EFiled: May 08 2018 04:28PM EDT
Filing ID 62007805
Case Number 506,2017

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

REPLY BRIEF OF APPELLANT NCM GROUP HOLDINGS LLC

OF COUNSEL:

Stephen Novack
Donald A. Tarkington
Andrew D. Campbell
Elizabeth C. Wolicki
Yvette V. Mishev
NOVACK AND MACEY LLP
100 North Riverside Plaza
Chicago, IL 60606
(312) 419-6900

ASHBY & GEDDES
Richard D. Heins (No. 3000)
Philip Trainer, Jr. (No. 2788)
Hayley M. Lenahan (No. 6174)
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, DE 19801
(302) 654-1888

Attorneys for Appellant, Defendant/ Counter-Plaintiff NCM Group Holdings LLC

Dated: May 8, 2018

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Rules

ARGUMENT

NCM argued in its Opening Brief in this Court ("Opening Brief" or "Op. Br. at ___") that the Court of Chancery misapplied the good cause test and abused its discretion in denying NCM's Motion to Amend the Protective Order ("P.O. Motion"). NorthStar and LVI each submitted Answering Briefs (cited herein as "NorthStar's Brief at ___" and "LVI's Brief at ___").

In responding to those Briefs, this Reply first addresses (in Section I below) their arguments regarding NorthStar/LVI's alleged reliance/prejudice. It then addresses (in Section II) the arguments as to NCM's need for modification and (in Sections III-V) other arguments in the Answering Briefs.

I. LVI and Northstar Would Not Suffer Prejudice If The Protective Order Is Amended

A. There Was No Prejudicial Reliance

The issue before the Court of Chancery was whether good cause existed to modify the Protective Order's one limitation on suing new parties in other jurisdictions -- *i.e.*, that Discovery Material could not be used in connection therewith. In considering the prejudice to NorthStar/LVI, the issue was not whether NorthStar/LVI would be worse off if modification were permitted. In every case where one side seeks modification of a protective order and the other side objects, the objecting party would presumably be worse off if modification were permitted. There is more to "good cause" prejudice than that.

Indeed, the relevant "prejudice" issue was whether any such prejudice resulted from something NorthStar/LVI did in detrimental or prejudicial reliance on the Protective Order. In other words, prejudice would exist only if the particular Discovery Material NCM would use in other jurisdictions would not have been produced by NorthStar in this case but for the Protective Order. Yet, any Discovery Material NCM would use in the other cases is also relevant in this case. Thus, it was required to be produced even without paragraph 9 and even if NorthStar had made a full manual review of the documents it produced. Thus, no such prejudice can or does exist, and there was nothing to balance against NCM's need to use Discovery Material.

The Answering Briefs do not demonstrate any *detrimental* or *prejudicial* reliance on the Protective Order or, for that matter, any prejudice at all. Indeed, all NorthStar does is argue it substantially relied on the Protective Order (without claiming that the reliance was detrimental or caused any prejudice) and all LVI does is quote language from the rulings below and suggest prejudice therefrom. Yet, all that the Court of Chancery's quoted (or other) language means is that the Court found that NorthStar substantially relied on the Protective Order in the way it produced documents. Critically, it did not find that such reliance was detrimental or resulted in any prejudice.

B. The Answering Briefs' Reliance On The Court Of Chancery's Ruling Denying Certification For Appeal Does Not Cure The Fatal Absence Of Prejudice

NCM's Opening Brief (at 32) argued that the Court of Chancery's oral opinion (the "Oral Opinion") -- *i.e.*, the decision appealed from in this case -- did not find prejudice. Although it found "substantial reliance" by NorthStar/LVI, it did not link that to *detrimental* or *prejudicial* reliance.

In defending against this point, NorthStar and LVI rely on certain language in the Court of Chancery's *subsequent* ruling denying certification for interlocutory appeal ("Certification Ruling"). That language, in which the Court responded to NCM's "lack of prejudice" argument, is as follows:

> 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 on 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, footnote signals and footnotes omitted.)

