EFiled: Apr 23 2018 07:07PM EDT
Filing ID 61945362
Case Number 506,2017

IN THE

Supreme Court of the State of Delaware

NCM GROUP HOLDINGS LLC,

Defendant/Counter-Plaintiff Below,
Appellants,

v.

LVI GROUP INVESTMENTS, LLC,

Plaintiff/Counter-Defendant Below,
Appellees,

and

SCOTT STATE, and NORTHSTAR GROUP HOLDINGS, LLC,

Counter-Defendants Below,
Appellees.

No. 506, 2017

COURT BELOW:

COURT OF CHANCERY OF THE STATE OF DELAWARE,
C.A. No. 12067-VCG

APPELLEE NORTHSTAR GROUP HOLDINGS, LLC'S ANSWERING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

This is a dueling fraud action between LVI Group Investments, LLC ("LVI") and NCM Group Holdings LLC ("NCM") over the April 23, 2014 merger through which LVI and NCM contributed their operating subsidiaries to form nominal defendant NorthStar Group Holdings, LLC ("NorthStar").

In July 2016, NCM circulated a proposed confidentiality stipulation based on the Court of Chancery's form order. With minor changes not relevant here, the court below entered the agreed upon order on August 29, 2016 (the "Protective Order").

Paragraph 9 of the Protective Order provides that "Discovery Material" "shall be used solely for purposes of this Litigation and shall not be used for any other purpose, including … any other litigation or proceeding." Relying on that provision, NorthStar employed an atypical approach to discovery to accommodate the parties' broad requests. Specifically, NorthStar ran over 250 requested search terms across the files of more than 150 custodians for a four-plus year period. NorthStar then produced more than 7.7 million documents without manual review.

On April 21, 2017, LVI sought leave to file an amended complaint in this action adding NCM principals as defendants. NCM responded in kind one week later, after the three-year anniversary of the Merger, by seeking to modify the Protective Order so it could sue two former LVI directors and one LVI investor in

Illinois and two former officers of LVI subsidiaries in New York (collectively, the "New Defendants"). At the time, NCM represented that it had only learned of its claims against the New Defendants through Discovery Material in this action, and that it needed to modify the Protective Order to use that material to sue in Illinois and New York given personal jurisdiction and statute of limitations arguments NCM might face in Delaware. On May 5, 2017, NCM moved to amend the Protective Order (the "Protective Order Motion").

On November 1, 2017, the Court of Chancery denied the Protective Order Motion. In doing so, the court below adopted the less exacting "good cause" standard advocated by NCM, but nevertheless concluded that NCM had not demonstrated good cause for amending the Protective Order (the "Ruling"). As explained below, the court credited NorthStar's "substantial reliance" on the Protective Order in how NorthStar conducted discovery, and determined that NCM's purported predicament was "entirely foreseeable" when it agreed to the Order.

Unbeknownst to the Court of Chancery and the other parties at the time of the Ruling, NCM had already sued two of the New Defendants in New York notwithstanding its prior representations that the Protective Order prevented it from doing so. NCM later claimed it had determined it could state a claim against

those individuals based on documents it possessed before this action—a changed position NCM did not relay to the court below prior to the Ruling.

On December 22, 2017, NorthStar and the other non-moving parties filed a motion for an order to show cause why NCM should not be sanctioned for violating the Protective Order in light of its pursuit of the New York action. At argument, the Court of Chancery stated that the motion presented what "seem[ed] to [the court] like clear and convincing evidence that there has been either a representation to this Court that was not true or a violation of the protective order." A1009. The court below has deferred deciding the motion to show cause pending the outcome of this appeal.

On February 6, 2018, this Court accepted NCM's renewed petition for certification of an interlocutory appeal of the Ruling. This appeal followed.

SUMMARY OF ARGUMENT

1. Admitted that the allegations appear in NCM's original April 2016 counterclaim. But NCM not only alleged in that counterclaim that LVI and two of its former officers defrauded NCM in connection with the Merger, it also identified by name the two former LVI directors that NCM now claims it needs to sue in Illinois. B36, B42-43. And while NCM did not identify by name the two individuals that NCM has sued in New York, it alleged "the direct participation of high level [LVI] management." B31. Based in part on these allegations, the Court of Chancery correctly concluded "it was entirely foreseeable" at the time NCM agreed to the Protective Order prohibiting all parties from using Discovery Material in other litigation that NCM might learn of potential claims against the New Defendants.

Denied that NCM faces new or unforeseen challenges to adding the New Defendants as counter-defendants in this action. Any potential personal jurisdiction or statute of limitations defenses are not the result of any changed circumstances. On the contrary, any personal jurisdiction defenses existed before the Protective Order, and any statute of limitations defenses are a problem of NCM's own making because NCM had the information on which its claims are based before the running of any applicable limitations period.

2. Admitted that (i) the Protective Order "prohibits NCM from using Discovery Material in any other case" and (ii) NCM seeks to pursue claims against the New Defendants in Illinois and New York, but otherwise denied. NCM represented below that it only learned of its claims against the New Defendants through Discovery Material it received in this action and that it needed that material to sue the New Defendants in Illinois and New York. NCM changed its story after the other parties learned that NCM had surreptitiously filed suit against two of the New Defendants in New York before the Ruling, and now claims that absent amendment it "cannot advance its best case against" those defendants in the New York action. Without knowing about NCM's New York filing, the Court of Chancery credited NCM's representations, but concluded that "it was entirely foreseeable" that NCM might learn of potential claims against the New Defendants when NCM agreed to the Protective Order prohibiting all parties from using Discovery Material in other litigation.

3. Admitted. As described below, the Court of Chancery correctly concluded that NCM had not demonstrated good cause for amending the Protective Order. The Ruling is subject to an abuse of discretion standard of review.

4. Admitted.

5. Admitted that the "good cause" standard applied by the Court of Chancery below should be the standard applied by trial courts for determining whether to amend a protective order, but otherwise denied.

