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IN THE SUPREME COURT OF THE STATE OF DELAWARE

NCM GROUP HOLDINGS LLC, Defendant/Counter-Plaintiff Below, Appellant, v. LVI GROUP INVESTMENTS, LLC, Plaintiff/Counter-Defendant Below, Appellee, and SCOTT STATE, and NORTHSTAR GROUP HOLDINGS, LLC, Counter-Defendants Below, Appellees	)	No. 506, 2017 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 12067-VCG

OPENING BRIEF OF APPELLANT
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NATURE OF PROCEEDINGS

This case arose out of alleged misrepresentations associated with a merger (the "Merger") between NCM Group Holdings LLC ("NCM") and LVI Group Investments, LLC ("LVI"), which combined to form NorthStar Group Holdings, LLC ("NorthStar"). NCM and LVI each alleged that the other misrepresented its financial condition prior to the Merger. During discovery, both NCM and LVI sought leave to bring claims against additional parties based on their alleged roles in the original alleged misrepresentations. NCM wished to bring its claims against three additional parties in Illinois and two others in New York, where personal jurisdiction and/or statutes of limitation would not be at issue. However, standing in the way of NCM proceeding in these forums was a stipulated protective order (the "Protective Order") which barred the parties from using any "Discovery Material" produced in this case (whether designated "confidential" or not) in any other case.

Accordingly, NCM filed with the Court of Chancery a motion to modify the Protective Order (the "P.O. Motion"). The P.O. Motion noted that if the court denied the relief sought, NCM would effectively be barred from bringing claims against the additional parties. Following the filing of its P.O. Motion, and after a further review of information NCM had acquired outside of discovery, NCM concluded that it was able to file suit in New York (but not in Illinois), relying on

documents not produced pursuant to the Protective Order in this litigation, but that its prosecution thereof would be hindered absent the relief sought in the P.O. Motion. As the result of an unintended oversight by NCM's counsel, the Court of Chancery was not informed before its ruling on the P.O. Motion that NCM had filed suit in New York.

On November 1, 2017, the Court of Chancery denied NCM's P.O. Motion. The transcript of this oral ruling is attached as Exhibit A. The court recognized that NCM may not be able to bring the new claims at all based on the ruling, but nevertheless found that NCM had not demonstrated "good cause" to amend the Protective Order. This interlocutory appeal followed.

SUMMARY OF ARGUMENT

1. NCM's original counterclaim in this case alleges that LVI and two of its former officers defrauded NCM in connection with the Merger. During discovery, NCM learned that five non-parties (the "New Defendants") also participated in and caused LVI's fraud. However, NCM could not add the New Defendants as additional counter-defendants in this case without facing the substantial expense of fighting and the intolerable risk of losing—in the trial court or later on appeal—a challenge by the New Defendants as to personal jurisdiction and/or statute of limitations defenses that would not be raised in two other available jurisdictions.

2. As a result—and as would otherwise be its right—NCM (logically and prudently) wants to pursue its claims against three of the New Defendants in Illinois and two of them in New York. However: (a) the Protective Order in this case prohibits NCM from using Discovery Material in any other case; and (b) NCM believes that without using Discovery Material it cannot sue the three New Defendants in Illinois at all and cannot advance its best case against the other two in New York.

3. The Court of Chancery denied NCM's P.O. Motion, which sought to allow NCM to use the Discovery Material in the other two jurisdictions. The

ultimate issue for this Court is whether the Court of Chancery abused its discretion in doing so.

4. In making that determination, this Court must first decide—*de novo*—the standard the Court of Chancery was to apply in making its decision.

5. The standard for modification should be the good-cause balancing standard, because in the Protective Order itself the parties agreed that it could be modified and chose the good cause standard for doing so.

6. Alternatively, if the Court chooses to set a general standard for Delaware courts to apply in deciding whether to modify protective orders (to date, this Court has not yet set such a standard), it should choose the good-cause balancing test applied by a majority of the U.S. Courts of Appeal (and at least one decision by the Delaware Superior Court) because that test is better reasoned, more appropriate and fairer than the more stringent compelling need test applied by the minority.

7. Generally speaking, the good cause standard balances the movant's need for modification against any prejudice the opposing party would suffer due to its reliance on the order.

8. Under this Court's precedent, a court abuses its discretion by: (a) refusing to consider a relevant factor, (b) giving significant weight to an irrelevant or improper factor, or (c) committing a clear error of judgment, even if the court

weighs all the appropriate factors. As this Court has also explained it, a court abuses its discretion when it exceeds the bounds of reason in view of the circumstances and ignores recognized rules of law or practice so as to produce injustice.

9. Here, the abuse of discretion determination is greatly informed by, among other things, the fact that no issues regarding confidentiality are involved. That is so because: (a) the provision NCM seeks to modify bars the use of *any* Discovery Material—confidential or not; and (b) NCM assured the Court of Chancery that it would seek protective orders in Illinois and New York to protect any confidential information.

10. The Court of Chancery abused its discretion under the good cause standard for either one or both of two reasons: (a) it gave significant weight to an irrelevant factor (its finding that NCM did not show that it could not be made whole without suing the New Defendants), in place of a significant relevant factor (the prejudice to NCM that denying the P.O. Motion would cause); and (b) it ignored a significant relevant factor (*prejudicial* reliance) and gave significant weight to an irrelevant factor (*non-prejudicial* reliance) by not requiring LVI and NorthStar to demonstrate *prejudicial* reliance.

11. The Court of Chancery abused its discretion under the compelling need standard because NCM demonstrated the compelling need for the requested modification of the Protective Order.

12. Finally, the Court of Chancery abused its discretion by exceeding the bounds of reason, producing an injustice and/or otherwise committing a clear error of judgment.