While NCM of course accepts the Court of Chancery's explanation as to what its language was meant to convey, the explanation confirms that the Court's "prejudice" analysis was, respectfully, an abuse of discretion. For starters, NCM respectfully submits that the Certification Ruling's language on which the Answering Briefs most heavily rely inaccurately construes the Protective Order. In particular, the portion of the Certification Ruling quoted above says the Protective Order "ensured neither party would have to bear the cost of litigating related claims outside of Delaware." However, the Protective Order did not do so. As LVI concedes, the Protective Order is not "an antisuit injunction" (A460, ¶15), and all parties were subject to the risk that related litigation might ensue in other jurisdictions for which they would have to "bear the cost." Indeed, NCM was free to sue other parties in other jurisdictions for the same Merger fraud, as long as the

litigation was not based on and did not use Discovery Material. (A455, ¶4.) Again, that was the only limitation, and it is the one NCM seeks to modify.

Other aspects of the Court of Chancery's abuse of discretion relating to reliance/prejudice, and the Certification Ruling's confirmation thereof, are discussed in subsections C and D below.

C. The Court Of Chancery Abused Its Discretion As To The Reliance/Prejudice Factor

Under the good cause test, reliance on a protective order alone is not enough to establish prejudice; the reliance must be detrimental or prejudicial and must be linked to or the cause of the prejudice. Yet, here, the only claimed reliance -- NorthStar's reliance on paragraph 9 of the Protective Order by producing millions of documents without making a manual review thereof (except for privilege) -- was not detrimental or prejudicial and, thus, caused no prejudice.

1. The Good Cause Balancing Test Requires *Detrimental* Reliance On The Protective Order And A *Causal* Relationship Between That Reliance And Prejudice

LVI's Brief (at 9-10) argues that the *Wolhar* case uses "reliance" and "prejudice" interchangeably, so reliance alone is prejudice. Not so. Instead, *Wolhar* requires both: (a) reliance; and (b) that, because of such reliance, modification would result in prejudice. *Wolhar v. Gen. Motors Corp.*, 712 A.2d 464, 469 (Del. Super. 1997) ("[T]he 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.") (emphasis added).

Because any alleged prejudice must be linked to or result from reliance, the reliance must be detrimental or prejudicial. Otherwise, modification would not cause prejudice.

LVI's Brief (at 10) cites to footnote 15 of the Certification Ruling, which says NCM "did not call attention to [the "prejudice"] aspect of *Wolhar* in its briefing or at oral argument." Respectfully, the Court's statement (and LVI's reliance thereon) are incorrect. Indeed, after setting forth the *Wolhar*/good cause standard, a repeated foundation of NCM's written and oral arguments was that NorthStar/LVI did not *detrimentally* rely on the Protective Order, so the reliance was *not prejudicial*. (A474, ¶19 -- NorthStar/LVI "did not detrimentally rely on the Protective Order"; AR8-9 -- arguing there was no prejudice based on the way NorthStar produced its documents; A491:6-495:4 -- arguing in detail the absence of prejudice.) Thus, throughout, NCM focused on *Wolhar's* and the good cause standard's prejudice factor.

LVI's assertion (at 10) that detrimental reliance is "a factor [NCM] now claims to be effectively irrelevant" is way off base. Detrimental/prejudicial reliance is a focal point of NCM's argument in this Court. (Op. Br. at 31-35.) Although reliance *without* any detriment or prejudice is not a relevant factor,

detrimental or prejudicial reliance is among the *most* relevant factors, and NCM has always so argued.

2. NorthStar's Alleged Reliance In Document Production Was Not Detrimental Or Prejudicial And Was Not Linked To Or The Cause Of Any Prejudice

NorthStar's Brief (at 27-32) attempts to uphold denial of the P.O. Motion based on its "substantial reliance" on the Protective Order by producing documents in an "atypical" way. To support this, NorthStar points (at 27-28) to the Certification Ruling, and its above-quoted statement that the "import" of the Court of Chancery's original language was that NorthStar/LVI would suffer prejudice. Nevertheless, immediately after referring to that "prejudicial import" language, NorthStar's Brief describes the findings that it seeks to uphold as the Court's finding that NorthStar/LVI had "substantially relied" (heading 3, p. 27) or its "substantial reliance" findings (text, p. 28). It is telling that, in seeking to uphold these findings in subsections 3(a) and (b) (at 29-30), NorthStar does not use the words "prejudice," "prejudicial," "detrimental" or "detrimental reliance."