6. Admitted that (i) this Court has not directly addressed the standard for determining whether to amend a protective order and (ii) this Court should adopt the "good cause" standard applied by the Court of Chancery below. But the "good cause" standard is a contextualized one that affords trial courts with flexibility to balance the particular considerations of a given case. In that regard, the federal cases cited by NCM almost exclusively involve collateral efforts by non-parties to access discovery materials. Here, by contrast, NCM is a party that proposed and agreed to the Protective Order's prohibition on using Discovery Material in other litigation. Cases involving similar circumstances to those presented here confirm that the Court of Chancery did not abuse its discretion in determining that NCM had failed to demonstrate good cause for amending the Protective Order.

7. Denied. NCM oversimplifies the good cause inquiry for amending a protective order. The Court of Chancery correctly balanced the relevant considerations, including the fact that NCM agreed to the Protective Order's prohibition on using Discovery Material in other litigation. Again, NCM attempts to avoid this aspect of the good cause inquiry by relying on cases that apply the

good cause standard in different contexts where this important factor was not relevant.

8. Admitted as to the general standard employed by this Court for assessing whether a trial court has abused its discretion, but denied as to NCM's suggestion that the inquiry is a formulaic one. In reviewing a decision for abuse of discretion, this Court affords trial courts significant flexibility as long as their decisions are based on "conscience and reason." *Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1106 (Del. 2006) (quoting *Chavin v. Cope*, 243 A.2d 694, 695 (Del. 1968)).

9. Admitted that the provision of the Protective Order that NCM seeks to amend, Paragraph 9 thereof, bars the use of any Discovery Material in other litigation, but otherwise denied. The issue of confidentiality raised by NCM is not relevant to the Ruling or this appeal. As recognized by the Court of Chancery, NorthStar and LVI "tailored their approach to discovery in reliance on the protective order's assurance that they would not have to face the burden and expense of litigation outside of Delaware." Op. Br. Ex. A at 12.

10. Denied. The Court of Chancery correctly determined that NCM had not demonstrated good cause for amending the Protective Order. The court below did not "g[i]ve significant weight to an irrelevant factor" or "ignore a significant relevant factor." On the contrary, the court weighed the relevant considerations,

including (i) that "it was entirely foreseeable" that NCM might learn of potential claims against the New Defendants when NCM agreed to the Protective Order and (ii) that NorthStar had "substantially relied" on the Protective Order in crafting its atypical approach to discovery to accommodate the parties' broad discovery requests.

NCM ignores the former altogether. And in arguing with respect to the latter that the Court of Chancery "ignored" the question of prejudicial reliance, NCM omits that the court below rejected the notion that it had failed to consider prejudice. Indeed, in denying NCM's application for certification of interlocutory appeal, the Court of Chancery explained that although it "did not use the word 'prejudice' in [its] bench ruling, [it] gave great weight to LVI and NorthStar's representations that 'they tailored their approach to discovery in reliance on the protective order's assurance that they would not have to face the burden and expense of litigation outside of Delaware.'" B180-81. The court below additionally expressed that "[t]he import of [its original] language is clear: LVI and NorthStar would suffer significant prejudice if [the court] declined to enforce an agreed-upon protective order that ensured neither party would have to bear the cost of litigating related claims outside of Delaware." B181.

11. Denied. In denying the Protective Order Motion, the Court of Chancery applied the "good cause" standard advocated by NCM.

12. Denied. The Court of Chancery employed a logical and well-reasoned process in concluding that NCM had not demonstrated good cause for amending the Protective Order. The court below held NCM to its agreement not to use Discovery Material in other litigation, largely because NorthStar had substantially relied on that agreement. In doing so, the court did not abuse its discretion, exceed the bounds of reason, produce an injustice, or otherwise commit a clear error of judgment.

STATEMENT OF FACTS

A. LVI and NCM combine to create NorthStar in April 2014.

LVI and NCM were two of the largest demolition and environmental remediation companies in the United States. A212. On April 23, 2014, the two entities contributed their operating subsidiaries to form NorthStar pursuant to a Contribution Agreement (the "Merger"). A264. LVI and NCM divided their equity in NorthStar based on the companies' supposed relative financial positions, with LVI owning 62.5% and NCM owning 37.5%. A208.

B. LVI and NCM each assert indemnification claims under the Contribution Agreement in April 2015, and subsequently assert dueling fraud claims in the Court of Chancery in early 2016.

The Contribution Agreement contained typical indemnification provisions. A337-41. In April 2015, as the one-year anniversary of the Merger approached, LVI and NCM asserted indemnification claims against each other, and began investigating their claims. A223, A266.

On March 3, 2016, LVI initiated this litigation against NCM and its former CEO alleging fraud and other claims arising out of the Merger. Specifically, LVI alleged, among other things, that NCM intentionally inflated its pre-Merger EBITDA to induce LVI to agree to the Merger and secure a greater share of NorthStar's equity. A206-07, A213.

On April 4, 2016, NCM responded to LVI's complaint by filing a counterclaim and third-party complaint alleging that LVI, Scott State and Paul Cutrone, as CEO and CFO, misrepresented material facts to persuade NCM to agree to the Merger and secure a greater share of NorthStar's equity. B30-31, B55. NCM also alleged post-merger breach of fiduciary duty claims against Mr. State for alleged fraud as CEO of NorthStar. B31-32, B60-64. NCM later amended its counterclaim to assert breach of fiduciary duty claims against Mr. Cutrone as well. A289-95.[1] NCM named NorthStar as a nominal defendant in connection with the derivative breach of fiduciary duty claims. A292-95; B34.

In its counterclaim, NCM alleged "the direct participation of high level [LVI] management" in the supposed fraud. B31. Even more, NCM alleged that Robert Hogan and Brian Simmons, the two individuals NCM now wants to sue in Illinois, "knew that [certain] Jobs were misstated on the LVI Financial Statements … [and that] there would be millions of dollars in losses on the Jobs and that those losses should have been taken and reflected in the … LVI Financial Statements." B41-43.