STATEMENT OF FACTS

A. The Parties' Litigation

In April 2014, the respective operating subsidiaries of NCM and LVI merged their demolition and environmental remediation businesses to form NorthStar. (Tab 4, A206 (¶1).)[1] LVI was owned by three private equity funds, one of which was CHS Private Equity V, L.P. ("CHS").[2] (Tab 11, A669 (¶12).) The Merger was consummated through a "Contribution Agreement," in which LVI and NCM each represented to the other that its financial statements for December 31, 2012, December 31, 2013 and February 28, 2014 fairly represented its financial position in conformity with GAAP. (Tab 4, A220 (¶38), A257-58 (¶2).)

In April 2015, pursuant to the Contribution Agreement, NCM served a claim notice on LVI, asserting that LVI's financial statements were materially misstated as a result of improperly accounting for ongoing jobs. (*Id.* at A266 (¶25).) Thereafter, LVI gave notice that it had parallel claims against NCM. Still later, pursuant to the Contribution Agreement, the parties mediated their dispute, but to no avail. (*Id.* at A268 (¶32).) LVI then filed this case against NCM and one of its

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[1] Citations to the record are found in NCM's Appendix, filed with this brief, and are cited using the format "Tab __, A___."

[2] The P.O. Motion referred to CHS's parent, CHS Capital LLC ("LLC"). NCM later learned that it was CHS, not LLC, that was one of LVI's direct owners. (Compare Tab 3, A153-204 and Tab 10, A583-92).

former officers, and NCM asserted counterclaims against LVI, certain legacy-LVI officers who had become officers of NorthStar and NorthStar (as a nominal party). (Tab 11, A596 (¶¶1-2).)

B. The Court Of Chancery Enters The Stipulated Protective Order

In August 2016, the parties stipulated to the entry of—and the Court of Chancery entered—the Protective Order. (Tab 2, A129-52.) It is based largely on a form protective order prepared by the Court of Chancery. (Tab 12, A827 (¶41).) The Protective Order governs the manner in which discovery is produced and how it may be used. (Tab 2, A130.) The Protective Order does not bar claims against additional parties based on Discovery Material as long as the claims are brought in this case. (*Id.* at 137.)

The Protective Order provides that "Discovery Material shall be used solely for purposes of this case and shall not be used for any other purpose, including, without limitation, any business or commercial purpose, or any other litigation or proceeding. . . ." (*Id.*) "Discovery Material" is defined as "documents, deposition testimony, deposition exhibits, deposition transcripts, written discovery requests, interrogatory responses, responses to requests to admit, and responses to requests for documents, and any other information or material produced, given or exchanged, including any information contained therein or derived therefrom . . . by or among any Party or non-Party . . . ." (*Id.* at A130.)

The prohibition on the use of Discovery Material "in other litigation" is not limited to the use of "Confidential" Discovery Material, but applies to all Discovery Material. (*Id.* at A137.) Paragraph 16 of the Protective Order provides that the parties "reserve the right to apply, pursuant to Court of Chancery Rule 5.1 and/or Rule 26(c), upon short notice . . . to modify the terms of this Stipulation." (*Id.* at A140.)

C. NCM Moves To Amend The Protective Order

During discovery, NCM obtained Discovery Material demonstrating that it had claims against the New Defendants, who are: Brian Simmons and Robert Hogan—principals of CHS; CHS; and Greg DiCarlo and John Leonard, who were senior members of LVI's management team. (Tab 3, A159-60.) Those claims were based on the same core allegations in NCM's original counterclaim—*i.e.*, that LVI defrauded NCM in connection with the Merger—adding only allegations that the New Defendants "participated in and directed" LVI to make the misrepresentations that were already at the heart of NCM's case against LVI. (Tab 11, A598.)

NCM wished to sue Simmons and Hogan in Illinois—where they are citizens—to avoid expensive and time consuming motion practice and risks relating to personal jurisdiction and statutes of limitations in Delaware. (Tab 3, A160-61, A164.) For similar reasons, NCM sought to bring claims against

DiCarlo and Leonard in New York, where they work and are subject to personal jurisdiction. (*Id.* at A161.) However, NCM's claims against the New Defendants could not proceed in Illinois and New York unless they could be substantiated with facts outside of the Discovery Material, which, at the time, NCM believed it could not do. (Tab 12, A817-18 (¶¶9-10).)

Accordingly, on May 5, 2017, NCM filed the P.O. Motion to remove the prohibition on using Discovery Material in "other litigation" by revising paragraph 9 to read in relevant part: "Discovery Material shall not be used for any business or commercial purpose." (Tab 3, A163.) Notably, NCM did not seek to alter any party's obligation to preserve the confidentiality of any properly designated Discovery Material, committing instead to seek similar confidentiality protections in any litigation brought in Illinois or New York. (Tab 7, A473-74.)

LVI/NorthStar opposed the P.O. Motion. (*See* Tab 5, A452-62.) In doing so, they never argued NCM was prohibited from using Discovery Material to bring claims against new parties in this case. (*Id*. at A455.) Nor could they; LVI admitted that it had brought claims in this case against NCM's ultimate owners based on Discovery Material. (*Id.* at A454.) Rather, they opposed the amendment

because they claimed they had detrimentally relied on the terms of the Protective Order when producing documents. (*Id.* at A453.)[3]

D. The Court Of Chancery Asks LVI And NorthStar To Identify Documents They Produced In Reliance On The Protective Order

Oral argument was held on the P.O. Motion on June 23, 2017. (*See* Tab 8, A482-524.) At the end of the hearing, the Court of Chancery ordered the parties to file supplemental briefing, including instructing LVI and NorthStar, if they wished, to identify "those categories of documents which [they] are indicating to me [they] would not have produced except in reliance on the order[.]" (*Id.* at A520-21.)