Instead, NorthStar merely repeats the argument it made below that it relied on the Protective Order by producing millions of documents in "an atypical manner" -- *i.e.*, without making a manual review thereof (except for privilege). This begs the question of how this squares with the fact that NorthStar designated as "confidential" virtually all of those documents, which designation, under

paragraph 3 of the Protective Order, "constitute[s] a representation that such [designated] Discovery Material has been reviewed by an attorney representing the Party making the designation . . . ." (A132.)

Regardless of the answer, the point here is that NorthStar does not say -- or even attempt to argue -- that such alleged reliance operated to its detriment or prejudice. Nor could it.

First, NorthStar does not say the "atypical" way it produced documents was more costly than the "typical" way. Indeed, the opposite is true, as it saved the substantial attorney time it would have taken to manually review over 7.7 million documents.

Second, the only other way there could have been detriment/prejudice is if NorthStar had produced documents that were: (a) *irrelevant* to this case (*i.e.*, documents that but for paragraph 9 NorthStar would not have produced); but (b) *relevant* in connection with the new litigation. Yet, those cannot both exist. NCM's new complaints allege the same underlying fraud involved here -- *i.e.*, the allegedly false financial statements attached to the Contribution Agreement on behalf of the LVI side. Those complaints seek to hold the New Defendants liable for participating in and directing that very same fraud. So, by definition, Discovery Material relevant to the new litigation would also be relevant to -- and

required to be produced in -- this case. Thus, NorthStar could not have withheld documents that would be relevant to the new litigation.

In other words, while there might have been prejudicial/detrimental reliance *if* NorthStar had produced an irrelevant document that was then used to file an unrelated claim in another court, that did not happen. Thus, the way NorthStar produced documents was neither detrimental nor prejudicial to NorthStar or LVI.

Moreover, as explained in subsection 1 above, the good cause balancing test requires prejudice caused by reliance. Yet, the new litigation does not result from any Discovery Material that would not have been produced had there been no Protective Order. Indeed, reliance on the Protective Order has nothing to do with any added burden/expense the new litigation would entail.

In sum, it was an abuse of discretion for the Court of Chancery to have given any weight to the *non-prejudicial* and *non-detrimental* reliance by NorthStar and to have found any prejudice based thereon. Yet, as confirmed by the Certification Ruling, the Court gave that "great weight." (B180.)

D. The Burden/Expense Of Additional Litigation Does Not Of Itself Constitute Prejudice Under The Good Cause Test

LVI's Answering Brief (at 10) argues that the Certification Ruling found that, regardless of any alleged reliance on the Protective Order, there would be prejudice because of "the burden and expense of litigation outside of Delaware."

Yet: (1) the Oral Opinion made no such finding; and (2) any such "finding" in the Certification Ruling would constitute an additional abuse of discretion.

First of all, the Court of Chancery did not find prejudice based solely on the burden and expense of the other litigation. The Court recognized that reliance was also required. Its mistake was in failing to require that such reliance was linked to any resulting "prejudice." (B180-81.)

But, if LVI were correct that the Certification Ruling made such a burden/expense "prejudice" finding, that would also be an abuse of discretion. As explained above, the mere fact that there would be additional burden and expense if the New Defendants were sued (here or in the other jurisdictions) does not of itself constitute prejudice for purposes of applying the good cause balancing test. Instead, to constitute prejudice for that purpose, any such burden and expense must be linked to and caused by NorthStar or LVI's reliance on the Protective Order. Indeed, for purposes of the good cause balancing test, it is not enough that the party opposing modification would be "worse off" if modification were granted. Otherwise, prejudice would be established in every case, without more.

Consistent with the foregoing, prior to the Court of Chancery's denial of the P.O. Motion, neither NorthStar nor LVI argued that the mere fact that there would be additional burden and expense in the other litigation constituted prejudice. (Their references to such burden/expense were for other purposes, such as LVI's

counsel's explanation of his view of the purpose of paragraph 9 of the Protective Order at the June 23, 2017 oral argument (A498:5-10).) Rather, the sole focus of NorthStar/LVI's so-called "prejudice" argument was on NorthStar's alleged reliance on the Protective Order in the way it produced documents.

Nor could NorthStar/LVI have made such an argument. *First*, as explained above, even with the Protective Order all parties (including NorthStar/LVI) were exposed to the possibility that related litigation (with its additional burden and expense) would ensue in other jurisdictions. The Protective Order also does not prohibit the use of Discovery Material to file new claims against new parties in this case. For example, LVI (based on Discovery Material) asserted additional claims against new parties in this case, implicating additional motion practice and possible discovery. As a result, new litigation against the New Defendants (and any additional burden/expense thereof) was always a risk.

