a shareholder's right to inspect under Del. Code Ann. tit. 8, § 220, there are instances in which it would be appropriate to relieve a § 220 plaintiff from a confidentiality order. These instances would include the so-called "smoking gun" situation, where § 220 documents definitively prove that the corporation made false or misleading disclosures. In such a circumstance, the faster such information is given to investors the better.

COUNSEL: Attorneys for the Plaintiff: A. Gilchrist Sparks, III, Esquire, S. Mark Hurd, Esquire, MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware; Stephen D. Alexander, Esquire, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, Los Angeles, California.

Attorneys for the Defendant: Robert K. Payson, Esquire, Donald J. Wolfe, Jr., Esquire, Stephen C. Norman, Esquire, POTTER ANDERSON & CORROON LLP, Wilmington, Delaware; Theodore N. Mirvis, Esquire, Paul K. Rowe, Esquire, Robin M. Wall, Esquire, WACHTELL, LIPTON, ROSEN & KATZ, New York, New York.

OPINION

OPINION ON REMAND

Remand Order: March 31, 2005

Remand Opinion: June 20, 2005

LAMB, Vice Chancellor.

On August 6, 2004, I issued an Opinion and Order (the "Opinion") denying plaintiff Roy E. Disney's motion to lift the confidentiality designation placed on ten documents. [1] Those ten documents constituted a small percentage of the material made available by the defendant Walt Disney Company (the "Company") in response to Mr. Disney's January 2004 demand to inspect the Company's [*2] books and records pursuant to Section 220 of the DGCL. The documents were given to Mr. Disney in voluntary compliance with that demand.

1 *Disney v. Walt Disney Co.*, 857 A.2d 444 (Del. Ch. 2004), *remanded*, No. 380, 2004 (Del. Mar. 31, 2005) (ORDER).

Mr. Disney appealed to the Delaware Supreme Court and, by order, the Supreme Court remanded the matter for certain additional analysis and explanation (the "Remand Order"). [2] In the Remand Order, the Supreme Court instructs me to "make specific findings as to whether the documents are confidential." If so, the court further orders me to address "the potential benefits and potential harm from disclosing the documents for [Mr.] Disney's stated purposes, and reach a conclusion as to whether the confidentiality designation should be removed or reduced to allow for specified communications." This is the response to the Remand Order.

2 *Disney v. Walt Disney Co.*, No. 380, 2004 (Del. Mar. 31, 2005) (ORDER).

[*3] **I.**

My analysis begins, as did the Opinion, with the observation that [HN1]the provision of nonpublic corporate books and records to a stockholder making a demand pursuant to Section 220 will normally be conditioned upon a reasonable confidentiality order. [3] [HN2]Delaware courts have repeatedly "placed reasonable restrictions on shareholders' inspection rights in the context of suit brought under 8 *Del. C.* § 220, and [have] made disclosure contingent upon the shareholder first consenting to a reasonable confidentiality agreement." [4] I also note that the documents at issue were not produced in litigation. Thus, the general standard governing protective orders under Rule 26 is not directly implicated. [5]

3 *See* 8 Del. C. § 220(c); *see also CM & M Group, Inc. v. Carroll*, 453 A.2d 788, 793-94 (Del. 1982) [HN3]("The Court of Chancery is empowered to protect the corporation's legitimate interests and to prevent possible abuse of the shareholder's right of inspection by placing such reasonable restrictions and limitations as it deems proper on the exercise of the right.").

[*4]

4 *See Stroud v. Grace*, 606 A.2d 75, 89 (Del. 1992) (and cases cited therein).

5 *Cf. Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 570 (Del. 1997) (the court held that [HN4]a comprehensive discovery order under Rule 34 and an order under Section 220 are not the same and should not be confused. A Section 220 proceeding should result in an order circumscribed with rifled precision, while Rule 34 production orders may often be broader in keeping with the scope of discovery under Rule 26(b).).

Pursuant to the Supreme Court's instructions, I again review the ten documents at issue and evaluate whether they are confidential. I will then evaluate "the potential benefits and potential harm from disclosing the documents[.]" For the sake of clarity, I will describe each document in turn.

A. The Contested Documents [6]

6 The ten documents at issue in this case were most recently attached as Exhibit C to the May 17, 2005 letter from Robert K. Payson, Esquire, counsel for the Walt Disney Company, to the court. These are the same documents I reviewed in connection with the Opinion.

[*5] The first disputed document is a letter from Stanley P. Gold, a long-time associate of Mr. Disney and former director of the Company, to Judith Estrin and John Bryson, [7] dated September 12, 2003 (the "Gold Letter"). [8] The Gold Letter was also copied to the entire Disney Board of Directors, of which Mr. Disney was then a member. The letter is a detailed account of Mr. Gold's thoughts and assessments of the Company's proposed director compensation plan.

7 Ms. Estrin was Chairman of the Company's Compensation Committee, and Mr. Bryson was a member of that Committee.

8 Appendix Page No. A86-A91.

The second disputed document is an excerpt of a presentation of financial results and internal targets in connection with the Company's tax-qualified compensation plan. [9] It sets out non-public targets established for the compensation plan. [10]

9 Appendix Page No. A93-A97.

10 Mr. Disney proposed releasing the document with the operating performance targets for FY 2004 redacted. The Company has resisted the production of the document even with these redactions.

[*6] The third disputed document is an email from Michael Breckinridge [11] to Ms. Estrin, dated November 20, 2002. [12] The email is heavily redacted and it relates to year-end compensation issues for FY 2002.

11 "Michael Breckinridge" is Michael Eisner's *now de plume.*

12 Appendix Page No. A99-A101.

The fourth disputed document is a letter from Mr. Eisner to Mr. Gold, dated December 11, 2002. [13] The letter refers to (and states that it attaches) another letter from Mr. Eisner to Ms. Estrin. It also refers to "the overall book that describes the bonus levels for each individual in the company that is to receive a bonus" which was given to Mr. Gold and the entire Compensation Committee. The letter asks Mr. Gold for his opinion on compensation issues.

13 Appendix Page No. A102.

The fifth disputed document is a memorandum [*7] from Irwin E. Russell (Mr. Eisner's personal attorney) to Mr. Eisner, dated November 21, 2003. [14] In it, Mr. Russell comments on the materials sent to the Compensation Committee regarding bonuses for Mr. Eisner and another executive.

14 Appendix Page No. A104-A105.

The sixth disputed document is a series of emails between and among Mr. Eisner, John England, and Ms. Estrin, dated December 9 and 10, 2003. [15] Mr. England

works for Towers Perrin, a consulting firm. In these emails, the parties discuss Mr. Eisner's bonus for FY 2003. Mr. Eisner also forwarded an email from Mr. Russell, regarding Mr. Eisner's compensation, to Mr. England and Ms. Estrin.

15 Appendix Page No. A106-A110.

The seventh disputed document is an email from Ms. Estrin addressed to, and copied to, certain directors, members of senior management, and their advisors, [*8] dated November 20, 2003. [16] The email advises the recipients of the issues that were going to be discussed at upcoming Compensation Committee meetings.