In response, the only categories NorthStar identified were documents concerning: (a) management bonuses; and (b) the departure of two former employees. (Tab 9, A528-29.) Otherwise, NorthStar only generally described the process it used to search for documents. (*Id.* at A526-29.) For its part, LVI did not identify a single document or category of documents it would have withheld from production if not for the Protective Order. (Tab 10, A584-85.)

[3] Scott State and Paul Cutrone also filed a one-page opposition to the P.O. Motion. (*See* Tab 6, A463-65.)

E. NCM Moves To Amend Its Counterclaims In This Case And Sues DiCarlo And Leonard In New York

By October 2017, the Court of Chancery had yet to decide the P.O. Motion, and statutes of limitations were running. (Tab 11, A601 (¶16).) Believing it had no other choice, NCM did two things.

First, on October 13, 2017—as a protective measure to toll the Delaware limitations period—NCM filed a motion for leave to amend its counterclaims to add Hogan, Simmons and CHS as additional counter-defendants. (*See generally* Tab 11, A593-813.) NCM did so knowing that any such claims would be met with personal jurisdiction and/or statute of limitations defenses that would not be raised if these new claims were brought in Illinois, where NCM wanted—and still wants—to bring them. (Tab 3, A160 (¶10); Tab 11, A600 (¶15).) Two weeks later, NCM amended its request for leave to amend by adding LVI Parent, Corp. ("LVI Parent") as another proposed counter-defendant. (Tab 11, A599 (¶9) and A601 (¶17).)

On February 23, 2018, the Court of Chancery granted leave to add LVI Parent. (Tab 13, A990-91 (73:22-74:12).) While this might strengthen the argument that Hogan and Simmons are subject to jurisdiction in the Court of Chancery, it does not guarantee the success of that argument or address the statute of limitations risks NCM can avoid by filing in Illinois. The court deferred ruling

as to Hogan, Simmons and CHS until after this Court rules on this appeal. (Tab 13, A924 (7:5-13).)

Second, NCM reassessed: (1) documents it received during the pre-mediation investigation; and (2) sworn testimony of legacy-LVI officers at a hearing NorthStar conducted outside of this case—none of which was subject to the Protective Order. (*Id.* at A1012 (95:4-12), A1007 (90:16-17), A1018 (101:21-102:10).) NCM determined that there were sufficient facts in those documents and testimony to bring its claims against DiCarlo and Leonard in New York, which it filed on October 17, 2017 (the "New York Action"). (*Id.* at A1001 (84:18-21).) This filing did not moot NCM's request to use Discovery Material in New York because: (1) NCM anticipates motions to dismiss in New York, which NCM would be in a stronger position to defend if able to amend its complaint with allegations based upon Discovery Material; and (2) it would need to use Discovery Material to fully prosecute the New York suit without having to redo the discovery already taken in this case. As the result of an unintended oversight by NCM's counsel, the Court of Chancery was not informed before its ruling that NCM had filed suit in New York. (*Id.* at 1010-11 (93:16-94:1), A1013 (96:6-9).)

NCM has not filed any claims in Illinois. (*Id.* at 1014 (97:4-9).) This is because, as of this time, NCM has not identified facts outside of the Discovery Material that would support claims against Simmons, Hogan and CHS. (*Id.*)

Notwithstanding its amendment as to LVI Parent, its request to amend as to Hogan, Simmons and CHS and its New York lawsuit against DiCarlo and Leonard, NCM still seeks and believes it needs the requested modification of the Protective Order as to both Illinois and New York. (*Id.* at A1014 (97:4-9), A1010-11 (93:16-94:1), A1013 (96:6-9).)

F. The Court Of Chancery Denies The P.O. Motion

On November 1, 2017, the Court of Chancery denied the P.O. Motion. (Ex. A, attached hereto.) In that oral ruling, the court acknowledged that, if Hogan, Simmons, DiCarlo and Leonard are not subject to personal jurisdiction in Delaware, then absent modification "they perhaps cannot be sued at all." (*Id.* at 9:24-10:1.) Still, the court gave "relatively little weight to NCM's good cause arguments" because "[NCM] has given me no reason to think that it must sue these four individuals in order to be made whole." (*Id.* at 12:6-13.) The court then denied the P.O. Motion noting that LVI and NorthStar claimed that they would have employed different document production procedures without the "other litigation" language in the Protective Order. (*Id.* at 10:22-11:16.)

This interlocutory appeal followed.

ARGUMENT

I. The Court Of Chancery Abused Its Discretion By Refusing To Modify The Protective Order

A. Question Presented

Did the Court of Chancery abuse its discretion by refusing to modify the Protective Order? (Ex. A, 13:10-11; Tab 3, A164.)

B. Standard And Scope Of Review

This Court has not yet decided the proper standard to apply with respect to modifying a protective order, so the standard itself is subject to *de novo* review. *Doe No. 1 v. Cahill*, 884 A.2d 451, 455 (Del. 2005) (applying *de novo* standard when the Supreme Court is called upon to adopt a standard for trial courts to apply); *Hubbard v. Hibbard Brown & Co.*, 633 A.2d 345, 352 (Del. 1993) (applying *de novo* standard when assessing legal standard to apply).

On the other hand, the Court of Chancery's decision not to modify the Protective Order is reviewed for abuse of discretion. *Homestore, Inc. v. Tafeen*, 886 A.2d 502, 506 (Del. 2005); *see also Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 783 (3rd Cir. 1994) (applying abuse of discretion standard when reviewing decision to modify a confidentiality order).