Second, any additional motion practice and discovery in other jurisdictions would be similar to, if not the same as, they would be if the New Defendants were added as parties in this case. Indeed, motion practice herein could be more complex than in the other jurisdictions, as personal jurisdiction and statute of limitations motions would likely be made here but not in the other jurisdictions.

Discovery should likewise not present a problem. As to document production, any perceived cost of duplicate document production can easily be

avoided by simply reproducing the documents produced in this case. And since document production in this case was electronic, that could be accomplished by simply pushing buttons.

As to depositions, none had yet been taken in this case when NCM filed the P.O. Motion, and that held true throughout the briefing, oral argument and supplemental briefing thereof (which ended on July 26, 2017). Thus, actual duplication was not then an issue.

Moreover, when depositions began, NorthStar/LVI knew that the P.O. Motion might be granted, thus implicating their alleged concern about duplicate depositions. And even if the P.O. Motion were denied, there was the possibility that NCM would amend to add the New Defendants in this case. Indeed, on July 11, 2017 -- while the P.O. Motion was still pending -- all parties stipulated that NCM could seek to add the New Defendants in this case within ten days *after* the P.O. Motion ruling. (AR1-2.) As a result, regardless of the outcome of the P.O. Motion, the possibility of duplicate depositions existed. Despite that, depositions went forward before the ruling on the P.O. Motion, with NorthStar and LVI not objecting on the ground that those depositions may have to be retaken and without seeking to stay depositions until the P.O. Motion was resolved. Having done nothing then, they should not be heard to object now.

In all events, duplication of depositions can be avoided (or greatly reduced) by the parties agreeing that depositions in this case can be used in the other jurisdictions. That should present no problem as the New York Defendants are being represented by counsel who have been actively representing another party in this case from the beginning (and who represented the New York Defendants in their depositions in this case), and it is likely that LVI's lead counsel in this case (who have their offices in Chicago) will represent the Illinois Defendants regardless of whether they are sued in Illinois or Delaware.

And, again, any such prejudice had to be linked to or caused by detrimental or prejudicial reliance on the Protective Order. Yet, as explained above, the alleged reliance on the Protective Order on which the Court based its "prejudice finding" and on which NorthStar/LVI base their argument (the so-called "atypical" way in which NorthStar produced documents) was not detrimental or prejudicial and there is no linkage or connection between that reliance and the claimed burden/expense or any other prejudice.

II. NCM Needs Modification Of The Protective Order

A. The Court Of Chancery Relied On An Improper "Need To Be Made Whole" Factor

NCM's Opening Brief (at 36) showed that the Court of Chancery abused its discretion by conflating NCM's need to use Discovery Material against the New Defendants in Illinois and New York -- where NCM otherwise has the right to sue the New Defendants, *see Eisenbud v. Omnitech Corporate Solutions, Inc.*, 1996 WL 162245, at *1 (Del. Ch. Ct. March 21, 1996) (only "extraordinary circumstances can supersede a plaintiff's right to select its choice of forum") -- with the Court's misplaced requirement that NCM prove it needed to sue the New Defendants to be "made whole." NorthStar disagrees, saying (at 34) that the "necessary to be made whole" requirement was just a "secondary" observation. Yet, that "made whole" determination was precisely why the Court rejected NCM's good cause argument. This is confirmed by the Court's statement immediately following its "made whole" point: "*Thus*, I give relatively little weight to NCM's good cause arguments." (A843:6-13, emphasis added.) So, the Court assessed NCM's good cause argument based on an improper factor. That is an abuse of discretion. *See Homestore, Inc. v. Tafeen*, 886 A.2d 502, 506 (Del. 2005) (explaining that consideration of an improper factor is one of the three ways a lower court can abuse its discretion).

B. NCM Needs To Use Discovery Material

Two important, but uncertain, issues made it necessary and extremely prudent for NCM to sue in the other jurisdictions: personal jurisdiction and statute of limitations.

