

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CONCORD STEEL, INC., a Delaware)
corporation as a successor in interest)
to CRC Wilmington Acquisition, LLC,)
a Delaware limited liability company,)
)
Plaintiff/Counterclaim Defendants,)
)
v.) Civil Action No. 3369-VCP
)
WILMINGTON STEEL PROCESSING)
CO., INC., a Delaware corporation, and)
KENNETH NEARY,)
)
Defendants/Counterclaim Plaintiffs.)

MEMORANDUM OPINION

Submitted: September 8, 2010

Decided: October 7, 2010

John L. Reed, Esquire, Stuart M. Brown, Esquire, Aleine M. Porterfield, Esquire,
EDWARDS ANGELL PALMER & DODGE LLP, *Attorneys for Plaintiff*

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DAVID T. SHULICK, Philadelphia, Pennsylvania, *Attorneys for Defendants*

PARSONS, Vice Chancellor.

This action is before me on a motion under Court of Chancery Rule 60(b) by Defendants Wilmington Steel Processing Co., Inc. (“WSP”) and WSP’s founder and president, Kenneth Neary, (together “Defendants”) to reopen the judgment entered on September 30, 2009, where I found that: (1) the Non-Competition covenant in WSP’s Asset Purchase Agreement (“APA”) with Plaintiff Concord Steel, Inc. (“Concord”) was breached by Defendants; (2) Concord was entitled to an injunction barring Defendants from breaching the Non-Competition covenant for a period lasting until September 12, 2011; and (3) WSP and Neary were liable for \$553,512 in damages.¹

On August 3, 2010, WSP moved this Court to reopen the judgment based on the “newly discovered evidence” prong of Rule 60(b). WSP contends that Concord’s President, Paul Vesey, identified in his January 24, 2008 deposition a laptop computer (the “Vesey Laptop”) with data concerning the sales process leading up to the APA between Concord and WSP.² After putting Concord’s counsel on spoliation notice regarding the laptop, WSP requested the laptop as part of discovery.³ WSP asserts that because this laptop was never produced and Concord denied possession of it, WSP filed a

¹ *Concord Steel, Inc. v. Wilm. Steel Processing Co.* (the “Post-Trial Opinion”), 2009 WL 3161643 (Del. Ch. Sept. 30, 2009). The Post-Trial Opinion recited the procedural history of this case. Briefly, Concord filed its complaint on November 21, 2007; I granted a preliminary injunction in favor of Concord on April 4, 2008; trial took place from October 20 to 22, 2008; and I issued the Post-Trial Opinion and entered judgment in favor of Concord on September 30, 2009. Thereafter, I also awarded Concord \$355,708.05 in attorneys’ fees and expenses.

² Defs.’ Opening Br. (“DOB”) 2. Similarly, I refer to Plaintiff’s Answering Brief and Defendants’ Reply Brief as PAB and DRB, respectively.

³ *Id.*

motion to compel on February 7, 2008 seeking “the laptop computer, server and related electronic and paper documents” that were identified by Vesey in his deposition. As discussed *infra*, on February 21, 2008, I granted WSP’s motion as to certain documents, but refused to order production of the laptop.⁴ WSP alleges that it continued to request to inspect the laptop after I ruled on its motion to compel, but Concord, again, claimed it did not have the laptop or know of its location.⁵ Toward the end of discovery, WSP again moved to compel production of certain documents and the laptop. Based in part on the eleventh hour nature of the motion, I denied the motion as to the laptop.⁶ The parties then proceeded to trial.

WSP alleges that it recently learned, as part of Concord’s unrelated bankruptcy proceedings in Ohio, that despite representing to WSP and this Court that it did not have the Vesey Laptop, Concord may have possession of it or knowledge of its whereabouts.⁷ It argues that a March 11, 2010 bankruptcy court order (the “Bankruptcy Order”), in response to a motion to compel by one of Concord’s creditors, identifies three laptops “that allegedly contain confidential business information regarding [Concord’s] customers” that the creditor sought from Concord (the “Bankruptcy Laptops”).⁸ WSP

⁴ PAB Ex. A, Feb. 21, 2008 Tr., at 9-10, 12.