[1] Mr. Cutrone moved to dismiss NCM's original and amended counterclaims for lack of personal jurisdiction in May and August 2016. The second motion was filed shortly before NCM submitted the Protective Order for approval, and the Court of Chancery granted that motion on September 7, 2017. *See LVI Grp. Invs., LLC v. NCM Grp. Holdings, LLC*, 2017 WL 3912632 (Del. Ch. Sept. 7, 2017).

C. NCM's fraud allegations prevent NorthStar from obtaining an audit and cause NorthStar to fall out of compliance with its lenders.

In mid-April 2016, Grant Thornton informed NorthStar that it would not issue an audit opinion until NorthStar's audit committee could investigate NCM's fraud allegations against Messrs. State and Cutrone who served as NorthStar's senior officers after the Merger. B86-87; B93. While NorthStar engaged independent professionals to perform that investigation,[2] without audited financials NorthStar fell out of compliance with the covenants in its credit agreements. B68; B87. NorthStar worked with its lenders to avoid default remedies, and agreed to explore a sale of the company. B68; B88. To ameliorate the damage caused by NCM's fraud allegations, NorthStar moved to expedite this litigation in July 2016. B67-102. The Court of Chancery denied the motion in August 2016. B116-19.

NorthStar's exploration of a sale continued in parallel with this litigation. That process culminated in a June 2017 recapitalization involving a partnership between a new private equity sponsor and NorthStar's lenders. B168-69. As a

[2] NorthStar's audit committee and board worked with Grant Thornton to implement a two-part investigation plan. B93-94. First, NorthStar's general counsel hired a former federal judge who retained independent forensic accountants to investigate NCM's allegations. *Id*. Second, NorthStar's new CFO, who joined the company after the alleged fraud, and whose hiring was approved by both LVI and NCM, reviewed the accounting treatment of six legacy LVI contracts identified by NCM. B94.

result of the recapitalization, LVI and NCM no longer own equity in NorthStar or have the right to appoint members to NorthStar's board. *Id*.

D. The parties agree to the Protective Order and other protections before discovery.

1. The Protective Order

In July 2016, NCM's counsel circulated a proposed confidentiality stipulation to the parties. With minor changes not relevant to this appeal, the parties agreed to and submitted the Protective Order, which the Court of Chancery entered on August 29, 2016. A129-52.

The Protective Order closely follows the Court of Chancery's form (B319-36), including Paragraph 9 which tracks the form verbatim: "Discovery Material shall be used solely for purposes of this Litigation and shall not be used for any other purpose, including, without limitation, any business or commercial purpose, or any other litigation or proceeding; provided, however, that the foregoing shall not apply to Discovery Material that is or becomes part of the public record." A137. "Discovery Material," in turn, was 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 … in this Litigation." A130.

2. NorthStar's Unconventional Approach to Discovery and the 510(f) Order

Given its status as nominal defendant and because, at the time, the parties were its owners or members of its board, NorthStar sought to accommodate the parties' broad discovery requests in an atypical manner. As NorthStar received and then evaluated the parties' requested search terms and custodians, it proposed to produce documents in two phases without manual review.

In the first phase, NorthStar proposed producing over 193,000 documents from its computer network for the projects the parties had put at issue. B146. NorthStar proposed producing these documents without manual review so long as the parties agreed to additional protections preventing the inadvertent waiver of privilege under Delaware Rule of Evidence 510(f). *Id*. NorthStar in fact produced these documents to the parties the same day it received their agreement to the proposed 510(f) privilege order, which the Court of Chancery entered on October 6, 2016 (the "510(f) Order"). *Id.*; *see also* B122-31.

The second phase focused on email. The parties proposed having NorthStar run over 250 search terms across the files of more than 150 custodians for a four-plus year period. B147. Because of the protections set forth in the Protective Order and the 510(f) Privilege Order, NorthStar applied the parties' proposed

search terms[3] to the identified custodians even though the proposed terms hit on an extraordinary number of documents. *Id*. NorthStar then produced without manual review the documents that hit on the parties' search terms, absent documents that hit on a "privilege filter" designed to identify potentially privileged documents. B147. Using this process, NorthStar produced more than 7.7 million documents without manual review. B147-48. In total, NorthStar produced more than 19.5 million pages and 227,000 excel spreadsheets. B148. Many of these documents were not relevant to this case. For example, NorthStar ran search terms related to projects that are not at issue here. A527-28. NorthStar also ran broad search terms[4] without requiring project-specific hits. *Id*. In short, NorthStar, as a nominal defendant, acted to facilitate discovery for its equity owners and did not separately undertake to restrict or review discovery for its own benefit.

3. NorthStar's Two-Tier Protective Order

NorthStar also offered to produce privileged documents to the parties. Because the Protective Order was only a "one-tier" stipulation, without a second "highly confidential" or "attorneys eyes only" designation, NorthStar requested

[3] NorthStar notified the parties of minor adjustments to search terms so that, for example, it was not searching for the term "LVI" in the email files of custodians who had LVI in their email extension. B147.

[4] Examples of those terms include "audit", "bank*", "claim*", "contractor*", "customer*", "EBIT", "EBITDA", "estimate*", "GAAP", "lender*", "litigat*", "loan*", "loss*", "margin", "problem*", "revenue", and "vendor". A527.

that the parties agree to a separate order adding that second tier. B145-46, B148-49; B154-62. After NCM refused to engage on the issue (B150), NorthStar moved to enter its order, which the Court of Chancery granted over NCM's objection as part of the Ruling. B145-46, B150-52; Op. Br. Ex. A at 13.[5]

E. LVI moves to amend its complaint to sue NCM principals and NCM responds by seeking to amend the Protective Order.

On April 21, 2017, LVI moved to file an amended complaint seeking to add NCM's owners, their principals and other related parties as defendants. B134; B241. One week later, after the three-year anniversary of the Merger—and therefore presumably after the statute of limitations on NCM's claims ran, NCM requested that the parties agree to modify the Protective Order to allow it to use Discovery Material in other litigation. A163. When the other parties did not agree, NCM filed the Protective Order Motion. A153-65.

NCM argued, among other things, that "[d]uring the course of discovery, NCM obtained Discovery Material demonstrating that" Messrs. Simmons, Hogan, DiCarlo and Leonard had "actively participated in and caused LVI to make fraudulent representations to NCM in connection with the [Merger]." A159-60.

