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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, and NORTHSTAR GROUP HOLDINGS, LLC and SCOTT STATE, Counter-Defendants Below, Appellees.	)	No. 506, 2017 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 12067-VCG

APPELLEE LVI GROUP INVESTMENTS, LLC'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

LVI Group Investments, LLC adopts and incorporates by reference the Statement of Nature and Stage of Proceedings set forth in Appellee NorthStar Group Holdings, LLC's Answering Brief ("NorthStar's Answering Brief").[1]

[1] LVI incorporates by reference the definitions in NorthStar's Answering Brief.

SUMMARY OF ARGUMENT

1. LVI adopts and incorporates by reference paragraph 1 of the Summary of Argument set forth in NorthStar's Answering Brief.

2. LVI adopts and incorporates by reference paragraph 2 of the Summary of Argument set forth in NorthStar's Answering Brief.

3. LVI adopts and incorporates by reference paragraph 3 of the Summary of Argument set forth in NorthStar's Answering Brief.

4. LVI adopts and incorporates by reference paragraph 4 of the Summary of Argument set forth in NorthStar's Answering Brief.

5. Admitted that the Supreme Court should apply the good-cause balancing standard as applied by the Court of Chancery for the purpose of this appeal because the Court of Chancery correctly denied NCM's request under that standard.

6. Admitted that the Supreme Court should apply the good-cause balancing standard as applied by the Court of Chancery for the purpose of this appeal because the Court of Chancery correctly denied NCM's request under that standard.

7. LVI adopts and incorporates by reference paragraph 7 of the Summary of Argument set forth in NorthStar's Answering Brief.

8. LVI adopts and incorporates by reference paragraph 8 of the

Summary of Argument set forth in NorthStar's Answering Brief.

9. LVI adopts and incorporates by reference paragraph 9 of the Summary of Argument set forth in NorthStar's Answering Brief.

10. LVI adopts and incorporates by reference paragraph 10 of the Summary of Argument set forth in NorthStar's Answering Brief.

11. LVI adopts and incorporates by reference paragraph 11 of the Summary of Argument set forth in NorthStar's Answering Brief.

12. LVI adopts and incorporates by reference paragraph 12 of the Summary of Argument set forth in NorthStar's Answering Brief.

STATEMENT OF FACTS

LVI adopts and incorporates by reference the Statement of Facts set forth in NorthStar's Answering Brief.

ARGUMENT

I. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION

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, when the parties substantially relied on the Order in employing an atypical approach to discovery and the limitations the Protective Order imposed were entirely foreseeable to NCM when it agreed to the Order? (B132-42; B143-53; A525-31; A589-91).

B. Standard and Scope of Review

The decision of whether to amend a protective order is reviewed by this Court for abuse of discretion. *Hallett v. Carnet Hldg. Corp.*, 809 A.2d 1159, 1162 n.9 (Del. 2002).

C. Merits of Argument

The Court of Chancery properly considered all of the relevant factors, and only the relevant factors, in denying NCM's motion; there was no abuse of discretion. In contending otherwise, NCM misconstrues the opinion of the court below. Indeed, when NCM sought certification of this appeal from the Court of Chancery, the court specifically rejected NCM's suggestion that it had failed to consider whether LVI and NorthStar would be prejudiced, confirming that it certainly *had* considered this factor. (B180-81). Nevertheless, NCM not only repeats that rejected argument here, but fails even to mention the unequivocal

rejection from the court below.

The Court of Chancery properly exercised its discretion in determining that NCM did not meet its burden of showing "good cause" for the modification. NCM claims that it "needs" to proceed against the putative defendants in other jurisdictions because they could theoretically assert that Delaware lacks personal jurisdiction over them. This is a sham argument. Not only have CHS Private Equity V, L.P. ("CHS"), Simmons, and Hogan never suggested that they would make such an argument, but NCM's supposed fear as to these proposed defendants is unfounded.[2] CHS is plainly subject to jurisdiction in Delaware because it is a Delaware entity. As for Simmons and Hogan, NCM admitted months ago that it could allege jurisdiction over them in good faith, (B171-72), and even NCM admits in its opening brief that its position is only stronger now that NCM has added as a counterclaim defendant a Delaware corporation of which Simmons and Hogan were both directors. (NCM Op. Br. at 12). The Court of Chancery has already found in this litigation that personal jurisdiction exists over other individuals in similar circumstances pursuant to 10 *Del C.* § 3114 and this Court's