⁵ DOB 3.

⁶ Sept. 29, 2008 Tr. at 20 (unofficial copy).

⁷ *Id.* at 4. Defendants failed to cite, however, any evidence that Concord represented to the Court that it did not possess the laptop or know where it was.

⁸ DOB 4, Ex. 7. In pertinent part, the Bankruptcy Order states “LB Steel’s last argument is that Debtor has failed to comply with the LB Steel APA by failing to

contends that one of the Bankruptcy Laptops, particularly the one identified as Vesey's (the "Phantom Laptop"), is the "phantom laptop that Plaintiff had repeatedly failed to produce in this case."⁹

Concord opposes WSP's motion to reopen the judgment. They argue first that I should not reach the merits of the motion because: (1) I do not have jurisdiction to hear it because WSP has failed to request a stay or remand of its pending appeal,¹⁰ and (2) WSP unduly delayed in bringing the motion and did so to further delay its appeal in the Supreme Court. If I do reach the merits, Concord urges the denial of the motion because WSP cannot meet its burden to satisfy the multiple factor test this Court applies when determining whether to reopen a judgment based on newly discovered evidence after a trial on the merits has occurred.

For the reasons set forth below, I deny WSP's motion to reopen the September 30, 2009 judgment.

turn over three laptop computers. Debtor insists that there are only two computers at issue and believes reference to the third computer may relate to a computer at the Essington Facility, which would be an Excluded Asset Debtor contends that 'arrangements regarding the two previously identified computers (one in possession of Mr. Pastor in Florida and the other in the possession of Mr. Vesey) had been made with LB Steel.'. . . Debtor represents that all confidential information was deleted from the third laptop computer before it was abandoned to the person assisting in the clean-up of the Essington Facility." DOB Ex. 7.

⁹ DOB 4.

¹⁰ PAB 2.

I. BACKGROUND

On September 19, 2006, Concord entered into the APA with WSP whereby Concord acquired substantially all of WSP's assets, including its oxyfuel cutting equipment, for \$4,000,000.00 dollars.¹¹ Section 7.7(b) of the APA is a noncompetition covenant which states that “for a period of four (4) years beginning on the Initial Closing Date, [WSP] and [Neary] shall not engage in or have an interest, anywhere in the world . . . in any Competitive Business.” “Competitive Business” is defined in § 1 of the APA as:

[A]ny business (on a worldwide basis) that is engaged in (i) the design, manufacture and sale of (a) counterweights, elevator weights, stage weights, counterbalances, test weights and crane weights made of any material and (b) steel components for heavy equipment as engaged in or to be engaged in by [Concord], [WSP] or the Acquired Business prior to and after the Effective Time, **or (ii) any other business competitive with the type of business engaged in by [Concord], [WSP] and the Acquired Business at any time prior to or after the Final Effective Time, except for the Defense Business, Ship Building, Wind Power Generation and Other Permitted Businesses.**¹²

The last clause of this section provides a carve-out to the Non-Competition covenant so that WSP could continue to provide its high-definition (“HD”) plasma services, a more precise form of steel cutting than oxyfuel, within the enumerated business carve-outs. In this litigation, Concord alleged that WSP breached § 7.7(b) of the APA by entering into a

¹¹ Unless otherwise noted, the facts are drawn from the Post-Trial Opinion, 2009 WL 3161643.

¹² APA § 1 (emphasis added).

contract with Joseph T. Ryerson & Son, Inc. (“Ryerson”) to produce HD parts for sale to Ryerson.