1. Jurisdiction

When NCM filed the P.O. Motion, the Court of Chancery was considering the jurisdictional motion to dismiss filed by Mr. Cutrone (another LVI official who allegedly participated in LVI's fraud). The Court's comments at the hearing on Cutrone's motion indicated a likelihood that it would be granted. (It later was.) For this and other reasons, NCM became concerned there would be no jurisdiction over DiCarlo and Leonard -- who were in the same category jurisdiction-wise as Cutrone -- or Simmons and Hogan, who, like Cutrone, lived outside of Delaware. NCM was also concerned about the parade of horribles that could occur -- including a jurisdictional reversal on appeal after a full merits trial. (Op. Br. at 24-26.)

In response, LVI (at 15) pronounces that there *is* (present tense) jurisdiction over Simmons and Hogan because: (a) LVI Parent's presence as a counter-defendant herein makes them (as directors thereof) subject to jurisdiction; (b) the Court of Chancery found that directors of a corporate affiliate of an owner of NCM

are subject to jurisdiction (the "Jurisdictional Ruling"); and (c) NCM sought leave to add Simmons/Hogan as counter-defendants in this case.

These reasons go nowhere. As to the first two, LVI Parent was not allowed to be added to this case and the Jurisdictional Ruling was not made until long after the P.O. Motion had been denied. So these events could not have been a part of the Court of Chancery's exercise of discretion. In any event, LVI cannot predict with certainty how the Court of Chancery or this Court would rule on jurisdiction.

As to the third reason, NCM's motion to add Simmons/Hogan herein was not filed by choice. Rather, NCM was forced to file that motion for Delaware statute of limitations reasons, and it will be withdrawn if the Protective Order is modified as requested. LVI points out (at 6) that (in answer to an earlier question by the Court of Chancery) NCM acknowledged it had a "good faith basis" for adding Simmons/Hogan herein. NCM, however, also was clear in stating that, at the time, it believed it was unlikely to prevail on jurisdiction. (B172.)

Finally, although LVI is correct that CHS is subject to jurisdiction, CHS faces liability based on Simmons/Hogan's conduct, so NCM wanted to sue CHS in the same jurisdiction as them. In all events, the Delaware statute of limitations issue remains as to CHS (and all New Defendants), so NCM desired to sue CHS in Illinois for this reason, too.

2. Limitations

NorthStar/LVI do not challenge NCM's concern that this would be a contested issue in Delaware. Instead, they say this is a problem of NCM's making because it waited too long to act.

NCM disagrees with the underlying premise of this argument. The premise is that the limitations period on NCM's fraud claims began running when the Merger closed (April 23, 2014) and ran out three years later. NCM contends that this is wrong because where, as here, there is fraudulent concealment, the limitations period is tolled. *E.g., Jeter v. ResolutionWear, Inc.*, 2016 WL 3947951, at *10-11 (Del. Ch. July 19, 2016). NCM submits the tolling period did not end until sometime in November 2014 at the earliest and more likely in 2015, so the filing of its New York Complaint on October 23, 2017 (B201) and its Motion for Leave to Amend its counterclaims herein on October 27, 2017 (A593-94) were well within Delaware's limitations period.

However, NCM recognizes that this issue is uncertain. Thus, even though NCM believes its claims would be timely under Delaware law, it desired to sue in Illinois and New York because of the uncertainty. Indeed, because LVI sought leave to amend its complaint to add new claims against new parties right at the Merger's three-year anniversary, NCM believed it would face the argument that its limitations period commenced on the Merger's closing -- an argument that LVI

now makes. Although NCM does not agree with that argument, it is uncertain as to how the Court of Chancery (or this Court on appeal) would rule. Given the expense and risk of this issue, NCM prudently desired to sue in Illinois and New York. Illinois has a five-year statute of limitations for fraud claims. *Citimortgage, Inc. v. Parille*, 49 N.E.3d 869, 884 (Ill. App. Ct. 2016). Moreover, its borrowing statute would not apply because Simmons and Hogan were Illinois residents when the cause of action accrued (and ever since). *See Employers Ins. of Wausau v. Ehlco Liquidating Tr.*, 723 N.E.2d 687, 693 (Ill. App. Ct. 1999) (explaining that the borrowing statute does not apply where, relevant here, any of the parties was an Illinois resident when the cause of action accrued). And while New York's borrowing statute may implicate Delaware's limitations period, it would also borrow Delaware's discovery rule. *Childs v. Brandon*, 459 N.E.2d 149, 150 (N.Y. 1983).