[2] When it moved to modify the Protective Order, NCM argued that it also needed the modification to sue NorthStar employees John Leonard and Greg DiCarlo. NCM subsequently reversed course, suing Messrs. Leonard and DiCarlo in New York without waiting for the ruling on its Protective Order Motion. NCM's conduct in filing that New York litigation is currently the subject of pending motion practice in the Court of Chancery. Regardless, NCM did not move to amend its counterclaim to add Messrs. Leonard or DiCarlo as defendants, and there is no live issue relating to Delaware personal jurisdiction over them.

ruling in *Hazout v. Tsang Mun Ting*, 134 A.3d 274 (Del. 2016). *See LVI Grp Invs., LLC v. NCM Grp. Hldgs., LLC*, 2018 WL 1559936, at *9 (Del. Ch. Mar. 28, 2018).

The other aspect of NCM's purported "need" – NCM's inability to avoid the statute of limitations in Delaware – is entirely of its own making. Although NCM alleged in its April 2016 counterclaim that Simmons and Hogan "knew" that LVI's represented financial statements were false yet confirmed their accuracy to NCM, (B42-43, ¶¶ 37-38), it delayed bringing any claim against them until after the limitations period had run. Had NCM amended its counterclaims in a timely fashion, as LVI did, there would have been no such issue.

NCM has manufactured these issues in furtherance of its desire to shop for a forum it believes will be more favorable. They accordingly fall far short of showing "good cause" to modify the Protective Order. Moreover, even if the Protective Order actually prevented NCM from bringing certain claims, for the reasons discussed in NorthStar's Answering Brief, that was an entirely foreseeable result at the time NCM proposed and agreed to the Protective Order at issue.

Importantly, NCM received broad, essentially unfiltered production of materials because of the Protective Order, and Paragraph 9 in particular. Now that NCM has received the benefit of that production, it would like to turn around and do exactly what it agreed not to do – *i.e.*, use it to impose on LVI and NorthStar the burden of duplicative, multi-forum litigation against individuals who they are

required to indemnify. It was not an abuse of discretion for the Court of Chancery to require NCM to abide by the Order to which it had agreed.

1. NCM cannot demonstrate any abuse of discretion by the Court of Chancery.

NCM concedes, as it must, that the denial of its motion to amend the Protective Order is reviewed only for abuse of discretion. This requires it to show that the Court of Chancery (i) ignored a relevant factor that should have been given significant weight; (ii) gave significant weight to an "irrelevant or improper" factor; or (iii) committed a "clear error of judgment" even when considering only proper factors. *Homestore, Inc. v. Tafeen*, 886 A.2d 502, 506 (Del. 2005); *see also Edwards v. State*, 925 A.2d 1281, 1284 (Del. 2007) ("A trial judge abuses his discretion when the judge 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.") (internal quotation marks and alterations omitted). Here, the Court of Chancery considered all of the appropriate factors and came to a reasoned and just result.

NCM asserts that, to the contrary, the Court of Chancery abused its discretion in all three ways proscribed in *Homestore*. In order to make that assertion, NCM must distort the record, which shows that the Court of Chancery *did* consider the proper factors, and only the proper factors – it just did not reach the result that NCM would have liked.

2. The Court of Chancery found that LVI and NorthStar would suffer significant prejudice from NCM's proposed change to the Protective Order.

NCM claims that the Court of Chancery failed to consider whether LVI and NorthStar would be prejudiced by the requested modification of the Protective Order, and instead took into account only their "reliance." (NCM Op. Br. at 31-32). NCM's attempted distinction between "reliance" and "prejudice" is purely its own invention. It is clear that in *Wolhar*, like the Vice Chancellor here, the court was using the terms synonymously: "In the instant matter, the Court must balance the Intervenors' proposed modification of the protective order against GM's *reliance* upon the order to determine whether such a modification would *prejudice* substantial rights of GM." *Wolhar v. Gen. Motors Corp.*, 712 A.2d 464, 469 (Del. Super. Ct. 1997) (emphasis added).