At trial, WSP claimed that §7.7(b) only reflected a covenant not to compete with Concord’s oxyfuel business and did not encompass any of its HD plasma business or equipment. Concord, on the other hand, argued that it covered any form of steel cutting, whether oxyfuel or HD plasma. In my Post-Trial Opinion, I addressed whether the term “Competitive Business” in § 7.7(b) encompassed WSP’s contract with Ryerson. Specifically, I examined the definition of “Competitive Business” in § 1(ii) of the APA stated above.¹³

I assumed, without deciding, that the term “competitive” was ambiguous as it plausibly was susceptible to two different constructions: one meaning two businesses trying to obtain a specific contract from the same client and the other, broader construction meaning two businesses vying for a relationship with the same client, rather than a specific contract. Under the second construction, WSP plainly would be “competitive” with Concord because it sought the same relationship with Ryerson as Concord. As to the first definition, however, WSP argued it could not be “competitive” with Concord because Concord’s oxyfuel cutting was not capable of satisfying Ryerson’s needs. While I was not convinced the two processes are mutually exclusive, I found that “[t]he evidence shows that in many instances HD plasma and oxyfuel are not both appropriate for the same job” and “the cost of using HD plasma far exceeds the cost of

¹³ *Id.* at *7.

using oxyfuel for jobs that do not require close tolerances.”¹⁴ Because of the potential ambiguity, I considered extrinsic evidence and ultimately found that the parties intended the second, broader construction “regardless of whether I consider the proffered extrinsic evidence.”¹⁵ Based on, among other things, the absence of an express HD plasma carve-out, the existence of a specific list of other carve-outs, and the need to maintain consistency with other provisions of the APA, I determined that the parties did not intend the covenant to refer only to oxyfuel cutting, as WSP argues. In addition, this conclusion comported with my finding that the phrase “type of business” in § 1 unambiguously referred to the steel cutting business generally, and not just the oxyfuel business.¹⁶

II. ANALYSIS

A. Jurisdiction

Preliminarily, I must determine whether I have jurisdiction to decide WSP’s Rule 60(b) motion. Concord argues that this Court does not have jurisdiction because WSP failed to request a remand or stay from the Delaware Supreme Court of its pending appeal in this matter. Concord argues that *Levine v. Smith*¹⁷ requires a litigant who discovers new evidence that potentially could be the subject of a Rule 60(b) motion to seek a remand or stay from the Supreme Court if that litigant is contemporaneously

¹⁴ Post-Trial Op., 2009 WL 3161643, at *7-8.

¹⁵ *Id.* at *8.

¹⁶ *Id.* at *8-9.

¹⁷ 591 A.2d 194, 203 (Del. 1991), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

moving forward with an appeal in that court. Otherwise, according to Concord, the trial and appellate courts would have to act on a dual track and risk the possibility that the Supreme Court will issue an advisory opinion. WSP, on the other hand, contends that Concord misreads *Levine*. WSP claims it requires a litigant to request a stay or remand from the Supreme Court only after the trial court indicates that it will entertain that litigant's Rule 60(b) motion during the pendency of its appeal.

This point, however, is now moot. After its motion in this Court was fully briefed, WSP moved in the Supreme Court for a stay or remand of the appeal pending the outcome of its Rule 60(b) motion in this Court.¹⁸ On October 6, the Supreme Court denied that motion, confirming an oral argument scheduled for October 13 will proceed as scheduled.¹⁹

In any event, even if WSP had not made a motion to stay or remand, this Court has jurisdiction to hear its Rule 60(b) motion despite the pending appeal. In *Levine*, the Supreme Court cited approvingly federal practice governing the disclosure of newly discovered material evidence during the pendency of an appeal. As explained in *Levine*, federal courts follow the rule that “[a]n appellant seeking relief from a judgment on the basis of newly discovered evidence should promptly apply for relief to the court which entered the judgment. ‘If the [trial] court indicates that it will allow the motion the

¹⁸ See Case No. 120.2010 Docket Item (“D.I.”) 24 (WSP’s motion to stay or remand).