16 Appendix Page No. A112.

The eighth document is a letter from Mr. Eisner to Ms. Estrin, dated December 15, 2002. [17] The letter was also copied to Mr. Bryson, Leo O'Donovan, and Sidney Poitier. [18] This letter describes in great detail the Company's performance in 2002, and details the Company's business strategy for 2003. It also describes the performance of several top Disney executives and gives recommendations for their future compensation. [19]

17 Appendix Page No. A114-A122.

18 Mr. O'Donovan and Mr. Poitier were both members of the Company's Compensation Committee.

19 Mr. Disney proposed redacting the performance evaluations of three senior Company executives, while not redacting the performance evaluation of another senior executive, and not redacting at all the other information contained in the letter. The Company has resisted releasing the document, whether or not redacted.

[*9] The ninth document is the Minutes of a Special Meeting of the Compensation Committee of the Board of Directors (the "Compensation Committee Minutes"). [20] The meeting took place on December 15, 2002. The meeting dealt primarily with the Company's Executive Performance Plan. Specifically, the Committee discussed the achievement of financial targets for FY 2002, and set financial targets for FY 2003. The meeting also dealt with which executives would be allowed to participate in the Company's Executive Performance Plan for FY 2003. According to the minutes, the Compensation Committee resolved that the matters discussed at the meeting were "confidential business information of the Corporation because the disclosure thereof could generate undue speculation about projected earnings of the Corporation or unwarranted inferences about the board's expectations in this regard." [21]

20 Appendix Page No. A124-A128.

21 Mr. Disney proposed releasing the document with the operating performance target for FY 2003 and FY 2004 redacted. The Company has resisted the production of the document even with these redactions.

[*10] The last document is an email from Robin Coleman addressed to, and copied to, certain directors, members of senior management, and their advisors, dated November 21, 2003. This email described materials that had been sent to the email's recipients in anticipation of certain Compensation Committee meetings.

B. The Documents Are Confidential

After a second review of the ten documents, I again conclude that they are of an intrinsically confidential nature and that the Company is justified in demanding that they remain confidential, subject to the possibility of disclosure, as discussed in the Opinion. They all relate to "private communications among or deliberations of the Company's board of directors." [22] These documents "reflect[] and relate directly to preliminary deliberations of the Company's board of directors." [23] Furthermore, "there is little doubt that those who participated in these communications had a reasonable expectation that they would remain private unless disclosed in the course of litigation or pursuant to some other legal requirement." [24]

22 *Disney*, 857 A.2d at 448.

[*11]

23 *Id.*

24 *Id.*

The confidential nature of these documents is evidenced by the Company's written confidentiality policy that bars present and former directors from disclosing information entrusted to them by reason of their positions, and includes a prohibition on the disclosure of "non-public information about discussions and deliberations" of the board. [25] Messrs. Disney and Gold participated as board members in the approval of this confidentiality policy and appear to be bound by it. The ten documents requested by Mr. Disney all fall under the ambit of this policy. By adopting this policy, the board has recognized the necessity of keeping the thoughts, opinions, and deliberations of its members confidential. This board policy deserves significant weight. [26]

25 *Id.* at 445 n.1.

26 *See, e.g., Amalgamated Bank v. UICI*, C.A. No. 884, 2005 Del. Ch. LEXIS 82, letter op. at 17 (Del. Ch. June 2, 2005) (holding as [HN5]confidential that information which the company believed, "in good faith constitutes confidential, proprietary, or commercially or person-

ally sensitive information that needs the protection of confidential treatment").

[*12] The Gold Letter illustrates the relevance of this policy to the issue at hand. It is a letter from one board member to another, and copied to the entire board, discussing an issue to come before the board. In very frank and direct language, Mr. Gold attempts to convince his fellow directors of his view of proper compensation for the board and senior management of the Company.

The very fact that Mr. Disney found it necessary to request the Gold Letter from the Company in his Section 220 demand suggests that even he believes that it is a confidential document that he is bound not to disclose in accordance with the board's policy that he approved. It is clear that Mr. Disney either has the Gold Letter in his possession or could easily get it. Mr. Gold is well-known to be an associate of Mr. Disney, and he surely would give Mr. Disney the document if asked. [27] Furthermore, as a member of the Company's board at the time Mr. Gold wrote the letter, Mr. Disney should have received a copy of this document. The most plausible explanation for why Mr. Disney would request a document that he already has is that he is seeking to have the court remove the confidentiality restriction to which he [*13] apparently feels bound, and which he participated in adopting. By doing so, in a strong sense, he is admitting that the document is confidential. The same can be said of the fourth document, a letter sent by Mr. Eisner to Mr. Gold. Surely, Mr. Disney has or can easily obtain a copy of that letter from Mr. Gold.

27 In its letter to the court, counsel for Mr. Disney states: "In its Letter, the Company lumps Mr. Gold's letter with other books and records in the apparent hope of obscuring the fact that it is attempting to prevent Mr. Gold from disclosing his own opinions merely because they were memorialized in a letter." Letter from A. Gilchrist Sparks to the court of May 27, 2005 at 7. Of course, the Company is not preventing Mr. Gold from doing anything in this case, because Mr. Gold is not a party to this action. It is Mr. Disney who is trying to disclose the information in the Gold Letter. However, counsel's comment is indicative of the close relationship between Messrs. Disney and Gold.

Finally, as I noted [*14] in my earlier Opinion, Mr. Disney's proposed selective release of documents or excerpts of documents regarding the board's deliberations would place the Company in an untenable position. Mr. Disney, acting *qua* stockholder, has no fiduciary obligation to make complete or candid disclosures. Instead, he would be free to disclose snippets of information culled from a few emails or internal memoranda that, he contends, are inconsistent with the corporation's public disclosures or otherwise evidence misconduct of some sort. His public disclosure of that information would lead the Company to disclose even more otherwise non-public information in order to put Mr. Disney's disclosures in, what the corporation believes to be, the proper context. There is no reason to believe that such a process would necessarily advance the best interests of the corporation or its stockholders.

Therefore, I again conclude that the ten disputed documents are confidential. Pursuant to the Supreme Court's instructions, I must now balance the potential benefit and potential harm of disclosure.

C. The Potential Harm Outweighs The Benefit Of Disclosure

The potential benefit of the release of these [*15] documents can be easily stated. [HN6]Stockholders have a legitimate interest in monitoring how the boards of directors of Delaware corporations perform their managerial duties. [HN7]Stockholders also have a legitimate interest in discussing decisions of a board that could affect the value of their investments, such as executive compensation. Both of these interests might be served by allowing Mr. Disney to disclose the ten documents to the public.

Balanced against that benefit is the potential great harm to the deliberative process of the board, and the boards of directors of all Delaware corporations. [HN8]If any shareholder can make public the preliminary discussions, opinions, and assessments of board members and other high-ranking employees, it would surely have a chilling effect on board deliberations. At the foundation of Delaware General Corporation Law is the presumption that, in making a business decision, the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the Company and that, absent an abuse of discretion, the courts will respect that judgment. [28] Concomitant to this grant of deference [*16] to the directors of a corporation is the need to allow the directors the ability to deliberate openly and candidly with each other. The preliminary deliberations of a corporate board of directors generally are non-public and should enjoy "a reasonable expectation that they [will] remain private." [29]

28 *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

29 *Disney*, 857 A.2d at 448.

In addition, as already noted, the board, including Mr. Disney, adopted a confidentiality policy relating to the communications in the disputed documents. Evidently, the board, including Mr. Disney, made the judg-

ment that the interests of the Company are best served by maintaining these types of communications in strict confidence. That judgment is sensible. In the circumstances, there is no adequate reason to relieve Mr. Disney of his duties under that policy.