Generally, a court abuses its discretion by: (1) refusing to consider a relevant factor, (2) giving significant weight to an irrelevant or improper factor, or (3) committing a clear error of judgment, even if the court weighs all the appropriate

factors. *Homestore, Inc.*, 886 A.2d at 506. As later explained by this Court, a court abuses its discretion when it has "exceeded the bounds of reason in view of the circumstances, or so ignored recognized rules of law or practice so as to produce injustice." *Edwards v. State*, 925 A.2d 1281, 1284 (Del. 2007).

C. Merits Of Argument

1. Confidentiality Issues Are Not Implicated In This Appeal

In most cases involving disputes over protective orders or requests to modify them, confidentiality is the focus. Here, however, it is important to note that confidentiality issues were not involved in the P.O. Motion and are not involved in this appeal. That is so for at least two reasons.

First, the specific provision of paragraph 9 of the Protective Order that NCM seeks to modify is the one that bars the use in other cases of *any* Discovery Material—whether designated as "confidential" or not.

Second, with respect to Discovery Material designated as "confidential," NCM will seek to either: (1) de-designate in the Court of Chancery the confidentiality designations as to certain documents; or (2) obtain similar confidentiality protections in the Illinois and New York courts with respect thereto.

Thus, any confidential documents or information will retain their confidentiality protections. The only difference will be that the protections will be administered by other courts, each of which is capable of maintaining

confidentiality. As a result, confidentiality is a false issue, and any suggestion that permitting NCM's requested modification would destroy confidentiality or defeat the parties' expectations relating thereto should be ignored. It is in that context that this Court should decide whether the Court of Chancery abused its discretion in not allowing the requested modification.

2. Applicable Trial Court Standards For Modification Of Stipulated Protective Orders

NCM did not find any opinion of this Court setting forth the standards Delaware courts should use in deciding whether to modify protective orders. In deciding issues of first impression as to Delaware rules that "closely track[] the language of [a federal rule of civil procedure]," this Court finds "persuasive guidance" from federal cases interpreting the federal rule. *Crumplar v. Superior Court ex rel. New Castle Cty.*, 56 A.3d 1000, 1007 (Del. 2012). As will be explained below, the standard under Court of Chancery Rule 26(c)—which closely tracks the language of Federal Rule of Civil Procedure 26(c)(1)—is implicated in this case. Therefore, NCM cites to federal cases.

Generally speaking, there are two schools of thought among the U.S. Courts of Appeal as to the standard for modifying a protective order. A majority applies a balancing test to determine whether "good cause" exists to modify a protective order, while a minority view applies a more stringent standard allowing modification only in extraordinary circumstances or when a compelling need can

be shown (the "compelling need" standard). *See Wolhar v. General Motors Corp.*, 712 A.2d 464, 469 (Del. Super. Ct. 1997) (explaining this breakdown and adopting the Third Circuit's application of the majority rule in *Pansy*, 23 F.3d at 789). Here, for two reasons, the Court should apply the "good cause" standard (which the Court of Chancery applied, albeit incorrectly).

First, the Court can apply that standard without stating a general rule, because the parties chose that standard in the Protective Order. The Order states that the parties "reserve the right to apply, pursuant to Court of Chancery Rule 5.1 and/or Rule 26(c) … to modify the terms of this Stipulation." (Rule 5.1 is not implicated here.) Although Rule 26(c) does not expressly refer to the *modification* of protective orders, it provides that a court may *enter* a protective order for "good cause." Thus, the parties effectively agreed to use the "good cause" standard for modifying the Protective Order. As a result, this Court should apply a good cause standard based on the parties' selection.

Second, even if the parties' selection is ignored, a good-cause balancing test should still be applied. Again, "good cause" is the majority rule. Federal courts applying this standard reason that because this is the standard set forth in Fed. R. Civ. Pro. 26(c)(1) for the *entry* of protective orders, it should also apply to requests to *modify* such orders. *See, e.g.*, *Pansy*, 23 F.3d at 790. This makes sense, and the same reasoning should apply equally to Court of Chancery Rule 26(c) and Superior

Court Rule 26(c), both of which are modeled after their federal counterpart. *Crumplar*, 56 A.3d at 1007. Indeed, the same reasoning was followed in *Wolhar*, 712 A.2d at 469, where the Delaware Superior Court followed the Third Circuit's analysis in *Pansy*, 23 F.3d at 790, and applied the good-cause balancing standard. In fact, in ruling upon the P.O. Motion here, the Court of Chancery said that it was employing the balancing test set out in *Wolhar* (although it incorrectly did so, as shown below).

Courts that follow the good-cause balancing test reject the minority's more stringent compelling need standard for several reasons. For starters, those courts observe that the more stringent standard had its genesis in Second Circuit decisions in which the government intervened and was potentially overreaching in connection with its investigatory powers. *See, e.g.*, *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990); *Pub. Citizen v. Liggett Corp., Inc.*, 858 F.2d 775, 791 (1st Cir. 1988); *Jochims v. Isuzu Motors, Ltd.*, 148 F.R.D. 624, 630 (S.D. Iowa 1993), *modified*, 151 F.R.D. 338 (S.D. Iowa 1993). Indeed, the Second Circuit has acknowledged that this was the basis for its application of the stringent standard. *Palmieri v. New York*, 779 F.2d 861, 866 (2d Cir. 1985). Here, there is no government intervention and this rationale does not apply.

Moreover, courts applying the majority standard reject the more stringent test for the additional reasons that it: (a) is "too stringent," *Pansy*, 23 F.3d at 790; (b) could lead to duplicative discovery in other cases, *Beckman Indus. Inc. v. International Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992); and (c) is not in keeping with the purpose of the liberal discovery rules to "secure the just, speedy and inexpensive determination of every action." *Jochims*, 148 F.R.D. at 630 n.9.

NCM submits that the good-cause balancing test is better reasoned, more appropriate and fairer than the more stringent test. It should be the Delaware standard.