¹⁹ *Id.* at D.I. 30 (Order denying WSP’s motion to stay or remand).

[appellate court] should then be requested to remand the cause.’’²⁰ The Court held that while our precedent is less developed, Delaware law is no different.²¹ Thus, I understand *Levine* as recognizing this Court’s jurisdiction to hear a motion such as WSP’s Rule 60(b)(2) motion.

B. Standard for a Rule 60(b)(2) Motion to Reopen Judgment

Court of Chancery Rule 60(b) allows a court to relieve a litigant of its burden under a final judgment if justice so requires. The Rule states, in pertinent part:

(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the Court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence . . . or (6) any other reason justifying relief from the operation of the judgment.²²

While litigants may resort to a Rule 60(b) motion to prevent an unfair result, they may do so only on a powerful showing that a substantial risk of injustice is present.²³

One basis on which a disappointed litigant may obtain judicial reconsideration of the merits of his claim under Rule 60(b) is by identifying newly discovered evidence.²⁴

²⁰ *Levine v. Smith*, 591 A.2d at 203 (internal citations omitted). The Court noted that the “likely result of a party’s failure to promptly invoke a Rule 60(b) claim while an appeal is pending is that the appellate court may render an advisory opinion or decide an issue that is arguably moot or upon an outdated factual record.” *Id.*

²¹ *Id.*

²² Ct. Ch. R. 60.

²³ *See Glinert v. Wickes Cos.*, 1992 WL 165153, at *3 (Del. Ch. July 14, 1992) (“A movant bears a heavy burden of proof in order ‘to protect the finality of judgments against efforts to turn the vicissitudes of litigation into grounds for more litigation still.’”).

Whether to reopen a judgment on this basis is committed to the discretion of the Court.²⁵ Generally, however, “the admission of late submitted evidence is not favored.”²⁶ In order to prevail on a newly discovered evidence claim, the movant has the burden to show that: (1) newly discovered evidence has come to his knowledge since the trial; (2) it could not, in the exercise of reasonable diligence, have been discovered for use at the trial; (3) it is so material and relevant that it will probably change the result if a new trial is granted; (4) it is not merely cumulative or impeaching in character; and (5) it is reasonably possible that the evidence will be produced at the trial.²⁷ The court also may examine additional equitable factors, including: (6) whether the moving party has made a timely motion; (7) whether undue prejudice will inure to the nonmoving party; and (8) considerations of judicial economy.²⁸ Moreover, while Rule 60(b)(2) does not contain hard deadlines, a

²⁴ See *Norberg v. Sec. Storage Co. of Wa.*, 2002 WL 31821025, at *2 (Del. Ch. Dec. 9, 2002).

²⁵ *Id.*; *Pope Invs. LLC v. Benda Pharm., Inc.*, 2010 WL 3075296, at *1 (Del. Ch. July 26, 2010).

²⁶ *Pope Invs. LLC*, 2010 WL 3075296, at *1. This is because Rule 60(b) “implicates two important values: the integrity of the judicial process and the finality of judgments.” *99-Year Lease Tenants of Lynn Lee Vill. v. Key Box 5 Operatives, Inc.*, 2005 WL 1924193, at *3 (Del. Ch. Aug. 4, 2005).

²⁷ See, e.g., *Levine v. Smith*, 591 A.2d 194, 202 (Del. 1991), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *Norberg*, 2002 WL 31821025, at *2.

²⁸ See *Pope Invs. LLC*, 2010 WL 3075296, at *1 (noting that when considering whether to reopen the record, a court can consider whether the moving party has made a timely motion, whether undue prejudice will inure to the nonmoving party, and considerations of judicial economy).

party seeking to reopen judgment based on newly discovered evidence must make its motion without unreasonable delay.²⁹

C. Should WSP's Rule 60(b)(2) Motion Be Allowed?

Concord opposes WSP's motion on several grounds that invoke one or more of the eight factors just mentioned. In particular, Concord objects to the motion as untimely in several respects. I begin with that objection and then turn to those of the enumerated factors that are relevant here.