As a result, NCM filed its P.O. Motion shortly after the three-year anniversary of the Merger. It did so on May 5, 2017, and anticipated a ruling well in advance of October 2017 when, depending on the ruling, it would file in New York and Illinois or timely seek to amend here. NCM was waiting for the Court's ruling, but when October came without it, NCM filed its New York Complaint (based on a new analysis) and its Motion for Leave to Amend its counterclaims in this case.

Under these circumstances, NCM acted prudently and with appropriate dispatch. It did not cause the limitations problem.

III. NCM's Status As A Party To The Protective Order Does Not Implicate Heightened Scrutiny

NorthStar/LVI argue that the "good cause" standard is heightened because NCM is a party, not a third party. Although the Answering Briefs of NorthStar (at 23-24) and LVI (at 14 n.3) cite cases to try to support this argument, those cases are distinguishable. Unlike here, all of those cases involved the protection of confidential information. *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 881 F.3d 550, 555 (7th Cir. 2018); *Romary Assocs., Inc. v. Kibbi, LLC*, 2012 WL 32969, at *2 (N.D. Ind. Jan 6, 2012); *Miles, Inc. v. Cookson Am., Inc.*, 1993 WL 547186, at *3 (Del. Ch. Dec. 30, 1993); *Jochims v. Isuzu Motors, Ltd.*, 145 F.R.D. 499, 500 (S.D. Iowa 1992). Also unlike here, those cases involved requests for modification where either: (a) there was no modification provision in the protective order (*Jochims* -- 145 F.R.D. at 501); (b) the court did not mention a modification provision (*Romary*); (c) it was unclear whether the court relied on a modification provision (*Miles*); or (d) the modification provision was restrictive (*Biomet*, 881 F.3d at 567 -- "because the eighth amended protective order outlines a detailed dispute-resolution process that the parties must follow before they ask the court for relief, it actually restricts [the movant's] right to seek amendment"). Further, *Miles* was decided four years before *Wolhars* and did not determine the standard for modifying protective orders. *Miles*, 1993 WL 547186, at *5.

Regardless, NCM submits that this Court should not adopt the heightened standard. If good cause to modify is established, it should not matter whether the movant is a party or a third party. But, even if, as a general matter, this Court were inclined to apply a heightened standard where the party seeking modification is a party to the protective order, that standard should not apply where, as here (in paragraph 16), the agreed protective order contains an express modification provision. Under those circumstances, the parties would have agreed not only to the provision sought to be modified, but also to the provision providing for the possibility that it could be modified.

This is particularly so here because paragraph 16 of the agreed-upon Protective Order not only provides for modification, but also expressly provides a procedure and standard for modification. (A140.) In particular, paragraph 16 expressly provides for modification pursuant to Court of Chancery Rule 5.1 (not implicated here) and/or Rule 26(c), "upon short notice." In turn, Rule 26(c) provides a good cause standard for entering a protective order. Thus, in paragraph 16 the parties agreed to the good cause standard for modifying the Protective Order (not a heightened standard), even though the Protective Order was an agreed order.

NCM argued below and in its Opening Brief (at 4, 9, 18, 20) that paragraph 16's modification provision is very significant. Nevertheless, the Answering

Briefs do not even acknowledge its existence. Yet, whether NorthStar/LVI ignored it or not, paragraph 16 is significant.

For one thing, NorthStar/LVI's argument that NCM is bound by paragraph 9 also means that NorthStar/LVI are bound by paragraph 16. Again, paragraph 16 grants the parties the right to seek to modify the Protective Order. And that means that NorthStar knew paragraph 9 could be later modified, thus making unreasonable any "no manual review" decision based on paragraph 9.

Moreover, because the parties agreed to the Protective Order, the Court of Chancery made no separate good cause finding in entering it. Thus, there should be no presumption of good cause for paragraph 9.

IV. The Answering Briefs' Foreseeability Arguments Lack Basis

NorthStar (at 33-34) and LVI (at 13-14) argue that denial of the P.O. Motion should be upheld because NCM should have foreseen the possibility of learning facts to sue others who were not subject to jurisdiction in Delaware. Respectfully, that asks too much of any party before the start of discovery.