The Court of Chancery already explained that this is a false semantic distinction. (B180-81). In denying NCM's application for certification of its interlocutory appeal by the trial court, the Vice Chancellor responded in no uncertain terms that he *had* weighed exactly that factor:

> NCM also argues that I misapplied the *Wolhar* test by ignoring its most important component: the need to show that the party opposing modification would suffer substantial prejudice from the sought-after modification. This argument lacks merit. While I did not use the word "prejudice" in my bench ruling, I 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." The import of this language is clear: LVI and NorthStar would suffer significant prejudice if I 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.

(B180-81, footnotes omitted).

The Court of Chancery further noted that NCM's attempted distinction between "prejudice" and "reliance" was a new argument made for the first time in its motion for interlocutory appeal: "Though NCM now claims that the need to show substantial prejudice is the most important part of the *Wolhar* test, it did not call attention to that aspect of *Wolhar* in its briefing or at oral argument." (B181 at 6 n.15). Indeed, NCM explicitly justified its motion with the argument that LVI and NorthStar "did not detrimentally rely on the Protective Order," a factor it now claims to be effectively irrelevant. (A474, ¶ 19).

NCM goes on to argue that there is no prejudice to LVI or NorthStar, but never addresses the prejudice found by the Court of Chancery: the burden and expense of litigation outside of Delaware. Indeed, if NCM were to be permitted to pursue separate litigation, it would trigger new indemnification obligations, lead to new and costly depositions, require negotiation of new protective orders, and almost certainly result in extensive motion practice involving NorthStar, LVI, and their employees, customers, directors, or officers. And these direct, duplicative litigation costs do not include the costs arising from the time and distraction any litigation necessarily creates. NCM might disagree with the court's finding of

prejudice, but it cannot credibly contend that the Court of Chancery did not find prejudice or that the court abused its discretion in determining that modifying the Protective Order would prejudice those who relied on it.

3. The Court of Chancery fully considered NCM's purported "need" for modification of the Protective Order.

NCM acknowledges, as it must, that the Court of Chancery did consider NCM's contention that it supposedly "needed" modification of the Protective Order in order to sue additional putative defendants. (NCM Op. Br. at 26). What NCM challenges is how much *weight* the court gave to this factor. (*Id.* ("The Court of Chancery gave little, if any, weight to NCM's legitimate and substantial need to modify the Protective Order.")). But this is not a proper basis for reversal, as determining the weight to place on relevant factors is at the heart of the Court of Chancery's discretion. Moreover, NCM's purported "need" does not constitute good cause because it has been manufactured by NCM as a pretext to support its desire to avoid this forum.

a. NCM impermissibly attacks the weight assigned to its "need" to modify the Protective Order.

NCM attempts to reframe its results-oriented challenge by asserting that it was improper for the Court of Chancery to even consider whether NCM's desire to sue these individuals outside of Delaware constituted "good cause" for modifying the Protective Order, *i.e.*, what harm, if any, NCM would suffer if it could not

proceed. According to NCM, that goal is inviolate; because the law *permits* NCM to sue any allegedly "jointly and severally liable" person – which is all that its cases say – NCM contends that it necessarily has a compelling *need* to do so. (*See, e.g.*, NCM Op. Br. at 23 (arguing the proper test "reduces to balancing NCM's need for modification against any prejudicial reliance")).

However, the Court of Chancery's job was to *weigh* NCM's interest in modifying the Protective Order against the countervailing interests, *i.e.*, those of LVI, NorthStar, and Delaware public policy. It could not do so without determining what weight to give NCM's interest in suing the putative defendants outside of Delaware using Discovery Material. *See, e.g.*, *Viskase Corp. v. W.R. Grace & Co.*, 1992 WL 13679, at *5 (N.D. Ill. Jan. 24, 1992) (finding no good cause to modify protective order because, *inter alia*, plaintiff had not established that disclosure of the covered information was "essential to the preparation of plaintiff's case"). Had the court *failed* to weigh all relevant factors raised by the parties, *that* could be an abuse of discretion.