In his briefing and before me at oral arguments, Mr. Disney made two additional arguments as to why I should remove the confidentiality [*17] designation from these ten documents. First, he argued that executive compensation is a topic of such importance that it warrants what amounts to special treatment under Section 220. By disclosing information regarding compensation obtained through a Section 220 demand when it contradicted the statements of the Company and board, stockholders would be able to more effectively place a "corporate check" on the board's compensation decisions.

The problem with this argument, as I stated in my earlier Opinion, is that [HN9]there is nothing in the language of Section 220 to differentiate its use in relation to compensation issues from any other subject relating to the management of the corporation. Thus, I expect that whatever rule is applied in this case would necessarily cover the gamut of management decision-making.

Second, Mr. Disney argued that he is uniquely suited to decide what disclosures would be in the best interests of the corporation. Mr. Disney contends that, due to his decades-long association with the Company, and the large number and value of shares he owns, his interests are perfectly aligned with the corporation such that he would never do anything to harm it. Therefore, [*18] the harm of disclosure would be minimal.

While not doubting Mr. Disney's *bona fides* in the least, I simply cannot accept this reasoning. [HN10]The policy of Section 220 allows a stockholder, even one owning a single share, access to the corporation's books and records. [30] There is nothing in the language of Section 220, nor in any case cited by Mr. Disney, that gives a large shareholder greater access to the corporate books and records and a greater ability to share those documents with other shareholders. Nor am I convinced that allowing any one shareholder to assume the role of public scourge of management with broad rights to release the corporation's confidential documents is sound public policy. There are other avenues for bringing directors to account for their mismanagement, most notably by contesting elections and by instituting derivative litigation. Nothing suggests to me that Mr. Disney or any other stockholder needs the ability to make public disclosure of the directors' confidential, internal deliberations to successfully pursue those other avenues.

30 [HN11]The right to inspect and copy documents is not "conditioned . . . on any minimum threshold investment on the part of the stockholder." DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY, § 8-6[a] at 8-56 (2001) (quoted approvingly in *Madison Ave. Inv. Partners, LLC v. Am. First Real Estate Inv. Partners, L.P.*, 806 A.2d 165, 176 n.27 (Del. Ch. 2002)).

[*19] For all of the above reasons, I must conclude that the potential harm of disclosure outweighs the potential benefit.

III.

In the Remand Order, the Supreme Court also stated that "if the trial court takes the position that no review of the disputed documents is appropriate because [Mr.] Disney may only seek a change of designation in the course of a subsequent substantive lawsuit, the court should so advise this Court."

I do not take such a position. In my earlier Opinion, I noted the circumstances in which a stockholder is entitled to use information obtained by making a Section 220 demand in ways that will lead to public disclosure of that information. [HN12]Chief among these, of course, is the use of the information to bring a derivative suit in the case of corporate waste or mismanagement, or to bring a suit attacking some aspect of a company's public disclosures. [31] However, there are also other instances, where a lawsuit was not prosecuted, in which it might be proper to publicly disclose confidential information obtained after a Section 220 demand. Specifically, the court will "entertain an application for relief from a Section 220 confidentiality agreement in the context [*20] of an active proxy solicitation," [32] or under other "exigent circumstances (*e.g.*, an active election contest) in which time constraints will not allow a stockholder to draft and file a complaint and then deal with issues of confidentiality in the ordinary course." [33]

31 *Disney*, 857 A.2d at 448.
32 *Id.* at 449.
33 *Id.* at 450.

[HN13]There may, of course, be other instances in which it would be appropriate to relieve a Section 220 plaintiff from a confidentiality order. These instances would include the so-called "smoking gun" situation, where Section 220 documents definitively prove that the corporation made false or misleading disclosures. In such a circumstance, the faster such information is given to investors the better. However, this is not a smoking gun case. None of the documents contain any proof that the board of the Company made any deliberately false or

misleading statements. Thus, under the circumstances, I find no reason why [*21] these ten documents should be made public.

Exhibit

F

DAVIS ACQUISITION INC., a Delaware corporation, and NWA CO., a Colorado general partnership, Plaintiffs, v. NWA INC., a Delaware corporation, STEVEN G. ROTHMEIER, JOHN F. HORN, JAMES A. ABBOTT, JAMES H. BINGER, E.W. BLANCH, JR., ROBERT A. CHARPIE, MELVIN R. LAIRD, JAMES N. LAND, JR., M. JOSEPH LAPENSKY, GEN. ROSCOE ROBINSON, JR., JEAN HEAD SISCO, RICHARD A. TRIPPEER, JR., and WM. BEW WHITE, JR., Defendants

Civil Action No. 10761

Court of Chancery of Delaware, New Castle

1989 Del. Ch. LEXIS 39; Fed. Sec. L. Rep. (CCH) P95,434

Date Submitted: April 24, 1989
April 25, 1989, Decided and Filed

NOTICE:

THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff corporation was formed to acquire a subsidiary of defendant corporation. Plaintiff general partnership owned all of plaintiff corporation's outstanding stock. Plaintiffs made a tender offer for all of defendant's stock. Defendant's board of directors authorized the issuance of defensive stock rights, and plaintiffs moved to enjoin the issuance of the stock rights until the holding of defendant's annual meeting.

OVERVIEW: The stock rights offered by defendant included a "deferred redemption provision," which provided that any board that was comprised predominately of members who were not nominated by the incumbent board could not redeem the stock rights for a period of 180 days following its election, if to do so would facilitate a transaction with an "interested person" (someone who was involved in the nomination of such non-incumbent director candidates). The incumbent board, or a successor that was predominately composed of persons nominated to office by the incumbent board, would be free to redeem the stock rights at any time before they became exercisable. The court denied plaintiffs' application for a preliminary injunction on condition that defendant undertake, in connection with the distribution of any certificates representing the stock rights, to give notice to the persons to whom they were distributed and to note on the face of such certificates that the validity of the restrictive provision had been challenged in the instant litigation and the scope of the rights could be affected by any final judgment entered in the action.

OUTCOME: The court denied plaintiffs' request for a preliminary injunction, conditioned on defendant placing certain language on the certificates representing the stock rights.

CORE TERMS: redemption, shareholder, slate, stock, notice, election, proxy, incumbent, injunction, issuance, contest, invalid, voting, annual meeting, preliminary injunction, redeem, promptly, announced, board of directors, tender offer, irreparable injury, fiduciary, elected, predominately, solicitation, nominated, mindful, prompt, claim asserted, legal power

LexisNexis(R) Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN1]The test for the issuance of a preliminary injunction focuses upon the existence and scope of a threatened irreparable injury to plaintiff; the establishment of a reasonable likelihood that the claim asserted will be found to be valid and the other circumstances present that bear upon considerations of fairness -- customarily referred to as a balance of the hardships. There is no mathematical aspect to the "reasonable probability of success" portion of the test. That probability that is found to be reasonable in the circumstances may vary depending upon how grievous the injury that is threatened is perceived to be, or how damaging to defendant an improvidently granted injunction may turn out to be. Similarly, a court of equity will respond particularly to particular threats of injury. The standard formulation of the legal test is more akin to a checklist of appropriate concerns stated as abstractions than it is a formula.

COUNSEL: [*1] A. Gilchrist Sparks, III, Esquire, Lawrence A. Hamermesh, Esquire, Alan J. Stone, Esquire, and Frederick H. Alexander, Esquire, of MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware, and John J. Huber, Esquire, of LATHAM & WATKINS, Los Angeles, California, Attorneys for Plaintiffs.