It is true that one Court of Chancery decision appears to have criticized *Wolhar*. *See Cantor Fitzgerald Corp. v. Cantor*, 1999 WL 413394, at *11 n.35 (Del. Ch. June 15, 1999). However, that decision should not change the analysis. This is so for several reasons.

First, *Cantor* held—just like NCM urges here—that where parties to a protective order had agreed therein to a "good cause" standard for any modification thereof, that is the standard that should apply. *Id*.

Second, Cantor's criticism of *Wolhar* is based in part on the view that *Wolhar* did not apply a "good cause" standard. *Id.* Yet, as shown throughout this brief, it surely did.

Third, NCM respectfully submits that *Cantor's* distinction of *Wolhar* based on the fact that the party seeking modification in *Wolhar* was a third party is not well grounded. Presumably, *Cantor's* theory is that courts should be less lenient to parties who seek modification than they would be to third parties. But, given the rationale for the "good-cause" balancing test described above, no such distinction is warranted. This is particularly true where, as here, the Protective Order was stipulated and the parties expressly included a provision allowing modification for good cause. *See Pansy*, 23 F.3d at 790; *Oracle USA, Inc. v. Rimini Street, Inc.*, 2012 WL 6100306 at *13 (D. Nev. Dec. 7, 2012); *In re EPDM Antitrust Litigation*, 255 F.R.D. 308, 320-21 (D. Conn. 2009).

Finally, although *Cantor* denied the modification sought in that case, it did so by applying, under the circumstances of that case, a discovery standard for determining whether good cause existed. 1999 WL 413394, at *11. As such, *Cantor* found that the documents sought to be reviewed would not lead to the discovery of admissible evidence and that the request was well after the discovery cutoff date and, thus, not timely. *Id.* at *12. Neither of those factors was present in *Wolhar* or the instant case. For any or all of these reasons, *Cantor* does not change the analysis.

Thus, the Court of Chancery was right to hold that a good-cause balancing test was the standard to apply, and that should be the standard regardless of

whether the Court follows the parties' selection or establishes a general rule. The particular formulation of this standard should be as set forth in the Third Circuit's *Pansy* case and adopted by *Wolhar* (the "*Pansy*/*Wolhar* Test"). Those cases say that the factors to be balanced are those that went into the good cause analysis by the court in entering the protective order in the first place, with the additional (but not outcome-determinative) factor of reliance on the order. *Pansy*, 23 F.3d at 790; *Wolhar*, 712 A.2d at 469.

Because the Protective Order here was stipulated, the Court of Chancery did not make any good cause finding or discuss any such factors in entering it. Moreover, NCM has been unable to find any reported Delaware authority identifying a set of factors that should go into the good cause analysis in entering or modifying a protective order. Indeed, in *Pansy*, the Third Circuit said that the factors "are unavoidably vague and are of course not exhaustive." 23 F.3d at 789. In using the good-cause balancing test, *Wolhar*, *Pansy* and other courts applied factors relevant to the situation at hand, factors that varied from case to case and primarily dealt with confidentiality (again, irrelevant here). *Pansy*, 23 F.3d at 789-90; *In re Enron Corp. Securities, Derivatives & ERISA Litigation*, 2009 WL 3247432 (S.D. Tex. Sept. 29, 2009); *Oracle*, 2012 WL 6100306, at *13; *Kamakana v. City and County of Honolulu*, 2002 WL 32255355, at *2 (D. Hawaii

Nov. 25, 2002); *Boca Raton Cmty, Hosp., Inc. v. Tenet Healthcare Corp.*, 271 F.R.D. 530, 537 (S.D. Fla. 2010).

Thus, relevant here, the *Pansy/Wolhar* Test reduces to balancing NCM's need for modification against any prejudicial reliance, if any, by NorthStar and LVI. *Pansy*, 23 F.3d at 790; *Wolhar*, 712 A.2d at 469. NCM submits that this is the standard to be applied here.

* * *

But, in the end, it should not matter whether this Court applies: (a) the *Pansy/Wolhar* Test; or (b) the compelling need test. As will now be shown, the Court of Chancery abused its discretion under both.

3. Abuse Of Discretion Under The *Pansy*/*Wolhar* Test

The Court of Chancery abused its discretion under the *Pansy*/*Wolhar* Test in two ways. The first abuse of discretion tainted the court's analysis of one side of the balancing test (NCM's substantial need for modification) while the second tainted its analysis of the other side (LVI/NorthStar's lack of prejudicial reliance). Each one is sufficient for reversal.

a. The Court Of Chancery Abused Its Discretion By Giving Significant Weight To An Irrelevant Factor In Place Of NCM's Substantial Need For Modification

NCM demonstrated a substantial, immediate and compelling need to modify the Protective Order. Nevertheless, the Court of Chancery gave that need little, if

any, weight. Instead, it gave significant weight to an irrelevant factor—its finding that NCM was required to show that it "must sue" the New Defendants in order to be made whole. As will now be shown, that was an abuse of discretion.

(1) NCM's Substantial Need For The Requested Modification

In the Court of Chancery, NCM demonstrated a substantial, immediate and compelling need to modify the Protective Order. It showed that it could not sue the New Defendants in this case without incurring substantial costs and intolerable risks that would *not* be incurred in the other jurisdictions. Suing the New Defendants in this case would invariably lead to time-consuming and expensive motion practice in which the New Defendants would raise personal jurisdiction and/or statute of limitations defenses that would not be available (or would be substantially weaker) in the other jurisdictions.

Moreover, those defenses would pose substantial risks for NCM in this case. For example, if NCM were to bring its claims against the New Defendants in this case, the Court of Chancery could possibly grant motions to dismiss on personal jurisdiction and/or statute of limitations grounds. And, worse still, if the Court of Chancery denied those motions, and then NCM won the case after a full trial on the merits, this Court could still possibly reverse on appeal on jurisdiction and/or limitations grounds.