[5] NCM's Opening Brief fails to present any argument with respect to this portion of the Ruling. Any argument relating to NorthStar's privileged documents or that separate order is therefore waived. *See Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004) (holding that "failure of a party appellant to present and argue a legal issue in the text of an opening brief constitutes a waiver of that claim on appeal") (quotation omitted).

NCM additionally stated that it wished to pursue litigation against these parties, as well as CHS Private Equity V, L.P. ("CHS Capital"), a Delaware entity that was an LVI investor, in Illinois and New York as opposed to Delaware. A159-61, A163. At the time, NCM argued that, absent amendment, the Protective Order "would effectively give tortfeasors [i.e., the New Defendants] a release for their wrongdoing." A162; *see also* Op. Br. at 1 ("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.").

On June 23, 2017, after receiving the parties' briefs, the Court of Chancery heard oral argument on the Protective Order Motion. A482-524. The court then requested supplemental submissions from the parties, asking NCM specifically whether it had a good faith basis for arguing for personal jurisdiction over the New Defendants. A519. NCM responded that "it cannot represent that it does not have a good faith basis for bringing claims against the additional defendants in [the Court of Chancery]," but that it still wanted to "avoid th[e] risks by bringing the new claims in the appropriate jurisdictions of its choice." B172. NCM also represented its belief that its "claims would not be time barred or stale even under the shorter three year limitations period in Delaware." B173.

F. NCM sues in New York and Delaware despite the pending Protective Order Motion.

NCM decided to hedge its bets. Unbeknownst to the court or the other parties, at the same time NCM was supplementing the Protective Order Motion in response to the Court of Chancery's questions, NCM tasked an associate with reverse engineering its claims against the New Defendants by reviewing non-Discovery Material NCM received during its pre-lawsuit investigation. B256-57; B286-87.

On October 17, 2017, the Court of Chancery informed the parties that it would rule on the Protective Order Motion on November 1. B246. Later that afternoon, NCM sued Messrs. DiCarlo and Leonard in New York. *Id*. NCM's counsel later claimed its decision to file suit in New York did not violate the Protective Order because it had found sufficient pre-discovery documents. B272-77. Regardless, NCM did not inform the Court of Chancery or the other parties that it had filed the New York action prior to the impending Ruling. B281-82. Nor did NCM serve the as-filed New York complaint prior to the Ruling. B279-80.[6] NCM's failure to advise the court below of what it had done in advance of the Ruling occurred even though that conduct directly contradicted NCM's prior

[6] New York Civil Practice Law & Rule 306-b provides a plaintiff with 120 days to serve defendants after the filing of a summons and complaint. *See* N.Y. C.P.L.R. 306-b.

representations that the New Defendants would be effectively released from claims absent a modification of the Protective Order. B187-88; B281-82.

On October 13 and 27, 2017, NCM filed motions for leave to amend its counterclaim to add Messrs. Hogan, Simmons and CHS Capital (the parties named in NCM's proposed Illinois action) as part of this litigation. A53, A65; A593-605. Thus, by the time of the Ruling on November 1, NCM had either sued (albeit surreptitiously), or requested leave to sue, all of the New Defendants and, according to NCM now, did not require an amendment to the Protective Order to do so.[7]

G. The Court of Chancery denies the Protective Order Motion and the other parties learn of the New York action and move for an order to show cause why NCM should not be sanctioned for violating the Protective Order.

As explained more fully below, the Court of Chancery denied the Protective Order Motion on November 1, 2017. Op. Br. Ex. A. Days later, one of NCM's attorneys inadvertently included one of LVI's attorneys on an email that referenced a "New York complaint." B191. Counsel for Messrs. DiCarlo and Leonard (in their capacity as deponents in this action) then searched for, and discovered, the New York action. *Id*.

[7] The New York action has been stayed, and the Court of Chancery has reserved its ruling on the motion for leave to amend with respect to Messrs. Hogan and Simmons and CHS Capital pending the outcome of this appeal. A924, A986; B311-12.

Thereafter, NorthStar, LVI, and Mr. State filed a Motion for an Order to Show Cause Why NCM Should Not Be Sanctioned for Violating Protective Order (the "Motion to Show Cause") in light of its pursuit of the New York action. B185-225. NCM responded by stating, among other things, that amendment was still needed so that "[it] could amend the NY Complaint to allege the detail it was forced to leave out because of the Protective Order." B235.

The Court of Chancery heard argument on the Motion to Show Cause in February, and stated the motion presented what "seem[ed] to [the court] like clear and convincing evidence that there has been either a representation to this Court that was not true or a violation of the protective order." A1009. The court therefore ordered (1) NCM to submit affidavits to respond to certain questions, and (2) the parties to submit a stipulated timeline. A1028. Subsequent to those submissions, the Court of Chancery held another teleconference in April in which it noted that it was both "concerned and disappointed" and found NCM's conduct "extremely problematic," but stated that it would defer deciding the Motion to Show Cause until after this appeal is resolved. B309-11. At that time, it also ordered NCM to file the stipulated timeline with this Court. *See* Dkt. #22 (included for ease of reference at B240-50, along with the transcript of the Court of Chancery's April teleconference, at B301-18, and certain of the parties' submissions, at B251-300).

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY DENIED THE PROTECTIVE ORDER MOTION.

A. Question Presented

Did the Court of Chancery abuse its discretion in determining that NCM did not show good cause for amending the Protective Order where, as here, NorthStar and other parties substantially relied on the Order in employing an atypical approach to discovery and NCM's purported predicament was entirely foreseeable when it agreed to the Order? A463-65; A482-524; A525-82; A583-92; B132-42; B143-162.

B. Standard of Review

The decision of whether to amend a protective order is left to the sound discretion of trial courts and is therefore reviewed by this Court for abuse of discretion. *See Hallett v. Carnet Holding Corp.*, 809 A.2d 1159, 1162 n.9 (Del. 2002).