Joseph A. Rosenthal, Esquire, of MORRIS, ROSENTHAL, MONHAIT & GROSS, P.A., Wilmington, Delaware, and Ronald Litowitz, Esquire, of BERNSTEIN, LITOWITZ, BERGER & GROSSMAN, New York, New York, and Judith A. Schultz, Esquire, of GOODKIND, LABATON & RUDOFF, New York, New York, Attorneys for Plaintiff-Intervenors.

R. Franklin Balotti, Esquire, C. Stephen Bigler, Esquire, and James C. Strum, Esquire, of RICHARDS, LAYTON & FINGER, Wilmington, Delaware, and Sheldon Raab, Esquire and Sandra Lipsman, Esquire, of FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, New York, New York, Attorneys for Defendants NWA Inc. and Northwest Airlines, Inc.

JUDGES: ALLEN, Chancellor

OPINION BY: ALLEN

OPINION

MEMORANDUM OPINION

ALLEN, Chancellor

Plaintiff Davis Acquisition Inc. is a Delaware corporation formed for the purpose of acquiring Northwest Airlines and its affiliated companies. Plaintiff NWA Co. is a Colorado general partnership that indirectly owns [*2] all of the outstanding stock of Davis Acquisition; it is controlled by Marvin Davis and persons related to him. Davis Acquisition is awaiting SEC clearance of its proxy material seeking to elect a full slate of directors to the board of defendant NWA Inc., the corporate parent of Northwest Airlines. In addition to this imminent proxy solicitation, on April 20, 1989, Davis Acquisition, after seeking unsuccessfully to open merger discussions with NWA Inc., announced the commencement of a public tender offer for up to all of NWA's shares for $ 90 per share cash. That offer may close no sooner than May 17, 1989. NWA will have its annual meeting on May 15, 1989.

On March 27, 1989, the board of directors of NwA authorized the issuance on April 27, 1989 of defensive stock rights to the holders of all of NwA's common stock. Pending is an application to enjoin, until the holding of defendants' annual meeting on May 15, 1989, the issuance of these stock rights. The rights are the now familiar flip-in/flip-over stock rights. These rights, however, contain a novel provision that is at the heart of this case. Plaintiffs claim that this innovative provision has the effect of interfering impermissibly [*3] with the election of the board of directors at the annual meeting and is otherwise invalid.

The innovation involved is a provision (referred to by defendants as the Deferred Redemption Provision) that in effect provides that any board that is comprised predominately of members who were not nominated by the incumbent board (and for whom there had not been 45 days' prior notice that they would be nominated) [1] may in no event redeem the stock rights for a period of 180 days following its election, if to do so would facilitate a transaction with an "interested person" *(i.e.,* loosely stated, someone who was involved in the nomination of such non-incumbent director candidates). The incumbent board, or a successor that is predominately composed of persons nominated to office by the incumbent board, would not suffer under any such limitation. It would be free, in the exercise of its business judgment, to redeem the stock rights at any time before they became exercisable.

1 Here, it is uncontested that plaintiffs did not have sufficient notice to permit them to comply with a 45 day notice condition.

Davis Acquisition claims that this provision substantially affects the proxy contest [*4] election that will be held this year. That is, it is said that shareholders are actively discouraged by the Delayed Redemption Provision from voting for the Davis slate of directors, since a board comprised predominately of such persons would have less corporate power than the incumbent board's slate. The distinction in corporate power is material in these circumstances, plaintiffs assert. The Davis slate of

directors will run on a "platform" that promises that if elected, they will promptly cause the sale of the Company at the highest available price. The constituency that could be expected to embrace this platform most warmly, it is said, is obviously those who seek a prompt sale. But such shareholders will be chilled, it is claimed, from voting for the Davis slate since it, but not the management slate, cannot authorize a prompt Davis transaction.

Plaintiffs assert that the Delayed Redemption Provision is invalid or (alternatively) cannot be applied to the Davis slate of directors for a number of reasons.

First. It is said to constitute a direct, intended impairment of the voting process that constitutes an offense to the principal-agent, legal relation that exists between [*5] the board and the shareholders. *See* Aprahamian v. HBO & Co., Del. Ch., 531 A.2d 1204 (1987); *Lerman v Diagnostic Data, Inc.*, Del. Ch., 421 A.2d 906 (1980); *Blasius Industries, Inc. v. Atlas Corp.*, Del. Ch., C.A. No. 9720, Allen, C. (July 25, 1988).

Second. Since these plaintiffs never had an opportunity to give 45 days' notice of an intention to nominate a slate of directors (the terms of the stock rights not becoming publicly known until after the 45 day period could no longer be complied with given the meeting date), they claim that the Delayed Redemption Provision constitutes a manipulation of the corporate machinery for the purpose of self-interested entrenchment. *See* Schnell v. Chris-Craft Industries, Del. Supr., 285 A.2d 437 (1971); *Aprahamian v. HBO & Co., supra.*

Third. Plaintiffs claim that it is beyond the power of defendants to limit the power of a future board of directors of NwA Inc. to take such action as it may in good faith deem expedient and in the corporation's best interest at the time a redemption of the stock rights might be considered. See *Abercrombie v. Davis*, Del. Ch., 123 A.2d 893 (1956), [*6] *rev'd on other grounds*, 130 A.2d 338 (1957); *Chapin v. Benwood Foundation, Inc.*, Del. Ch., 402 A.2d 1205 (1975). Indeed, the existence of the ability to make a specific judgment whether or not to redeem stock rights at the time a tender offer is made, is, it is claimed, the essential condition that allowed our Supreme Court to recognize that issuing such securities was not necessarily a violation of duty. *Moran v. Household International, Inc.*, Del. Supr., 500 A.2d 1346 (1985). The stock rights here would, because of the Delayed Redemption Provision, purport to deprive a duly elected board of the power to make such a judgment with effect.

In answer to defendants' contention that boards very frequently do take valid action that has the effect of constraining future boards, plaintiffs add that the limitation that the Delayed Redemption Provision imposes upon the scope of a future board's effective power is not similar to the host of matters that may collaterally and properly limit that discretion. Surely, it is admitted, the effect, for example, of the mortgage of all assets by one board will limit the practical alternative [*7] that a later board has open to it. Similarly, loan covenants (such as restrictions on dividends) may properly be imposed by one board upon a later one. But here, plaintiffs say, the effect complained about is not the collateral effect of a decision made with respect to the firm's operations (as in the cited examples). Rather, the limitation on a future board's discretion is the principal intended effect of the contested provision. Moreover, that provision discriminates between possible future boards based upon who nominates a majority of the new board. In what way, plaintiffs wonder, can the current board justify trying to impose restrictions upon a future board's discretion that will be effective only if a majority of the current directors are released from their duties to the Company and its management is placed in other hands by the stockholders?

To all of this defendants, as I understand them, say several things. First, they say there has been no showing that the Delayed Redemption Provision will have any material effect upon the proxy contest. The NWA board has announced its willingness to explore extraordinary transactions designed to enhance share values. Thus, the principal [*8] issue before the shareholders would appear to be which set of directors do the shareholders prefer to have responsibility to conduct this effort: the Davis slate that is committed to selling the Company promptly for the highest available price (and is a potential buyer), or the incumbent board that is committed to exploring value-enhancing, extraordinary transactions. This issue, defendants say, is the principal issue and not whether the Davis slate will be impaired in doing a self-dealing transaction.