Because all of these substantial costs and intolerable risks could be avoided by NCM suing the New Defendants in Illinois and New York, NCM strongly (and logically and prudently) prefers to bring these claims in those other jurisdictions. Yet, without the requested modification: (a) NCM has concluded that it cannot bring suit in Illinois against Hogan, Simmons and CHS (because it needs Discovery Material to do so); and (b) without amending its complaint in New York with Discovery Material, NCM cannot advance its best case against a motion to dismiss and, if it survives such a motion, would not be able to prosecute its case without redoing the discovery conducted in this case.

In fact, NCM's need for modification is further demonstrated by the motion for rule to show cause filed by NorthStar, LVI and State, which is pending in the Court of Chancery. (Tab 1, A24.) The movants assert that NCM's New York Complaint is a violation of the Protective Order and request that the Court of Chancery, among other things, enjoin NCM from prosecuting that case. (*Id.*) The bases for the motion include arguments that the facts outside of Discovery Material, on which NCM based its New York complaint, do not support NCM's claims and that NCM cannot prosecute the claims in New York, even if it did not base those claims on Discovery Material, because it cannot unlearn what it learned in discovery in this case. Movants' arguments—while wrong—illustrate the

difficulties the Protective Order will cause NCM in prosecuting the New York Action even though they filed it without using Discovery Material.

As a result, NCM has a substantial, immediate and compelling need to modify the Protective Order. Nevertheless, as the next section will show, the Court of Chancery abused its discretion by ignoring that need and considering an irrelevant factor in its place.

(2) The Abuse Of Discretion

The Court of Chancery gave little, if any, weight to NCM's legitimate and substantial need to modify the Protective Order. In doing so, it abused its discretion by giving significant weight to an irrelevant and improper factor. *See Homestore, Inc.*, 886 A.2d at 506. In particular, it based its analysis in large part on its—*sua sponte*—finding that NCM failed to show the Court that it "must sue" the New Defendants to make NCM "whole." The court's oral ruling said:

> Moreover, while NCM may be correct about the protective order's effect on its ability to sue these four individuals, it has given me no reason to think that it must sue these four individuals in order to be made whole for any damages it has suffered in connection with the merger, which is the subject of this litigation. Thus, I give relatively little weight to NCM's good cause arguments.

(Ex. A, 12:6-13.) In coming to this conclusion, the court abused its discretion in several ways.

For starters, whether there are other parties from whom NCM could collect is not relevant to the good cause balancing analysis. In deciding to sue a wrongdoer who has caused it damage, a claimant is not required to show that it "must" sue the wrongdoer or that it cannot be made whole from another wrongdoer. Nor is there (or should there be) any such requirement in seeking to modify a protective order in order to sue a wrongdoer.

To the contrary, a claimant is entitled to sue a wrongdoer even if others have participated in the wrong and are solvent. Under our system of justice, a plaintiff can choose which wrongdoer to sue and which to collect from. If not, the whole concept of joint and several liability would be irrelevant. *See In re Rural/Metro Corp. Stockholders Litigation*, 102 A.3d 205, 221 & n.2 (Del. Ch. 2014) (when "some persons are jointly and severally liable to an injured person, the injured person may sue for and recover the full amount of recoverable damages from any jointly and severally liable person.") (citations omitted). Thus, the Court of Chancery's conclusion that NCM was required to show a need to sue the New Defendants was an abuse of discretion.

Indeed, in requiring NCM to show it could not be made whole without suing the New Defendants, the Court of Chancery conflated the *relevant* "need" under the *Pansy*/*Wolhar* Test—*i.e.*, the *need to modify* the Protective Order so that NCM *could* sue parties it had the legal right to sue (*see* Section I.C.2, *supra*)—with the

need to sue such parties, a factor *irrelevant* to the *Pansy*/*Wolhar* analysis. The *Wolhar* case shows why.

Wolhar involved a product liability claim brought against General Motors ("GM"). 712 A.2d at 466. Plaintiffs from other cases with similar claims against GM sought to modify the protective order at issue so they could use—in the other cases—a significant confidential document produced in *Wolhar*. *Id.* at 466. Although they could have obtained that document in discovery in their new cases, the other plaintiffs wanted to avoid duplicating discovery taken in *Wolhar*. *Id.* at 467. Thus, although it was *preferable* to avoid duplicate discovery of the key GM document (just like here NCM *prefers* to sue the New Defendants in Illinois and New York), it was *not necessary* that such duplication be avoided. What was necessary (just like here) was modifying the protective order so that the duplicative discovery *could* be avoided. And, after balancing the modification request "against any prejudice that a party may suffer as a result of modifying the protective order, including the original parties' reliance on the order," the court modified the protective order. *Wolhar*, 712 A.2d at 466, 469.

Here, too, what is relevant is NCM's need to modify the Protective Order so that it can prosecute its claims against the New Defendants in Illinois and New York, where it (logically and prudently) wants to sue them, not whether it "must sue" the New Defendants.

Importantly, the Court of Chancery's consideration of its irrelevant "need to sue" factor was not harmless. To the contrary, as the above-quoted language from the court's oral ruling confirms, that factor was outcome determinative, as it caused the court to give "relatively little weight to NCM's good cause arguments." (Ex. A, 12:12-13.) Under this Court's *Homestore, Inc.* decision, giving significant weight to an irrelevant factor, let alone making it outcome determinative, is an abuse of discretion. 886 A.2d at 506.