C. Merits of the Argument

The Court of Chancery has presided over this protracted action for more than two years. NCM sought to amend the Protective Order well into this litigation, and only after NCM proposed and agreed to the Protective Order, NCM agreed to the additional provisions of the 510(f) Order, NorthStar agreed to apply all of the parties' requested search terms to more than 150 custodians, and

NorthStar produced more than 7.7 million documents without manual review. The court below understood these circumstances in evaluating the Protective Order Motion, balanced the relevant considerations, and determined that NCM had failed to show good cause for amending the Protective Order.

As explained below, NCM mischaracterizes and omits key portions of the Ruling in arguing that the Court of Chancery abused its discretion in denying the Protective Order Motion. And while NCM cites a bevy of decisions in arguing that courts have granted similar motions, nearly all of NCM's cases involve non-parties seeking to amend protective orders and therefore do not involve the important reliance interests at issue here. More broadly, the Ruling is supported by policy considerations as the relief NCM seeks would upend the way parties conduct discovery in the Court of Chancery with the net result being less discovery and more discovery disputes and uncertainty.

In short, the Court of Chancery did not abuse its discretion and the Ruling should be affirmed because it "was based upon conscience and reason," not "capriciousness or arbitrariness." *Coleman*, 902 A.2d at 1106 (quoting *Chavin*, 243 A.2d at 695); *see also Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988) ("Judicial discretion is the exercise of judgment directed by conscience and reason, and when a court has not exceeded the bounds of reason in

view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused.").

1. The Court of Chancery applied the "good cause" standard advocated by NCM below.

At NCM's urging, the Court of Chancery applied the "good cause" standard in evaluating whether to amend the Protective Order. Op. Br. Ex. A at 9. Specifically, the court applied the balancing test adopted by the Superior Court in *Wolhar v. General Motors Corp.*, 712 A.2d 464 (Del. Super. Ct. 1997), for purposes of determining whether good cause exists to amend a confidentiality order. Op. Br. Ex. A at 8-9. NorthStar does not challenge this standard on appeal.

Under the good cause standard, NCM as the moving party bears the burden of justifying amendment of the Protective Order. *See Miles Inc. v. Cookson Am., Inc.*, 1993 WL 547186, at *5 (Del. Ch. Dec. 30, 1993). And because the "parties agreed to [the Protective Order] before presenting it to the Court for approval," NCM bears "a higher burden to justify a modification of the order." *Id.*; *see also Jochims v. Isuzu Motors, Ltd.*, 145 F.R.D. 499, 501 (S.D. Iowa 1992) ("*Jochims I*") ("[T]here is general unanimity among the courts that where a party to [a] stipulated protective order seeks to modify that protective order, that party must demonstrate particular good cause in order to gain relief from the agreed to protective order."); *Romary Assocs., Inc. v. Kibbi, LLC*, 2012 WL 32969, at *3 (N.D. Ind. Jan. 6, 2012) (denying plaintiff's motion to modify protective order where the order had

"already been in place ten months," become "'part of the landscape of th[e] case,'" and defendants had completed their production of "thousands of pages of documents" in reliance thereof) (quotation omitted).[8]

The good cause standard, which *Wolhar* adopted from federal decisions, balances "the interests of promoting a liberal discovery policy against any prejudice that a party may suffer as a result of modifying a protective order." *Wolhar*, 712 A.2d at 466; *see also Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787 (3d Cir. 1994) ("In considering whether good cause exists for a protective order, the federal courts have generally adopted a balancing process.").

The particular factors considered in evaluating whether good cause exists are highly contextualized and fact dependent. Indeed, the factors "are unavoidably vague and are of course not exhaustive" because "a balancing test is necessary to provide [trial] courts the flexibility needed to justly and properly consider the factors of each case." *Pansy*, 23 F.3d at 789; *see also Glenmede Tr. Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995) (noting that the specific factors identified in *Pansy* "are neither mandatory nor exhaustive").

[8] NorthStar agrees with NCM that this Court looks to federal decisions interpreting similar rules. Op. Br. at 17 (citing *Crumplar v. Superior Court ex rel. New Castle Cty.*, 56 A.3d 1000, 1007 (Del. 2012)).

2. Balancing the relevant considerations, the Court of Chancery determined that NCM had failed to show good cause for amending the Protective Order.

The Court of Chancery accepted NCM's framing of "[t]he problem" arising from the Protective Order's prohibition on the use of Discovery Material in other litigation. Op. Br. Ex. A at 7. Because NCM represented that it learned of its claims against the New Defendants "in the course of discovery" in this action, *id.* at 6-7, NCM asserted it could not "file viable complaints against [the New Defendants in Illinois and New York] without using information obtained in discovery." *Id*. at 7. NCM further argued that while it could sue the New Defendants in Delaware, "they may not be subject to personal jurisdiction here, and the claims against them may be time-barred." *Id*. at 7-8. "NCM [thus] argue[d] that the protective order effectively prevents it from suing these persons anywhere," and sought amendment so that it could sue the New Defendants in Illinois and New York. *Id*. at 8.

As noted above, the Court of Chancery "employ[ed] the balancing test set out by our Superior Court in" *Wolhar*. *Id*. at 8-9. "Accordingly, in determining whether good cause exists to modify the protective order," the court "balance[d] the reliance interests of the parties opposing modifications against the need for the party seeking the modification to obtain or use the material in question." *Id*. at 9; *see also id*. (recognizing that the test "requires [the court] to 'balance the interests,

including the reliance by the original parties to the order, to determine whether good cause still exists for the order'") (quoting *Pansy*, 23 F.3d at 790).

NCM claimed it "needed" to amend the Protective Order to sue the New Defendants outside Delaware because "if they cannot be sued outside of Delaware, they perhaps cannot be sued at all." Op. Br. Ex. A at 9-10. While NCM ultimately abandoned that position to pursue claims against all of the New Defendants,[9] the Court of Chancery was nevertheless "mindful of NCM's concern" at the time of the Ruling but explained that "when NCM agreed to th[e] protective order it was entirely foreseeable that [NCM] may uncover information through discovery that would implicate certain individuals in the fraud allegedly perpetrated by LVI." *Id*. at 11. This was particularly so here because "NCM's original counterclaim filed in April 2016 … alleged that two of the [New Defendants] played a role in misrepresenting LVI's financial statements." *Id*. at 12. The court also noted that NCM had "given [it] no reason to think that it must sue [the New Defendants] to be made whole for any damages." *Id*. It accordingly "g[a]ve relatively little weight to NCM's good cause arguments." *Id*.