NCM provides no authority to support its position that the court was wrong to consider the strength of its interest. NCM cites *Wolhar*, but the Superior Court there made no such holding; rather, it modified a protective order under very different circumstances. The intervenors in *Wolhar* were plaintiffs in *already pending* cases, who sought access to a study that the defendant had produced in the

Delaware action rather than be forced to seek it in duplicative discovery in their own cases. 712 A.2d at 466. The only interests at stake were the intervenors' desire to avoid duplicative discovery on one hand and, on the other, the defendant's interest in confidentiality. *Id.* at 469-70. Unlike here, the court in *Wolhar* did not have to weigh the intervenors' interest in bringing their actions outside of Delaware, nor the prejudice to the defendant of exposure to duplicative litigation in multiple jurisdictions, because those other actions already had been brought without using documents subject to the protective order. *Wolhar* provides no authority for the notion that the supposed ultimate harm to NCM from denying its motion was an improper factor to consider.

NCM also blames the Court of Chancery for NCM's own failure to make the argument that it would be prejudiced if it could not sue the putative new defendants because it could not obtain full relief from LVI. (NCM Op. Br. at 29). The court below did not find that NCM was *required* to make that showing, only that the weight given to NCM's desire to sue these individuals was mitigated by the absence of any showing that this was a true "need," *i.e.*, that NCM would suffer actual harm if it could not pursue those claims in other jurisdictions using Discovery Material. NCM's desire to sue as many parties as possible for the same damages and the same alleged wrongdoing does not create a "need" to modify the stipulated Protective Order that outweighs the substantial countervailing interests

that support holding the parties to the bargain they struck and relied upon. In all events, NCM's failure to make proper arguments on its own behalf cannot transform the court's well-reasoned opinion into an abuse of discretion.

b. NCM misconstrues what constitutes "good cause" for its requested amendment.

NCM asserts that LVI and NorthStar were *required* to show that they would suffer prejudice from modification of the Protective Order – *i.e.*, modification should automatically be granted if these other parties cannot establish that they would be prejudiced. (NCM Op. Br. at 31-35). But "good cause" is not the mere absence of prejudice.[3] This would impermissibly shift the burden that properly rests on NCM to justify the modification. *Miles*, 1993 WL 547186, at *5 ("Generally, a movant should bear the burden of justifying a modification of an existing protective order."). Aside from the fact that LVI and NorthStar would suffer significant prejudice, and even assuming *arguendo* that NCM would suffer

[3] For purposes of this appeal, LVI does not challenge the Court of Chancery's application of the lower "good cause" threshold for modification of a protective order, because there was plainly no abuse of discretion even under that approach. Under the good cause standard, when a party seeks amendment to a protective order that it agreed to, the required showing of good cause is necessarily higher than when a third party seeks access to documents subject to a protective order put in place by other parties. *See, e.g.*, *Miles Inc. v. Cookson Am., Inc*., 1993 WL 547186, at *5 (Del. Ch. Dec. 30, 1993) ("[W]here the parties agreed to it before presenting it to the Court for approval, the moving party should bear a higher burden to justify a modification of the order."); *see also Heraeus Kulzer, GmbH v. Biomet, Inc.*, 881 F.3d 550, 567 (7th Cir. 2018) ("Heraeus's burden was even higher because Heraeus agreed to the protective orders at issue.").

actual harm if it cannot sue these putative defendants, NCM has failed to meet its initial burden to show good cause.

NCM's purported "need" for modification of the Protective Order is predicated on its assertion that, absent modification, it cannot sue CHS, Simmons, and Hogan (the "CHS Defendants"), who would effectively be "released" from these claims. This is untrue.

The Protective Order did not leave NCM without any means to pursue claims against the CHS Defendants. Consistent with the Protective Order, it could have brought those claims, using Discovery Material, in this Delaware action. NCM argues to the contrary, asserting that (i) the CHS Defendants might contend that Delaware lacks jurisdiction over them,[4] and (ii) its claims are arguably barred by the statute of limitations in Delaware. The former is wrong, and the latter is a problem purely of NCM's own making and, therefore, not "good cause."