Second, defendants assert that any "impairment" of a future Davis slate board is immaterial because it is likely that a careful, advised study of alternatives and sale of the Company, which the Davis slate says it would do if elected, would absorb all or much of the 180 day delay anyway. Therefore, the 180 day delay is not much of an additional burden, if any. Indeed, defendants' expert offers the view that given the $ 90 price of the Davis offer and the $ 102 current market price of the NWA stock, some shareholders who would not vote for the Davis slate without the Delaying Redemption Provision (because the Davis interests would be in a position to redeem the stock rights immediately [*9] and close the below market tender offer) will do so with that provision in place.

Finally, with respect to injury, the Company claims that any injunction by this court does threaten the incumbent slate with irreparable injury that should be taken into account. It is asserted in that connection that any

injunction by this court threatens to be misunderstood as a reprimand of the incumbent board by a court charged with supervising fiduciary obligations. Such a misunderstanding could have an important effect upon the forthcoming election and care should be taken, it is respectfully suggested, so that may be avoided or minimized.

Passing beyond the denial of any demonstrated threat to the integrity of the forthcoming election, defendants, of course, deny that the Delayed Redemption Provision is (or is likely finally to be held to be) invalid under Delaware corporation law. It is a defensive measure that the board has legal power to take *(see* 8 *Del.* c. §§ 141, 157; Moran v. Household International, Inc., Del. Supr., 500 A.2d 1346 (1985)) and insofar as the claim is one of impermissible motive, this action is to be judged by the standard of Unocal Corp. v. Mesa Petroleum Co., Del. Supr., 493 A.2d 946 (1985). [*10] It passes inspection under that test, defendants assert. The Delayed Redemption Provision represents, they say, a reasonable response to a threat to shareholder interests. It is indeed a moderate, measured response. The threat is that shareholders might, without the board having 45 days' notice, misguidedly elect a board in a proxy contest or by consent that would either then breach its fiduciary duties or proceed in a hurried way (to the shareholders' detriment) to accomplish a change in control transaction:

The Board recognized that a Rights Plan without a Delayed Redemption Provision left shareholders vulnerable to an unsolicited bidder's attempt to conduct a consent solicitation or surprise short-notice proxy contest to replace the Board with a slate that would be willing to effectuate a transaction with the unsolicited bidder on an accelerated schedule. (Thornton Aff. para. 5).

Defendants' memorandum, p. 8.

The Delayed Redemption Provision is said to be a moderate response to this "threat." It does not interfere with the right to vote, it is said. The delay that it does impose lasts only 180 days and even during that period the rights may be redeemed in order to facilitate [*11] transactions with third parties *(i.e.,* arms-length transactions).

Accordingly, the defendants say that issuance of the stock rights is within the power of the board under Sections 141 and 157 of the Delaware Corporation Law; that in exercising that legal power they have not breached any fiduciary duty since they are taking the action they propose to take in a good faith effort to protect the NWA shareholders from a risk they reasonably perceive.

* * * *

The motion is brought as one for a temporary restraining order. Because there was an opportunity to take some discovery and to submit briefs and affidavits from both sides, I allowed that it would be treated as a motion for preliminary injunction. *See Cottle v. Carr,* Del. Ch., C.A. No. 9612, Allen, C. (February 9, 1988). The distinction, however, is not material in this instance. Ordinarily, a preliminary injunction motion will present the court with a fuller record and a better opportunity to evaluate the substantive merits of the complaint than will a restraining order application. However, the *sine qua non* of each remedy is the existence of a threat of irreparable injury and each requires a shaping of relief, if any [*12] is to be afforded, so that detrimental impacts upon others may be minimized. It is this similar characteristic that is most salient in this instance.

[HN1]The test for the issuance of a preliminary injunction, of course, focuses upon the existence and scope of a threatened irreparable injury to plaintiff; the establishment of a reasonable likelihood that the claim asserted will be found to be valid and the other circumstances present that bear upon considerations of fairness -- customarily referred to as a balance of the hardships. *E.g.* Ivanhoe Partners v. Newmont Mining, Del. Supr., 535 A.2d 1334 (1987). There is no mathematical aspect to the "reasonable probability of success" portion of the test. That probability that is found to be reasonable in the circumstances may vary depending upon how grievous the injury that is threatened is perceived to be, or how damaging to defendant an improvidently granted injunction may turn out to be. Similarly, a court of equity will respond particularly to particular threats of injury. The standard formulation of the legal test is more akin to a checklist of appropriate concerns stated as abstractions than it is a formula.

In this [*13] instance, proper resolution of the pending motion turns most importantly upon an evaluation of the harms that can reasonably be expected to flow from granting or denying the application. This evaluation, which is always an explicit or implicit part of the process by which an application for interim injunctive relief is considered, is especially significant in a case such as this.

This court, in recent years, (and down through the years no doubt) has been required to act with respect to litigated legal claims asserted in the midst of an ongoing public election campaign, as well as those asserted as part of contested election for internal political party office. In those instances, as in this instance where an ongoing proxy contest for the control of a publicly traded corporation provides context, the court's function is to strive to protect established rights (or in a preliminary motion, those that appear likely to be established) while being mindful that the expression of opinion by a court may have an impact upon the outcome of the election. Since, in my view, a court should ordinarily do what it can to minimize any impact that its statements may have upon the outcome of an election [*14] (beyond assuring

when such a matter is appropriately placed before it that the process by which the election is being conducted is proper), this spectre that an expression by the court may have a substantial impact requires that a court in such a setting exercise particular care and imagination to minimize the risks of such danger.

I am mindful that defendants have asserted this threat as a real one here and I am not in a position to dismiss that concern as extravagant.

* * * *

I do view the balance of harm here as critical and turn to that subject immediately. I confess to being rather unimpressed that plaintiffs' fear that the Delayed Redemption Provision will be a material factor to those NWA shareholders who might otherwise vote for the Davis slate is well grounded. [2] Had the NWA board not recently announced itself willing to consider a value "enhancing" transaction, I would feel more confident that the real issue facing the shareholders is whether they want the Company sold now or not. In that context, the issue would have been clearly joined and the Delayed Redemption Provision would have seemed a relatively insignificant cloud. But NWA has announced its intention to consider [*15] alternatives and so the stark issue referred to above has been muted. As a consequence, the Delayed Redemption Provision may take on relatively greater importance. Shareholders who have an interest in consummating an extraordinary transaction promptly may now find the incumbent slate somewhat more appealing than they did before the announcement, and the Delayed Redemption Provision would provide some further reason for such a shareholder to vote for the incumbent slate. This threatened injury does not strike me as compelling. Several of defendants' counter arguments have force. But in the present situation, I must conclude that the provision in question is likely to have some effect upon the voting by the shareholders.

> 2 I do doubt that it was the intention of defendants to coerce the NWA shareholders with respect to any proxy contest that may develop. Rather, it does seem that the likely purpose of the Delayed Redemption Provision, insofar as Mr. Davis was concerned, was to discourage him from conducting a proxy contest or a consent solicitation. While these aims might not be unrelated, they can meaningfully be distinguished.