The Court of Chancery next considered NorthStar and LVI's countervailing reliance interests in opposing amendment and found that both had "shown

[9] As noted above, NCM both sued two of the New Defendants in New York and moved for leave to file an amended counterclaim in this action naming the other New Defendants.

substantial reliance on the terms of the protective order." *Id*. The court recognized each party's "represent[ation] that they tailored their approach to discovery in reliance on the protective order's assurance that they would not have to face the burden and expense of litigation outside of Delaware." *Id*. More specifically, the court credited NorthStar's and LVI's representations that "if they had known they might have to litigate outside of this state, they would have attempted to limit NCM's search terms, reduce the number of custodians, and manually review documents for responsiveness." *Id*. at 12-13. The court found that these were "substantial reliance interests," and concluded that "they outweigh[ed] NCM's argument for substantially modifying the agreement it reached with the other parties." *Id*. at 13.

Balancing NCM's desires against the parties' substantial reliance interests, the Court of Chancery concluded that NCM had "not shown good cause to amend the protective order." *Id*.

3. The Court of Chancery correctly found that NorthStar and LVI had substantially relied on the Protective Order.

NCM acknowledges that "the opponent's reliance is a factor" (Op. Br. at 31), but argues that the Court of Chancery abused its discretion by not requiring NorthStar and LVI to demonstrate "prejudicial reliance" below. NCM is wrong.

As an initial matter, NCM fails to address the fact that when it raised a similar argument for the first time in its application for interlocutory appeal, the

Court of Chancery found that it "lack[ed] merit." B180. Specifically, the court below explained that although it "did not use the word 'prejudice' in [its] bench ruling, [it] gave great weight to LVI and NorthStar's representations that 'they tailored their approach to discovery in reliance of the protective order's assurance that they would not have to face the burden and expense of litigation outside of Delaware.'" B180-81. The court additionally expressed that "[t]he import of [its original] language is clear: LVI and NorthStar would suffer significant prejudice if [the court] declined to enforce an agreed-upon protective order that ensured neither party would have to bear the cost of litigating related claims outside of Delaware." B181.[10]

As explained below, the soundness of the Court of Chancery's substantial reliance findings is plain from both the hostile environment in which NorthStar agreed to the Protective Order and the unconventional nature of NorthStar's production.

[10] The Court of Chancery also noted that "[t]hough NCM [later claimed in its application for interlocutory appeal of the Ruling] that the need to show substantial prejudice is the most important part of the *Wolhar* test, it not did call attention to that aspect of *Wolhar* in its briefing or at oral argument." B181. NCM fails to address this in its Opening Brief as well.

a) NorthStar agreed to the Protective Order fully aware of LVI and NCM's dispute.

By April 2015, LVI and NCM had asserted claims for indemnification under the Contribution Agreement. A contentious investigation followed and culminated in this litigation in early 2016. Again, NCM's counterclaims accused NorthStar's CEO and former CFO of fraud and breaches of fiduciary duty. It was against this backdrop, with the resulting audit and lender problems addressed above, that NorthStar agreed to the Protective Order in late August 2016.

b) NorthStar agreed to produce millions of documents in an atypical manner in reliance on the Protective Order.

As described more fully above, NorthStar accommodated the parties' sweeping document requests in an unconventional manner and the scope of NorthStar's production was enormous. NorthStar produced email from over 150 custodians for a four-plus year period and applied more than 250 requested search terms to those files. B147. The result was the production of more than 7.7 million documents, 19.5 million pages, and 227,000 excel spreadsheets—almost all without manual review. B147-48.

NCM asks this Court to accept that NorthStar would have done all of this from the beginning if NCM had proposed a protective order that deviated from the Court of Chancery form by permitting a party to use NorthStar's documents in other litigation. That suggestion strains credulity for two reasons. First, Paragraph

9 of the Protective Order applies to NCM's productions as well. Given the acrimonious history of NCM's dispute with LVI, it is hard to believe that NCM would have agreed to language permitting LVI to use Discovery Material to sue its owners in other jurisdictions, especially given NCM's position below that the Court of Chancery did not have personal jurisdiction over them.[11] Second, even if NCM had proposed such language, NorthStar would have never agreed to it. The parties' dispute, including NCM's allegations of fraud against NorthStar's executives in particular, was harming NorthStar. No company facing those circumstances would agree to produce documents to its feuding owners knowing either could use the documents to start additional litigation outside of Delaware.

c) Producing documents in reliance on an agreed upon protective order weighs heavily against amendment sought by a party that agreed to the order.

Where, as here, a party agrees to a protective order, receives broader discovery because of another party's reliance on the order, and then seeks to amend the order to eliminate the protections the producing party relied upon, the party bears a higher burden in seeking to modify the order. *Supra* 23-24. This is even more so where the party seeks amendment to use discovery in other litigations.

[11] *LVI Grp. Invs., LLC v. NCM Grp. Holdings, LLC*, 2018 WL 1559936, at *7 (Del. Ch. Mar. 28, 2018).

For example, in *Jochims I*, the plaintiff moved to modify the agreed-upon protective order so that it could share discovery with counsel for other plaintiffs in similar lawsuits against the defendant. *Jochims I*, 145 F.R.D. at 502. But the court denied the motion because permitting the plaintiff "to conduct discovery under one set of rules and then have the court abrogate those rules after [the plaintiff] has achieved his desired result would be to countenance discovery by ambush." *Id.* at 503.