Furthermore, the "need to sue" requirement was raised for the first time when it was included—*sua sponte*—in the Court of Chancery's final ruling. None of the parties had raised the argument, and it was not an element considered by *Wolhar*, *Pansy* or any Delaware case of which NCM was (or is) aware. Had the court raised the issue and requested supplemental briefing—as it did with other issues on which it had questions—NCM could have asked for discovery on LVI's financial condition or, by the time the supplemental briefs requested by the court on other issues were filed, informed the court that LVI likely had little or no assets by reason of the sale of what NCM believes was LVI's sole asset (its interest in NorthStar) with no equity going to LVI.

Indeed, by requiring NCM to prove that it *needed* to sue the New Defendants to make it whole, the Court of Chancery effectively applied the more stringent compelling need standard, not the *Pansy*/*Wolhar* Test.

Finally, the effect of all this, if allowed to stand, would be to prevent NCM from prosecuting (or fully prosecuting) its claims against the New Defendants in the jurisdictions that it (logically and prudently) wants to do so. Yet, NCM should not be precluded from bringing and proving its claims against the New Defendants by the happenstance that it learned of their involvement in LVI's fraud through discovery in this case. Indeed, if not modified, these prohibitions may shield the alleged wrongdoers from lawsuits in other appropriate forums. Worse still, it could effectively give tortfeasors who are arguably not subject to personal jurisdiction in Delaware a release for their wrongdoing.

Courts that have encountered similar circumstances have modified protective orders to avoid such an outcome. For example, in *Suture Exp. v. Cardinal Health 200, LLC*, 2015 WL 5021959, at *4 (D. Kan. Aug. 24, 2015), the court was confronted with a motion to modify a protective order that prohibited the use of any discovery material obtained in that case in any other outside litigation. The court reasoned that "the protective order's language prohibiting dissemination of information discovered in this litigation from being used for anything but the prosecution or defense of this litigation is not intended to immunize individuals or even parties from subsequent suits, should information justifying such action become known during discovery." *Id.* That same reasoning applies here.

b. The Court Of Chancery Abused Its Discretion By Not Requiring LVI And NorthStar To Demonstrate Prejudicial Reliance And, In The Process, By Ignoring A Relevant Factor And By Giving Significant Weight To An Irrelevant Factor

As already explained, under the *Pansy*/*Wolhar* Test, the substantial need for modification of the Protective Order demonstrated by NCM is balanced against any harm, if any, modification would cause that would be suffered by LVI and NorthStar by reason of their reliance on that Order. Thus, although not outcome determinative, the opponent's reliance is a factor. *Pansy*, 23 F.3d at 790; *Wolhar*, 712 A.2d at 469. As a general principle of law, where reliance is required, it must be prejudicial. *HC Companies, Inc. v. Myers Indust., Inc.*, 2017 WL 6016573, at *7 (Del. Ch. Dec. 5, 2017) (finding promissory and equitable estoppel claims fail absent reasonable, detrimental reliance); *Phelps v. West*, 2017 WL 4676651, at *4 (Del. Super. Ct. Dec. 5, 2017) (speculation of what plaintiff would have done differently based on defendant's conduct is not actionable reliance for fraud); and *Touch of Italy Salumeria & Pasticceria, LLC v. Bascio*, 2014 WL 108895, at *5 (Del. Ch. Jan. 13, 2014) (dismissing fraud claim where plaintiff failed to show meaningful action it took in reliance on misrepresentation). Indeed, if naked reliance were sufficient, the reliance factor would be satisfied in every modification case because to some degree all parties "rely" on protective orders when responding to discovery requests. Thus, a party opposing modification of a

protective order must demonstrate that its reliance on the protective order would result in prejudice if the order were changed.

Yet, here, the Court of Chancery found reliance alone, without attempting to link it—let alone actually linking it—to prejudice. As such, the court abused its discretion in either one or both of two of the recognized ways. It either: (a) refused to consider a relevant factor—*prejudicial* reliance; or (b) gave significant weight to an irrelevant or improper factor—*non-prejudicial* reliance. *See Homestore, Inc.*, 886 A.2d at 506. We now show why.

Although the court said that "LVI and NorthStar have shown substantial reliance on the terms of the protective order" (Ex. A, 12:14-15), it never linked that "reliance" to prejudice. Indeed, in its oral ruling, the Court of Chancery did not use the word "prejudice" or "prejudicial" even once. The court cited the general points NorthStar and LVI made about how they conducted discovery as support for its decision. (*Id.* at 12:16-13:4.) But, the general way in which NorthStar and LVI conducted discovery is of no moment unless the manner in which they produced documents prejudiced them. The relevant question is whether LVI and NorthStar relied on the Protective Order such that they would be prejudiced by its modification. As the court in *Wolhar* put it, the court must balance the proposed modification against the opponent's "reliance upon the order to determine whether such a modification would *prejudice* substantial rights of [the opponent]." *Wolhar*,

712 A.2d at 46 (emphasis added). As shown below, the Court of Chancery gave LVI and NorthStar two tries to show prejudice, but they failed to do so.

NorthStar and LVI argued that in reliance on the Protective Order, they did not manually review the documents they produced for relevance or responsiveness. When hearing this argument, the Court of Chancery appeared to have *correctly* recognized that the only way this could have prejudiced LVI and NorthStar was if they produced documents that were *irrelevant* to this case but would be *relevant* to the claims against the New Defendants. As such, the Court of Chancery *correctly* required LVI and NorthStar to identify in supplemental briefing, by category, any documents they produced that they would not have produced but for the Protective Order.

In response, LVI was silent on this question. It did not identify any documents, by category or otherwise. For its part, NorthStar identified only two such categories: (a) documents relating to officer bonuses; and (b) documents relating to the departure of two employees who are not involved in any of the pending or proposed cases. Those documents have nothing to do with the claims against the New Defendants and would not be used in New York or Illinois. Nor did (or could) NorthStar say how producing those documents possibly prejudiced it. Nevertheless, the Court of Chancery gave NorthStar and LVI a free pass on

prejudice, not mentioning the word "prejudice" or "prejudicial" even once in its ruling.