In addition to the factual claim that the existence [*16] of the Delayed Redemption Provision presents the threat of affecting the vote, plaintiffs assert the claim of legal injury: that violation of a statutory right justifies the issuance of an injunction in all events. The statutes said to be violated by the Delayed Redemption Provision are Sections 141(a) and 228. The legal proposition that violation of a statute may be enjoined without more has force. *See, e.g., Prime Computer, Inc. v. Allen,* Del. Ch., C.A. No. 9557, Allen, C. (January 22, 1988), *aff'd,* 540 A.2d 417, 421 (1988). This principle has its clearest application when legal rights have been finally determined after trial. I note, however, that *Prime Computer* was a preliminary injunction case. In that case, however, I note that the Supreme Court made special mention of the fact that a strong case on the merits (as there) may compensate for a weak showing of irreparable harm. 540 A.2d at 421. I do not mention this as an implied comparison with the strength of plaintiffs' claims here, but rather to demonstrate that, where the matter is before the court at a preliminary stage, no violation of legal rights is established and all of the [*17] factors -- including the likelihood and the type of injury that may result from an improvident issuance of the injunction, as well as the prospect for ultimate success by plaintiffs -- should be considered in determining the motion.

How compelling this source of legal injury (the claimed violation of a statute) will be perceived at the preliminary injunction phase, however, is likely to be a function of a number of factors relating to the court's evaluation of the merits of the claim, all of which reduce to how confident the court feels that its preliminary judgment is sound. In this instance, all I wish to say on this topic is that I have considered in reaching this decision the extent to which the Delayed Redemption Provision would limit the statutory right of future directors to exercise power under Section 141(a).

As indicated above, I am mindful of claims of injury that may result from issuance of an improvident injunction. They are deserving of weight. Indeed, even were I to assume that plaintiffs have advanced strong claims, this factor, together with alternative steps that can be taken to eliminate or minimize the threat to the voting process, would persuade me, on condition, [*18] to decline to issue the remedy now sought.

* * * *

A result here may be shaped that accommodates the contending claims but recognizes that there has been no procedure contemplating nor any time for an authoritative determination of the claims of right asserted. Plaintiffs claim a necessity to have a decision today -- the record date for the distribution of rights.

The essential claim of injury is that NWA shareholders may be disinclined to vote for the Davis slate because -- while it could be in a position in fact within one month or two to conclude its promised review and sale -- it may not be able to sell to one known prospect (Davis Acquisition Inc.) for a period of six months.

This threat can be eliminated by an undertaking by this court, upon timely application, to hear and finally determine the validity of the Delayed Redemption Provision promptly -- within 45 days -- of the closing of the polls at the annual meeting and by appropriate notice of that fact to the shareholders. Such notice will, in effect, inform shareholders that *if* this provision is invalid, it will not substantially delay effectuation of a sale transaction by the Davis slate. Shareholders receiving such [*19] notice will, of course, still have to contend with their own evaluation of whether the provision will ultimately be found to be invalid or not. But that circumstance is a function of the fact that that question has not been (and could not on this motion have been) determined authoritatively. While the court does -- as part of its analysis in deciding to enter a preliminary injunction or not -- oftentimes express tentative or preliminary views on the merits of a case, where, as here, that is not required in order to resolve the motion, plaintiffs have no right to a preliminary declaratory statement evaluating the strengths and weaknesses of contending positions. Thus, a judicial commitment to finally resolve this matter promptly, if necessary, will minimize or eliminate the risk that shareholders will fail to understand that if the Delayed Redemption Provision is invalid it will not interfere with a relatively prompt sale of NWA to Davis Acquisition. Such a judicial commitment, however, will not eliminate the risk that shareholders may, correctly or incorrectly, evaluate the Delayed Redemption Provision as valid and be affected in their voting by such view. But prior to final judgment, [*20] that uncertainty cannot appropriately be reduced by this court.

Plaintiffs' application will be denied on condition that defendants undertake, in connection with the distribution of any certificates representing the stock rights, (1) to give notice to the persons to whom they are distributed and to note on the face of such certificates, in effect, that the validity of the provision that places special restrictions upon the power of certain future boards to redeem the rights has been challenged in this litigation and the scope of the rights and the holders of such rights may be affected by any final judgment entered in such action; and (2) that defendants cause any Summary of Rights to Purchase Preferred Shares distributed pursuant to Section 3(c) of the Rights Agreement, as amended, to contain a similar notice together with notice of this court's intention to finally determine the validity of Section 24(c) of the Rights Agreement within 45 days of the Company's annual meeting, upon timely application by any party to this litigation. *See* Newell Co. v. Wm. E. Wright Co., 500 A.2d 974 (1985).

Exhibit

G

WILLIAM B. CHANDLER III
CHANCELLOR

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

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: July 5, 2007
Decided: July 10, 2007

Andre G. Bouchard
David J. Margules
Joel Friedlander
Sean M. Brennecke
Bouchard Margules & Friedlander, P.A.
222 Delaware Avenue, Suite 1400
Wilmington, DE 19801

Kevin G. Abrams
Abrams & Laster LLP
Brandywine Plaza West
1521 Concord Pike, Suite 303
222 Delaware Avenue, Suite 1400
Wilmington, DE 19803

David C. McBride
Rolin P. Bissell
Christen Douglas Wright
Danielle Gibbs
Michael W. McDermott
Tammy L. Mercer
Young Conaway Stargatt & Taylor, LLP
P.O. Box 391
Wilmington, DE 19899

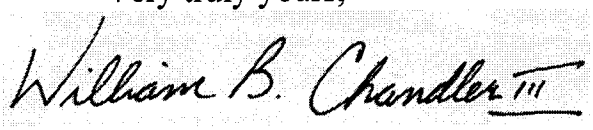
Re: *Minneapolis Firefighters Relief Ass'n v. Ceridian Corp.*
Civil Action Nos. 2996-CC & 3012-CC

Dear Counsel:

The above referenced matters are scheduled for a two-day trial August 1-2, 2007. Per plaintiffs' request, the Court will hear oral arguments on plaintiffs' amended preliminary injunction motion concurrent with the already scheduled trial. Thus, the trial and oral arguments will occur August 1-3, 2007. As an additional matter, I would prefer traditional briefing, including an opening, answer, and reply rather than the simultaneous schedule currently in place. Accordingly, parties shall confer and submit a new briefing schedule.

IT IS SO ORDERED.

Very truly yours,



William B. Chandler III

WBCIII:trm

IN THE COURT OF THE CHANCERY OF THE STATE OF DELAWARE

In Re Yahoo! Shareholders Litigation	Consolidated C.A. No. 3561-CC

FILED UNDER SEAL

YOU ARE IN POSSESSION OF A DOCUMENT FILED IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE THAT IS CONFIDENTIAL AND FILED UNDER SEAL

If you are not authorized by Court order to view or retrieve this document read no further than this page. You should contact the following persons listed below:

BOUCHARD MARGULES & FRIEDLANDER, P.A.

David J. Margules (#2254)
Joel Friedlander (#3163)
Evan O. Williford (#4162)
222 Delaware Avenue, Suite 1400
Wilmington, DE 19801
(302) 573-3500
Co-Lead Counsel for Plaintiffs

Exhibit

H

THE COURT OF THE CHANCERY OF THE STATE OF DELAWARE

- - - - - - - - - - - - - - - - - -

IN RE:	)	
YAHOO! SHAREHOLDERS LITIGATION	)	CONS. C.A.
	)	No. 3561-cc

- - - - - - - - - - - - - - - - - -

HIGHLY CONFIDENTIAL

30(b)6 DEPOSITION OF COMPENSIA

VIDEOTAPED DEPOSITION OF TIMOTHY SPARKS

WEDNESDAY, MAY 21, 2008

BY: KATHERINE E. LAUSTER, CSR NO. 1894, CRR

Highly confidential 30(b)6 deposition of COMPENSIA, deposition of TIMOTHY SPARKS, taken on behalf of PLAINTIFFS, at 525 University Avenue, Suite 1100, Palo Alto, California, commencing at 9:04, Wednesday, May 21, 2008, before Katherine E. Lauster, Certified Shorthand Reporter No. 1894, pursuant to Notice.