Other courts agree. For example, in February of this year, the United States Court of Appeals for the Seventh Circuit affirmed a district court decision denying a party's motion to modify a protective order so that it could use discovery materials against the same defendant in other related actions, in part because the court correctly "considered the parties' longstanding reliance" on the protective order. *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 881 F.3d 550, 568 (7th Cir. 2018); *see also Lewis v. Texas Instruments Inc. Emp. Health Benefits Plan*, 2014 WL 2815692, at *3 (N.D. Tex. June 23, 2014) (denying plaintiff's motion to modify protective order and noting, among other things, defendant produced document "with the assurance that it would not be used in other proceedings unless they consented or the court ordered disclosure of the [document] in the other proceedings"); *Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393, 404 (W.D. Va. 1987) (denying motion to modify protective order to allow plaintiff

to share documents with litigants in other cases because defendant "relied on [parties'] mutual understanding that the information it was disclosing was to be used solely for preparing this case").

As NCM acknowledges, Paragraph 9 of the Protective Order "bars the use in other cases of *any* Discovery Material—whether designated 'confidential' or not." Op. Br. at 16. The issue is not whether particular documents should be marked confidential, but whether NCM should be able to obtain vast discovery under agreed upon rules, and then change those rules after receiving the discovery. As the federal cases cited above confirm, the Court of Chancery's determination that NCM should not be permitted to do so was correct. The fact that these courts have reached the same result in similar circumstances moreover confirms that the conclusion of the court below was not an abuse of discretion.

4. The Court of Chancery correctly found that NCM's purported needs for amendment did not constitute good cause because they were foreseeable when NCM agreed to the Protective Order.

Good cause for amending an already entered protective order "'implies changed circumstances or new situations.'" *Romary Assocs.*, 2012 WL 32969, at *4 (quotation omitted). "Not surprisingly, a party's oversight in not negotiating a provision in a protective order concerning a matter which should have been reasonably foreseeable at the time of the agreement has been held to not constitute good cause for relief from the protective order." *Jochims I*, 145 F.R.D. at 502.

Thus, where, as here, a party "should have anticipated and accounted for its present problem when it agreed to the Protective Order in the first instance," the equities weigh against amendment. *Viskase Corp. v. W.R. Grace & Co.-Conn.*, 1992 WL 13679, at *4 (N.D. Ill. Jan. 24, 1992).

a) It was foreseeable that NCM might learn of additional defendants it would seek to sue.

As the Court of Chancery recognized below, when NCM agreed to the Protective Order prohibiting all parties from using Discovery Material in other litigation, "it was entirely foreseeable" that NCM might learn that additional individuals were involved in LVI's actions that it alleged were fraudulent. That was particularly so here because NCM identified former LVI directors Messrs. Hogan and Simmons—the two individuals NCM now claims it needs to sue in Illinois—by name in its April 2016 counterclaim. B36, B42-43; Op. Br. Ex. A at 10. And while NCM did not identify the two individuals it has sued in New York by name (Messrs. DiCarlo and Leonard), NCM had already sued LVI's former CEO and CFO and expressly alleged in its original counterclaim "the direct participation of high level [LVI] management." B31. NCM's Opening Brief does not even mention the Court of Chancery's key conclusion that NCM's purported predicament "was entirely foreseeable." NCM tellingly ignores the central holding of the court below because it cannot rebut it.

Instead, NCM argues that the Court of Chancery gave "significant weight to an irrelevant and improper factor." Op. Br. at 26. But that "factor" only related to the court's secondary, and correct, observation that NCM had not argued that suing the New Defendants was necessary to make NCM whole. Indeed, NCM portrays this observation as the sole pillar on which the Ruling rests, going so far as to claim that "that factor was outcome determinative." *Id*. at 29. Even a cursory reading of the Ruling shows that NCM has not accurately described it. Op. Br. Ex. A at 12.

b) Any potential personal jurisdiction or statute of limitations concerns were also foreseeable.

Similarly foreseeable was NCM's claimed need to avoid "the substantial expense of fighting and intolerable risk of losing ... a challenge by the New Defendants as to personal jurisdiction and/or statute of limitations defenses." Op. Br. at 3. Any personal jurisdiction or statute of limitations defenses are not the result of a new development and exist independently of anything having to do with the Protective Order.

With respect to personal jurisdiction, NCM cannot credibly claim surprise in learning that some individuals associated with pre-merger LVI, a national demolition firm with offices throughout the country, may not be subject to personal jurisdiction in Delaware. Again, Mr. Cutrone, one of the two former officers NCM sued initially, moved to dismiss for lack of personal jurisdiction twice before the

parties submitted the Protective Order for approval. *Supra* 11 n.1. Regardless, NCM represented to the Court of Chancery in July 2017 that it had a good faith basis for jurisdiction in Delaware against the New Defendants (B171-72) and has subsequently sought leave to sue three of them in Delaware. A53, A65; A593-605.

Nor is any statute of limitations concern a changed circumstance as Delaware law has not changed. Moreover, any such defenses are the product of NCM's delay in asserting its claims. Again, NCM only moved to amend the Protective Order after the three-year anniversary of the Merger, thereby creating the prejudice it claims establishes good cause for amendment. Permitting NCM to benefit from its delay would encourage future litigants to sit on their claims in order to manufacture "good cause" to amend a protective order by creating statute of limitations concerns.

Separately, NCM contradicts itself in now claiming that it can independently allege claims against Messrs. DiCarlo and Leonard in New York based on documents it possessed before this action. *See* Op. Br. at 13. If NCM had such information all along, any delay and attendant statute of limitations issues would be the result of years of NCM's own delay. Again, NCM slept on its rights (or tactically delayed asserting them) and acted only after LVI amended its complaint. In short, NCM has not identified any new or unforeseen event that might justify amending the Protective Order.

5. NCM's cited authority does not support the result it seeks.

Unlike the cases cited above, which deny motions involving similar facts, NCM's cited authority (Op. Br. at 19-23) primarily addresses motions by non-parties, usually intervenors, to obtain discovery subject to a protective order.[12] Indeed, it bears noting that the Superior Court in *Wolhar* itself confronted an attempt by six non-party intervenors to modify a protective order to create discovery efficiencies in already filed separate actions. *Wolhar* therefore considered whether modification would "substantially prejudice" the defendants' position in the pending Delaware litigation. *Wolhar*, 712 A.2d at 467. The Superior Court was clear that it had weighed the fact that the intervenors were third parties otherwise entitled to the sought information. *Id.* at 469.