The primary purpose of protective orders of this type is to protect confidentiality and privilege, and that is what the parties and counsel are most concerned about and focus upon. It puts too much of a burden on anyone to look into a crystal ball at the outset of litigation (when they agree to a form protective order) to see that they might later learn information in discovery that would allow them to sue another party *and* that the new party would not be subject to jurisdiction in the pending case.

Indeed, policy reasons argue against such a requirement, as it would likely produce resistance to including provisions like paragraph 9, resulting in contested proceedings as to whether to enter what otherwise is a court form. NorthStar (at 39) cites *Bayer AG & Miles, Inc. v. Barr Laboratories, Inc.*, 162 F.R.D. 456 (S.D.N.Y. 1995), and makes the opposite policy argument -- *i.e.*, that "foreseeable" modification would place uncertainty on provisions like paragraph 9. Yet *Bayer* was dealing with a different issue -- confidentiality. If anything, *Bayer* supports NCM, as it holds that where, like here, the provision at issue applies to all

discovery material (not just confidential information), "the burden generally will be on the party seeking protection to show good cause" for *not* amending. *Id.* at 465.

NorthStar/LVI particularly focus on Simmons/Hogan, saying NCM should not have agreed to paragraph 9 because they were identified in NCM's original counterclaims as persons who had knowledge of LVI's fraud. Yet, merely having knowledge of an entity's fraud and failing to disclose it is not fraud by the entity's officers or directors. *E.g., Prairie Capital III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 52 (Del. Ch. 2015). That's all NCM knew at the time. It did not know that Simmons/Hogan were involved in the fraud. Consistent with Rule 11, NCM did not initially name Simmons/Hogan.

V. The New York Complaint

The Answering Briefs try to make much of NCM's filing in New York while the P.O. Motion was awaiting decision. Although that issue should have nothing to do with the outcome of this Appeal, the short answer is that -- with the one exception discussed below -- there was nothing wrong about this filing.

The one thing that was done incorrectly was an omission by NCM's Illinois and Delaware counsel, not NCM. In particular, counsel failed to notify the Court of Chancery that they had: (a) investigated the situation further; (b) concluded that NCM had enough information aside from Discovery Material on which it could file a complaint in New York sufficient to stop the statute of limitations from running; and (c) filed the New York Complaint. Counsel apologized to the Court on the record orally and in writing for failing to so notify it. However, as NCM's Illinois and Delaware counsel explained to the Court of Chancery in numerous affidavits, the failure to notify was not done consciously or as the result of a decision by anyone.

Other than that, there was nothing wrong with the New York filing. As NCM explained below, based on its counsel's knowledge and analysis at the time it filed the P.O. Motion, NCM firmly believed that it could not file in New York or Illinois without using Discovery Material. However, as October 2017 (and the possible running of the Delaware limitations period) were fast approaching without

a decision on the P.O. Motion, concern became heightened. As a result, counsel investigated further to see if there was sufficient information outside of Discovery Material on which to file a complaint that would stop the limitations period. Counsel concluded they could, and so the New York Complaint was filed at that time for that purpose, and without using Discovery Material.

Moreover, despite NorthStar/LVI's contentions, the New York filing was not "surreptitious." It was a public filing for all the world to see. Indeed, it was against the General Counsel and Chief Operating Officer of NorthStar, a party to this case. There was no possibility that this filing could or would be kept under wraps.

Finally, though it does not excuse or make "harmless" the failure to notify, we are constrained to point out that the failure did not change the outcome on the P.O. Motion in any way. Even without knowing about the New York Complaint, the Court denied the P.O. Motion, ruling against NCM and giving "relatively little weight to NCM's good cause arguments." (A843.)

CONCLUSION

For the foregoing reasons and for the reasons set forth in NCM's Opening Brief, 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.

ASHBY & GEDDES

OF COUNSEL:

Stephen Novack
Donald A. Tarkington
Andrew D. Campbell
Elizabeth C. Wolicki
Yvette V. Mishev
NOVACK AND MACEY LLP
100 North Riverside Plaza
Chicago, IL 60606
(312) 419-6900
Doc# 1013050

/s/ Philip Trainer, Jr.
Richard D. Heins (No. 3000)
Philip Trainer, Jr. (No. 2788)
Hayley M. Lenahan (No. 6174)
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, Delaware 19801
(302) 654-1888

Attorneys for Appellant, Defendant/Counter-Plaintiff NCM Group Holdings LLC

Dated: May 8, 2018