APPEARANCES OF COUNSEL:

FOR PLAINTIFFS:

BOUCHARD, MARGULES & FRIEDLANDER
BY: JOEL FRIEDLANDER, ATTORNEY AT LAW
222 Delaware Avenue, Suite 1400
Wilmington, Delaware 19801
Telephone: (302) 573-3502
E-mail: jfriedlander@bmf-law.com
and
BERNSTEIN, LITOWITZ, BERGER & GROSSMANN, LLP
BY: BRETT M. MIDDLETON, ATTORNEY AT LAW
12481 High Bluff Drive
San Diego, California 92130-3582
Telephone: (858) 720-3189
E-mail: brettm@blbglaw.com

FOR DEFENDANT YAHOO!:

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
BY: GARRETT J. WALTZER, ATTORNEY AT LAW
525 University Avenue, Suite 1100
Palo Alto, California 94301
Telephone: (650) 470-4540
E-mail: garrett.waltzer@skadden.com

APPEARANCES OF COUNSEL (CONTINUED):

FOR DEFENDANT COMPENSIA, MR. SPARKS:

GCA LAW PARTNERS, LLP
BY: JAMES L. JACOBS, ATTORNEY AT LAW
1891 Landings Drive
Mountain View, California 94043
Telephone: (650) 428-3900
E-mail: jjacobs@gcalaw.com

FOR INDIVIDUAL DEFENDANTS:

MUNGER, TOLLES & OLSON, LLP
BY: ROBERT L. DELL ANGELO, ATTORNEY AT LAW
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071-1560
Telephone: (213) 683-9540
E-mail: dellangelorl@mto.com

ALSO PRESENT:

BRIAN MONROE, VIDEOGRAPHER
TATYANA SHMYGOL

INDEX

WEDNESDAY, MAY 21, 2008

-o0o-

QUESTIONS INSTRUCTED NOT TO ANSWER

PAGE	LINE
119	23
120	15
121	2

-o0o-

REQUESTS

PAGE LINE

(NONE)

-o0o-

HIGHLY CONFIDENTIAL - TIMOTHY SPARKS

Q. They asked what your experience was with a change-of-duties-and-responsibilities trigger?

A. I'm sorry.

Q. Did they ask you in particular what your experiences were with a duties-and-responsibilities trigger?

A. I don't recall them asking me. I recall providing that input.

Q. Well, what did you say on the subject, sir?

A. I told them, at the earliest conversation, that, as a purely administrative matter, I was generally opposed to duties and responsibilities provisions.

Q. Did you ever have any follow-up conversation on that subject, sir?

A. I may have. I don't have specific recollection.

Q. Did you tell them what your experience was in that regard, sir?

A. Yes.

Q. What did you say?

A. I said in my experience, those provisions have troubling administrative elements to them.

HIGHLY CONFIDENTIAL - TIMOTHY SPARKS

Q. What is your experience in that regard, sir?

A. I've advised committees that have had to interpret those provisions.

Q. Who?

A. Electronic Arts, for one.

Q. Any others, sir?

A. Not that I can specifically recall.

Q. Well, when did you -- when did you advise Electronic Arts about administration of a duties-and-responsibilities trigger?

A. In the past two years.

Q. Okay. How many employees were covered by that provision?

A. I don't recall.

Q. Approximately?

A. I don't recall. They do many acquisitions, and these issues percolate to the committee.

Q. Oh, I see. So you're -- you're advising them in their role as acquirer; correct?

A. Having to live with these provisions.

Q. Okay. In over the course of numerous acquisitions, or any one acquisition in particular?

HIGHLY CONFIDENTIAL - TIMOTHY SPARKS

A. A combination.

Q. And it posed difficulties for Electronic Arts to deal with those provisions?

A. Not just Electronic Arts, but other companies as well.

Q. Now, how do you know that, sir?

A. I've practiced for over 20 years in this area.

Q. Well, how do -- how do companies tend to deal with those -- these troubling administrative provisions, as you put them?

MR. JACOBS: Objection. Form.

THE WITNESS: Some of them are very aggressive about defending the integrity of the provision. Others take the path of least resistance. It varies.

BY MR. FRIEDLANDER:

Q. What is the "path of least resistance," sir?

A. It is to interpret the trigger broadly.

Q. And therefore do what?

A. Pay the severance.

Q. Okay. Now, you can probably preemptively pay the severance too, correct, so that an employee

HIGHLY CONFIDENTIAL - TIMOTHY SPARKS

is not incentivized to leave; correct?

A. I imagine so.

Q. Like for instance, when an acquirer comes along, they can -- they can -- they can tell employees: You don't have to leave to get these benefits. We'll give these benefits to you, and therefore that -- to keep that employee from walking out the door; right?

A. I imagine that's possible.

Q. You have heard about the conversion -- it's basically converting it from a double trigger to some sort of single trigger; correct? That can be done; correct?

A. I imagine so.

Q. And that's the only way -- if you don't do that, then you're just left with dealing with the claim after the employee has already left the company --

MR. JACOBS: Objection --

BY MR. FRIEDLANDER:

Q. -- right, sir?

MR. JACOBS: Objection to the form of the question.

THE WITNESS: Most of those provisions

HIGHLY CONFIDENTIAL - TIMOTHY SPARKS

require -- include a notice-and-cure provision so they don't have to wait until the employee leaves.

BY MR. FRIEDLANDER:

Q. Who -- to whom did you tell that you were generally opposed to a duties-and-responsibilities trigger? Who did you have that conversation with?

A. It would have been --

MR. DELL ANGELO: Misstates testimony.

THE REPORTER: Was that an objection?

MR. DELL ANGELO: Yes. Misstates the testimony.

THE WITNESS: In my preliminary conversation with Carl and David Yardly.

MR. JACOBS: David Windley?

THE WITNESS: David Windley.

BY MR. FRIEDLANDER:

Q. Was that over the weekend of February 2nd and 3rd, sir?

A. No.

Q. When was it?

A. I believe it was the 4th and/or the 5th.

Q. All right. Monday the 4th or Tuesday the 5th?

A. Correct.

HIGHLY CONFIDENTIAL - TIMOTHY SPARKS

Q. Is that when -- is that when you learned that there was -- that someone else had recommended a good-reason trigger that included duties and responsibilities?

MR. DELL ANGELO: Objection. Asked and answered.

THE WITNESS: Yeah, I don't recall when they first learned of the good-reason?

BY MR. FRIEDLANDER:

Q. Did there come a point when you learned someone else had recommended a good-reason trigger with a duties and responsibilities claim to it?

A. I don't recall when I learned or the basis of the recommendation.

Q. Tell me everything you -- you do recall about the conversation you had with Mr. Statkiewicz and Mr. Windley about the duties and responsibilities trigger.

A. I basically shared with them what I've shared with you, that I am generally opposed to having broad-based duties-and-responsibilities provisions included in a good-reason definition with a double trigger. That's -- that was the input I provided.