These non-party cases are not instructive here because it is NCM who agreed to the Protective Order, benefited from the production of documents pursuant to its terms, and is now seeking to avoid the restrictions it agreed to by commencing new litigation with the Discovery Material. Underscoring the point,

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[12] *See Pansy*, 23 F.3d 772; *Beckman Indus. Inc. v. Int'l Ins. Co.*, 966 F.2d 470 (9th Cir. 1992); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424 (10th Cir. 1990); *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775 (1st Cir. 1988); *In re Enron Corp. Sec., Derivatives & ERISA Litig.*, 2009 WL 3247432 (S.D. Tex. Sept. 29, 2009); *Jochims v. Isuzu Motors, Ltd.*, 148 F.R.D. 624 (S.D. Iowa 1993) ("*Jochims II*"); *In re EPDM Antitrust Litig.*, 255 F.R.D. 308 (D. Conn. 2009); *Kamakana v. City & Cty. of Honolulu*, 2002 WL 32255355 (D. Haw. Nov. 25, 2002); *Boca Raton Cmty. Hosp., Inc. v. Tenet Healthcare Corp.*, 271 F.R.D. 530 (S.D. Fla. 2010).

NCM relies on *Jochims II* (Op. Br. at 19) where the court granted a motion to intervene and allowed a non-party access to certain materials. But NCM tellingly ignores *Jochims I* where the same court denied an amendment motion when it was the *plaintiff* seeking modification. *Jochims II*, 148 F.R.D. at 626 (referencing *Jochims I* and noting that the court had previously denied plaintiff's motion to modify the protective order).

NCM's remaining cases are likewise dissimilar. In fact, in the only Delaware case NCM cites, Op. Br. at 20-21, the court denied the motion to amend a protective order where a party to the order sought modification to use material in another action. *See Cantor Fitzgerald, L.P. v. Cantor*, 1999 WL 413394, at *11 n.35 (Del. Ch. June 15, 1999). And the plaintiff in *Oracle USA, Inc. v. Rimini Street, Inc.*, 2012 WL 6100306 (D. Nev. Dec. 7, 2012) (Op. Br. at 21-22), sought to use discovery it obtained from a non-party. At first, the court denied the motion to amend the protective order because there "was no pending collateral litigation" in which to use the documents. *Id*. at *1. Only after the plaintiff filed a new suit "based entirely on its investigation and discovery of non-confidential and/or publicly available information" did the court modify the protective order to allow the use of discovery in the new litigation. *Id*. at *2. *Oracle* therefore does not support NCM's position that it should be able to use Discovery Material to start a new litigation, including one (the proposed Illinois action) where it concedes it

would have no basis to bring suit absent what it learned from material subject to the Protective Order.

Finally, NCM relies on *Suture Express v. Cardinal Health 200, LLC*, 2015 WL 5021959 (D. Kan. Aug. 24, 2015) (Op. Br. at 30). *Suture* has superficial appeal from NCM's viewpoint because it was the defendants that moved to modify the protective order, and the court granted their motion. But the similarities end there. The defendants in *Suture* sought to use documents that were in the possession of the plaintiff that contained information that had been stolen from the defendants by the defendants' former employees who went to work for the plaintiff. *Suture*, 2015 WL 5021959, at *2. It was only these documents "containing defendants' own protected information" that the court allowed the defendants to use in collateral litigation. *Id*. at *3-5. The court specifically stated, however, that it would not give the defendants "carte blanche to 'mine' through all the information produced in this case." *Id*. at *5. In other words, the court allowed the defendants to use their *own* documents that the plaintiff had stolen, but limited their ability to broadly use other discovery to pursue separate litigation.

6. Policy considerations support affirmance.

The Court of Chancery affirmatively endorses the inclusion of the provisions at issue in its form order. B325. As such, the decision here will affect nearly every case before the Court of Chancery in which the parties exchange discovery.

The court below appreciated this and acknowledged "the precedential value of what [it did] here." A518.

Allowing NCM to use Discovery Material to commence litigation in other jurisdictions when it was "entirely foreseeable" that NCM could learn of new claims will lead to more uncertainty as to whether provisions like Paragraph 9 will be enforced. That will reduce the willingness of litigants to agree to broad disclosure and lead to more discovery disputes. As explained by the court in *Jochims I*, "[t]he obvious effect of such an approach to discovery would be to place a chill upon future stipulated confidentiality agreements. This in turn would likely impede the processing of cases as the courts are called upon to rule upon countless motions under Rule 26." *Jochims I*, 145 F.R.D. at 503. And as similarly recognized by the Southern District of New York in *Bayer AG & Miles, Inc. v. Barr Laboratories, Inc.*, 162 F.R.D. 456 (S.D.N.Y. 1995), if the court "were to allow [the defendant] to modify the Protective Order after [the plaintiff] has produced millions of documents in reliance on that Order, the Court would be sending a negative message to future litigants." *Id.* at 467.

Delaware additionally has a strong policy in favor of enforcing voluntary agreements between sophisticated parties. *See NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 35 (Del. Ch. 2009) ("Delaware upholds the freedom of contract and enforces as a matter of fundamental public policy the voluntary

agreements of sophisticated parties."). NCM, through its counsel, proposed the Court of Chancery's form order, and the parties agreed to it. The language of such orders matter and NCM, like anyone else, should be held to its agreement.

Finally, the fact that NCM's claims are potentially stale under Delaware law cuts against NCM, not in its favor. Delaware adheres to the principle that the "right to be free of stale claims in time comes to prevail over the right to prosecute them." *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 530 (Del. Ch. 2005) (quotation omitted). And Delaware's borrowing statute reflects a policy decision "to prevent shopping for the most favorable forum." *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1, 17 (Del. 2005).

CONCLUSION

For each of the reasons explained above, this Court should affirm the decision of the Court of Chancery.

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Dated: April 23, 2018