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**OF THE**
**STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
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Re: *Fox, et al. v. Paine, et al.*
Civil Action No. 3187-CC

Dear Counsel:

I have reviewed the briefs for plaintiffs' motion for a protective order, and I conclude the following: plaintiffs should not be protected from the contested document requests served by defendants, but plaintiffs should be permitted to designate documents as "Highly Confidential," per plaintiffs' proposed amendments to the 2007 confidentiality order.

The briefing on this motion has devolved, to a large extent, into an argument about the merits of the cross-motions to enforce the settlement agreement. I understand the motivating force behind this devolution to a focus on the merits—that the relevance of discovery is inherently related to the claims upon which the discovery is based—but given the nature of the motions that the parties have

chosen to bring before the Court,[1] I must resolve the discovery dispute as a discovery dispute before parties can complete additional briefing and I can examine the claims and their merits.

There are two issues before me on this motion: whether the requested documents are relevant to defendants' counterclaims, and whether those documents warrant protection via an amended confidentiality order.

On the issue of relevance, I disagree with plaintiffs' assertion that defendants' discovery requests are "a classic prohibited fishing expedition to support some yet unasserted claims that the [r]ights [o]fferings were improper in some respect."[2] Defendants clearly have hooked their counterclaims to a certain definition of "dilution"—and when the appropriate time comes in these proceedings, defendants' counterclaims may live or die on that definition—but defendants also have explained clearly why the requested documentation relates to the merits of their counterclaims. Defendants allege that Fox structured the rights offerings specifically to dilute the Fund II carry[3] and in violation of the settlement agreement, and they now seek any and all documentation relating to those rights offerings, including any and all details that may support their counterclaims and that may assist them with the calculation of any damages arising from a breach of the settlement agreement. I find this reasoning a sufficient demonstration of relevance and, thus, one that entitles defendants to discovery, particularly given the established scope of discovery in the Delaware Court of Chancery.[4] This is not a fishing expedition in which a party seeks discovery on the basis of an asserted

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[1] For example, here I am not being asked to rule on a motion to dismiss, which may have involved plaintiffs accepting defendants' assertions of the facts and requesting that I move directly to a determination of the contested legal issues, such as whether defendants' definition of "dilution" is entirely nonsensical or whether the settlement agreement clearly and unambiguously imposes no constraints on plaintiffs' ability to do what defendants allege plaintiffs have done. Rather, the procedural history of this case finds me faced with cross-motions for enforcement of the settlement agreement, which in and of themselves have not disrupted parties' entitlements to discovery.

[2] Pls.' Reply 6-7 (citing *Tafeen v. Homestore, Inc.*, 2004 WL 1043721 (Del. Ch. Apr. 27, 2004), and its characterization of a party's discovery requests as a "fishing expedition").

[3] Defs.' Resp. 11.

[4] *See, e.g.*, *Omnicare, Inc. v. Mariner Health Care Mgmt. Co.*, 2009 WL 1515609, at *3 (Del. Ch. May 29, 2009) ("The scope of discovery pursuant to Court of Chancery Rule 26(b) is broad and far-reaching … [and] renders discoverable any information that 'appears reasonably calculated to lead to the discovery of admissible evidence.' Consequently, absent injustice or privilege, the Rule instructs the Court to grant discovery liberally.") (quoting *Pfizer, Inc. v. Warner-Lambert Co.*, 1999 WL 33236240, at *1 (Del. Ch. Dec. 8, 1999)).

claim but with the true intent of using that discovery to build a basis for a claim yet to be asserted. At the worst—although I have formed no opinion on this now—defendants have already snagged a fish that, due to plaintiffs' shark-like persistence and tenacity in litigation, defendants will never be able to bring to shore.[5] But that outcome is a story in the making, one whose conclusion stands poised to be written after an examination of the evidence and an analysis of the merits.

Despite this relevance, however, I am persuaded by plaintiffs' arguments that discovery should not proceed entirely unfettered. I recognize the sensitive nature of some of the documents defendants have requested. Indeed, it is to be expected that approval of such a sweeping discovery request puts in play sensitive material. Accordingly, I grant plaintiffs' request that an amended confidentiality order be entered, which would enumerate the types of materials that would fit within a category of "Highly Confidential Discovery Material" (rather than provide a general description, as supported by defendants) and which would restrict access to those materials to defendants' outside counsel only and any outside experts or consultants who need play a role in this litigation. I am not persuaded by defendants' argument that these private-equity firms will not compete simply because they do not currently compete, whether in terms of competition for investors, management talent, executives, or target investments. Nor am I persuaded by defendants' arguments that plaintiffs have failed to provide sufficient specificity regarding the types of injuries they may suffer as a result of disclosing competitively sensitive information.[6] To the extent these materials should relate to the legal issues in this case and not to business or investment opportunities, lawyers, perhaps with the aid of consultants, should be fully capable of assessing the documents' relevance and determining how best to integrate their contents into the briefs on the pending motions. A word of caution to plaintiffs, however: the amended confidentiality order is not to be abused, and I expect plaintiffs to utilize it in such a way and with such prudence as to minimize—or, dare I hope, obviate

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[5] *See* ERNEST HEMINGWAY, THE OLD MAN AND THE SEA (1952).

[6] *See, e.g.*, Pls.' Reply 13-14 (providing a description, even if only a brief one, of the ways in which these documents relate to and may reveal plaintiffs' ability to achieve success in the marketplace, and thus the impact unfettered discovery may have on plaintiffs' ability to maintain its success). Furthermore, I reject defendants' invocation of *MacLane Gas Co. v. Enserch Corp.*, 1990 WL 96247 (Del. Ch. July 5, 1990), and their assertion that plaintiffs have failed to explain why the existing confidentiality order is not up to the task. As plaintiffs explain, the 2007 confidentiality order was entered at a time when plaintiffs and defendants were still business partners. *See* Pls.' Mot. for a Protective Order 18. Times have changed—the parties now compete in certain key ways—and it is reasonable to determine that the confidentiality order should change with them.

entirely—the need for defendants to contest plaintiffs' use of the "Highly Confidential" label and the subsequent need for me to review any of these documents *in camera*.

For the reasons I have outlined above and being faced with the procedural path that the parties have decided to forge, I decline to protect plaintiffs from defendants' discovery requests, though I do grant plaintiffs' request for an amended confidentiality order providing for a category of "Highly Confidential Discovery Material" subject to attorneys'-and-consultants'-eyes-only treatment. Parties shall confer and submit a proposed form of Order consistent with this Opinion and reflecting the relevant amendments to the parties' 2007 confidentiality order.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

WBCIII:bjt