HIGHLY CONFIDENTIAL - TIMOTHY SPARKS

Q. And that was just -- that was on one occasion?

A. I can't say if it was only one.

Q. Do you -- do you recall anything they said, sir, either Mr. Windley or Mr. Statkiewicz --

A. No.

Q. -- on that subject?

A. No.

Q. And that was after you'd already given some advice about what -- what kind of trigger should be in place, and for how much, and what they should -- and what -- you know, what kinds of forms of compensation should have those triggers; correct?

MR. DELL ANGELO: Object to the form.

MR. WALTZER: Objection --

THE WITNESS: Yeah, I don't recall the sequencing. I had a conversation with Carl and Mindy on Saturday, the 2nd, that was a very preliminary, high level discussion of various approaches that could be taken.

So if that -- by that you -- by different vehicles and whatnot, you mean that conversation, then yes it did fall after that conversation.

BY MR. FRIEDLANDER:

HIGHLY CONFIDENTIAL - TIMOTHY SPARKS

Q. Were you ever -- now, are you aware that various individuals at Compensia were sort of scurrying around to try to -- to get data to support -- to support the company for -- for purposes of getting some sense of what other companies do about different elements of change-of-control and severance provisions?

MR. DELL ANGELO: Object to the form.

MR. WALTZER: Scur- -- scurrying?

THE WITNESS: I wasn't aware that they were developing data to support what the company was doing. I was aware that they were developing market data.

BY MR. FRIEDLANDER:

Q. Okay. And did you -- are you aware of any effort by Compensia to provide market data about giving a duties and responsibilities trigger for every employee of the company?

A. I'm not aware of that.

Q. Did you ever have any conversation with anybody on that subject?

A. I may have.

Q. But you don't recall?

A. Not specifically.

size of the deal?

A. I don't recall that he asked.

Q. Do you recall that somebody asked?

A. I do recall that somebody asked.

Q. And that's -- and that's what Compensia was going to work on with Mr. Statkiewicz?

A. That's what we were working on with Mr. Statkiewicz.

Q. Does that -- does that refer to -- what does that refer to?

A. Multiple -- were there multiple models being run?

MR. DELL ANGELO: Object to the form.

THE WITNESS: What does what refer to?

BY MR. FRIEDLANDER:

Q. That you were running models as to the estimated cost?

A. Yes, I believe so.

Q. Okay. And what -- what were these models -- the only -- the only difference in the models that were incorporated into the books, isn't it true, is full acceleration at different turnover assumptions?

MR. JACOBS: Objection. Foundation.

THE WITNESS: I believe that's true, that there were differences on the retention grants, for example. I don't know how those factored in.

BY MR. FRIEDLANDER:

Q. All right. So other than the amount of RSUs, the only other factor that's -- that have different costs attached to it, different models, would be the -- the turnover assumptions?

A. I believe dollars --

MR. DELL ANGELO: Same objection.

THE WITNESS: Price of the stock in which the termination occurs, that was a variable.

Q. Oh, okay. And the numbers were -- there's 31, 35 and 40.

A. Maybe even 45. I don't -- we had multiple price points.

Q. Okay. And did Compensia ever render an opinion, formally or informally, as what the -- the best estimate of turnover assumption was, if there was any one number, did they, based on the terms were layed out having a good reason trigger with the duties -- duties and responsibilities prone to it?

MR. DELL ANGELO: Objection to form.

BY MR. FRIEDLANDER:

Q. Is that fair to say, sir?

A. We did not render an opinion.

Q. You said basically that you provided data at three levels, 15 percent, 30 percent, and 100 percent; correct?

A. Yes.

Q. And didn't provide advice about which -- which number or anything in between was the right number or best estimate; correct?

A. That's correct.

Q. And when you ran 15 percent, 30 percent, and 100 percent, that was from the bottom of the pay scale all the way to the top, without any variance in between; correct?

A. That's correct.

MR. WALTZER: Belated objection to form.

BY MR. FRIEDLANDER:

Q. I'll ask a follow-up question. So for instance, at the 15 -- when you ran 15 percent, it's 15 percent of people at this IC or manager level, as well as 15 percent of the EVP and SVP level; correct?

A. That's correct.

Q. And when you ran 30 percent, it's

30 percent of the IC and manager levels and other levels, all the way up to VP -- executive vice president level?

A. That's correct.

Q. And there was no effort to model and no request to you to model any type of mixed tiering of turnover assumptions?

A. That's correct.

MR. FRIEDLANDER: Is this a good time to break, or no?

MR. WALTZER: Fine.

MR. FRIEDLANDER: All right.

THE WITNESS: Keep going.

MR. FRIEDLANDER: Keep going?

THE WITNESS: Yeah.

BY MR. FRIEDLANDER:

Q. All right. I'll come up with some more questions. Just bear with me for a minute.

Did you participate in any calls on the 6th?

A. With anyone?

MR. JACOBS: I wasn't going to do it. I was going to be nice.

BY MR. FRIEDLANDER:

IN THE COURT OF THE CHANCERY OF THE STATE OF DELAWARE

In Re Yahoo! Shareholders Litigation	Consolidated C.A. No. 3561-CC

FILED UNDER SEAL

YOU ARE IN POSSESSION OF A DOCUMENT FILED IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE THAT IS CONFIDENTIAL AND FILED UNDER SEAL

If you are not authorized by Court order to view or retrieve this document read no further than this page. You should contact the following persons listed below:

BOUCHARD MARGULES & FRIEDLANDER, P.A.

David J. Margules (#2254)
Joel Friedlander (#3163)
Evan O. Williford (#4162)
222 Delaware Avenue, Suite 1400
Wilmington, DE 19801
(302) 573-3500
Co-Lead Counsel for Plaintiffs

Exhibit

I

Broad Based Benefits Comparison to Other Recent Transactions

	Payout			
	Proposed Yahoo US Severance (base salary only)	BEA Plan (base & target bonus or commissions)	PeopleSoft Plan (base salary only)	Seibel Plan (base & target bonus or commissions)
IC	4 months	3 Months	Paid based on length of service (8-18 weeks)	3 Months
Sr IC/Mgr/Sr Mgr	6 months	3 Months		3 Months
Dir/Sr Dir	12 months	6 Months		6 Months
VP	12 months	12 Months	12 Months	12 Months
SVP	18 months	12 Months	12 Months plus	18 Months
EVP	24 months	n/a	n/a	n/a
Additional Benefits	Full vesting acceleration of stock awards Continuation of health benefits equal to severance period Outplacement services with amount varying by level	50% vesting acceleration of stock awards Continuation of health benefits equal to the length of severance	Full vesting acceleration of stock awards Continuation of health benefits based on length of service (2 - 5 months)	Full vesting acceleration of stock awards Continuation of health benefits equal to the length of severance Legal fees to enforce agreement

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2008, I caused a copy of the foregoing **Plaintiffs' Surreply in Support of Unsealing the Proposed Amended Complaint** to be served on the following counsel via LexisNexis File & Serve:

Edward P. Welch, Esquire
Skadden Arps Slate Meagher & Flom
One Rodney Square
Wilmington, DE 19801

David C. McBride, Esquire
Young Conaway Stargatt & Taylor
The Brandywine Building
1000 West Street
Wilmington, DE 19801

/s/ Joel Friedlander
Joel Friedlander (#3163)