The reason NorthStar and LVI cannot show prejudice is simple. The fraud alleged against the New Defendants is the same fraud alleged originally in this case. Namely, NCM alleged that LVI made fraudulent misrepresentations in the context of the Merger. (*See supra* at Stmt. of Facts §A.) The basis of the claims against the New Defendants is that they participated in and caused those misrepresentations. Thus, by definition, documents relevant to the New Defendants' alleged fraud are absolutely relevant to this case too. So there cannot be a document that is irrelevant to this case, but relevant in New York and Illinois.

LVI/NorthStar's assertion that they produced documents irrelevant to this case goes nowhere unless they can show that those documents would be used in New York or Illinois. Yet, NCM has no interest in using irrelevant documents against any of the New Defendants. In fact, those documents do not pertain to the New Defendants at all. Again, this is not a situation where NCM's claims against the New Defendants are based on completely different facts than the claims against LVI. For example, if NorthStar or LVI had turned over a document about an agreement that was unrelated to this case, and NCM tried to commence a new lawsuit based on that agreement, then LVI and NorthStar would at least have an

argument that they detrimentally relied on the Protective Order. That is not the case here.

Finally, NCM is not trying to make the documents at issue public. NCM's proposed modification of the Protective Order would not change the confidential nature of the documents. To the extent any confidential documents are implicated, NCM's obligation to keep those documents confidential would remain in place. NCM requests only that it be allowed to use the documents in other courts, with the understanding that confidentiality will be maintained.

In sum, LVI and NorthStar did not show any prejudicial reliance. Thus, there was no such reliance to balance against the substantial need NCM showed it has for modifying the Protective Order, and it was an abuse of discretion to deny the P.O. Motion. Stated another way, the Court of Chancery abused its discretion by ignoring the relevant prejudicial reliance factor and by giving significant weight to an irrelevant factor—non-prejudicial reliance. *See Homestore, Inc.*, 886 A.2d at 506.

* * *

By reason of the foregoing, under the *Pansy*/*Wolhar* Test, the Court of Chancery abused its discretion in denying modification of the Protective Order. As will now be shown, the same is true even if this Court were to adopt the more stringent "compelling need" test.

4. Abuse Of Discretion Under The Compelling Need Test

The compelling need standard provides that "[w]here there has been reasonable reliance by a party or deponent, [the court] should not modify a protective order granted under Rule 26(c) absent a showing of improvidence in the grant of the order or some extraordinary circumstance or compelling need." *S.E.C. v. TheStreet.Com,* 273 F.3d 222, 229 (2nd Cir. 2001). Yet, even if the Court were to adopt that minority standard (it should not), NCM has satisfied it.

As already explained in Argument Section I.C.3.a.1 above, NCM demonstrated and has a substantial, immediate and compelling need for modifying the Protective Order. Among other things, bringing the claims against the New Defendants in this case creates intolerable risks. And, without the ability to use Discovery Material in the other jurisdictions, NCM has concluded that it cannot sue Hogan, Simmons and CHS in Illinois at all and cannot put its best case forward in New York.

As a result, NCM's need is so compelling that it satisfies not only the good cause balancing test, but also satisfies the compelling need test. *See Charter Oak Fire Ins. Co. v. Electrolux Home Prods., Inc.*, 287 F.R.D. 130, 134 (E.D.N.Y. 2012) (finding a compelling and extraordinary need to share discovery materials with counsel for the same plaintiff in other related litigations).

5. In All Events, The Court of Chancery Abused Its Discretion By Committing Clear Error In Not Modifying The Protective Order

Even if the Court finds—under whichever standard it decides to apply to this case—that the Court of Chancery considered all relevant factors and did not consider any irrelevant or improper factors, the Court should still find that it abused its discretion by committing a clear error of judgment, by exceeding the bounds of reason and/or by producing an injustice in deciding not to modify the Protective Order. *See Edwards*, 925 A.2d at 1284; *Homestore, Inc.*, 886 A.2d at 806.

As explained in Argument Section I.C.3.a.1 above, NCM has shown a substantial, immediate and compelling need to modify the Protective Order. Again, to the extent NCM has a good faith jurisdiction basis to sue the New Defendants in this case, it cannot do so without incurring substantial costs and intolerable risks that would not be incurred in the other jurisdictions. Indeed, even if it wins a full trial on the merits in the Court of Chancery, this Court could reverse on appeal on jurisdiction and/or limitations grounds. And if NCM tries to bring claims in this case and fails, it could lose those claims forever. Without the requested modification, however, NCM cannot bring suit in Illinois against Hogan, Simmons and CHS (because it needs Discovery Material to do so). Further, without amending its complaint in New York with Discovery Material, NCM

cannot advance its best case against a motion to dismiss and, if it survives such a motion, would not be able to prosecute its case without redoing the discovery conducted in this case.

And on the other side of the coin, NorthStar and LVI have not been prejudiced by relying on the Protective Order and would not be prejudiced if the Protective Order were modified as requested. As already explained above, there are no confidentiality issues as the parties will be in the same position in the other jurisdictions as they are now in Delaware with respect to confidentiality. Nor has LVI or NorthStar shown any other detriment or prejudice.

Under these circumstances, the denial of the P.O. Motion was a clear error of judgment, exceeded the bounds of reason and produced an injustice. That is an abuse of discretion. *See Edwards*, 925 A.2d at 1284.

CONCLUSION

NCM respectfully requests that the Court: (A) reverse the decision of the Court of Chancery and remand with instructions to modify the Protective Order as NCM sought in its P.O. Motion; and (B) grant NCM such other and further relief as is appropriate.

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