NCM has no legitimate basis to say that it cannot proceed against CHS in Delaware. CHS is a Delaware limited partnership. Similarly, Simmons and Hogan

[4] NCM has already sued Greg DiCarlo and John Leonard in New York, claiming to have done so without using Discovery Material. (NCM Op. Br. at 13). While the counterdefendants have argued in the Court of Chancery that NCM's pursuit of the New York litigation violates the Protective Order, and are seeking, among other things, an order barring NCM from proceeding in that suit, NCM has strenuously maintained that the Protective Order is not a bar to suing Messrs. DiCarlo and Leonard in New York. Thus, while NCM now maintains that a modification would enable it to "advance its best case" in New York, it no longer contends that it "needs" the modification to pursue those claims. (*Id.* at 3).

were directors of a Delaware corporation – LVI Parent Corp., a counterdefendant in this action – and, as such, are subject to jurisdiction per Delaware's director consent statute, 10 *Del. C.* § 3114. Indeed, the Court of Chancery has already found that the directors of Defendant Evergreen Pacific Partners Management Company, Inc. are subject to jurisdiction on that basis. *LVI Grp.*, 2018 WL 1559936, at *9. Belying its supposed jurisdictional concerns, NCM has now moved for leave to add the CHS Defendants to its counterclaims here. (NCM Op. Br. at 12).[5]

LVI believes that the putative claims against the CHS Defendants are, indeed, time-barred in Delaware, but that is a problem purely of NCM's own making. As noted above, NCM alleged wrongdoing by Simmons and Hogan in its April 2016 counterclaim, yet waited until after the three-year statute of limitations had expired before it even sought to modify the Protective Order. (B42-43, ¶¶ 37-38). Had NCM brought its purported counterclaims against these individuals within three years of the merger – as LVI did when it amended its own claims to

[5] LVI's opposition to NCM's attempted amendment is based solely on the fact that, without justification, NCM waited until after deposition discovery was substantially complete before seeking to add these new parties, creating undue costs and delay.

add additional defendants – there would have been no statute of limitations issue.[6] NCM cannot rely on its own tactical delay to manufacture "good cause" for it to shop for a different jurisdiction, particularly when it means reneging on its previous agreement, on which other parties relied.

Moreover, application of the statute of limitations is not unfair prejudice. *See Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (statutes of limitations are "practical and pragmatic devices to spare the courts from litigation of stale claims"). To the contrary, it is the putative defendants who would be prejudiced if NCM's delay gave rise to "good cause" to eliminate a protection for which they had negotiated and on which they had relied. *See In re Sirius XM S'holder Litig.*, 2013 WL 5411268, at *4 (Del. Ch. Sept. 27, 2013) ("After the statute of limitations has run, defendants are entitled to repose and are exposed to prejudice as a matter of law by a suit by a late-filing plaintiff who had a fair opportunity to file within the limitations period.").

NCM's belief that other forums may be more hospitable to its claims than Delaware – whether based on longer limitations periods or any other reason – cannot create the "need" to rewrite the Protective Order. Certainly, LVI and NorthStar should not be forced to pay the price, in the form of costly multi-

[6] Seeking to have it both ways on this issue, NCM denies that the limitations period has run, but contends that it must be permitted to select a different forum with a longer limitations period in order to avoid any such potential defense.

jurisdictional litigation, for NCM's decisions. This is what the Protective Order was designed to prevent; rather than "good cause" for modification, NCM's actions demonstrate why the Court of Chancery's form protective order contains this provision. The Court of Chancery's decision to deny NCM's motion was an entirely proper exercise of its discretion.

4. The Court of Chancery made no "clear error of judgment."

In asserting that there has been "a clear error of judgment," NCM simply invites this Court to reconsider the issue and substitute its own judgment for that of the Court of Chancery – which is entirely improper when reviewing for abuse of discretion. As this Court has held, abuse of discretion means that no reasonable judge could have come to the conclusion reached by the court below. *See Edwards*, 925 A.2d at 1284 ("A trial judge abuses his discretion when the judge has exceeded the bounds of reason ….") (internal quotation marks and alterations omitted). NCM makes no such showing; it simply reiterates its belief that its desire to file suit in other jurisdictions using Discovery Material should have outweighed what it falsely characterizes as a lack of prejudice to LVI and NorthStar.

CONCLUSION

For the foregoing reasons, LVI respectfully requests that this Court affirm the decision of the Court of Chancery.

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