1. Is WSP's motion untimely?

WSP claims that it did not discover that the Vesey Laptop may very well exist until after the October 2008 trial in this case. WSP allegedly learned this information from Concord's bankruptcy proceedings in Ohio, in which Concord admitted it possesses a laptop that is related to the Essington facility, which WSP argues must be the Vesey Laptop. In particular, WSP states that it found out about the existence of this laptop through reading the Bankruptcy Order of March 11, 2010.³⁰ Therefore, the alleged newly discovered evidence did not come to WSP's attention until after the trial. As discussed below, however, this factor is not material to my analysis.

Concord contends, however, that I should deny WSP's motion as untimely because WSP waited nearly five months after the Bankruptcy Order was issued to bring this action. Unlike its federal counterpart, Rule 60(b) does not prescribe definite time

²⁹ See *In re U.S. Robotics Corp. S'holders Litig.*, 1999 WL 160154, at *8 (Del. Ch. Mar. 15, 1999).

³⁰ DRB 3-4.

limits for bringing a motion under it.³¹ Nevertheless, Delaware courts require that the movant act without unreasonable delay.³² WSP asserts it met that standard because it only recently became aware of the Bankruptcy Order and brought its motion within a reasonable time thereafter.

Based on the facts before me, I cannot conclude that WSP unreasonably delayed in bringing its motion. There is no evidence that WSP was a party to the Concord bankruptcy proceeding or that it received a copy of the Bankruptcy Order contemporaneously with its issuance. In these circumstances, I cannot ascribe any unreasonable delay to WSP in bringing its Rule 60(b) motion and, therefore, reject Concord's argument that the motion is untimely.

2. Whether the newly discovered evidence could not, in the exercise of reasonable diligence, have been discovered for use at the trial?

WSP contends that it could not have discovered the existence of the Vesey Laptop before trial because, among other things, Concord represented to WSP and this Court that Concord did not have possession of the laptop or know of its location. WSP further asserts that in response to its motion to compel Concord to provide the Vesey Laptop, I issued an order "requiring Plaintiff to provide Defendants with 'the laptop computer, server, and related electronic and paper documents that were identified by Paul Vesey.'"³³ But, that is not true. The quoted language is taken from paragraph 2 of

³¹ *In re U.S. Robotics Corp.*, 1999 WL 160154, at *8.

³² *See id.*

³³ DOB 2.

WSP's proposed discovery order;³⁴ it does not conform to the order I ultimately entered on WSP's motion to compel. Rather, I issued an order "grant[ing] *with modifications*" WSP's motion. That order states in relevant part that "[t]he relief sought in paragraph 2 of [WSP's] proposed order is granted to the extent stated on the record of the telephone conference with counsel on February 21, 2008, [but] is otherwise denied."³⁵

The transcript of the February 21, 2008 telephone conference makes clear that I denied WSP's request to inspect the Vesey Laptop.³⁶ Instead, I ordered Concord to produce *documents* and information essentially in the form of an interrogatory answer pertaining to Exhibit P-6 (a worksheet related to the Ryerson contract at issue in the litigation) that may have been on the Vesey Laptop.³⁷

Further, the transcript does not support WSP's suggestion that I denied them access to the Vesey Laptop because Concord said it did not exist. Rather, the record shows that I denied the motion to compel production of the laptop because WSP filed that motion too close to the end of the expedited discovery period related to the preliminary injunction hearing scheduled for March 17, 2008.³⁸ Nothing in the transcript or my

³⁴ D.I. 30.

³⁵ D.I. 37.

³⁶ *See* PAB Ex. A., at 10-12.

³⁷ *Id.*

³⁸ *See generally* PAB Ex. A. As to that aspect of the motion to compel, I stated: "I saw some reference to somebody's computer. We're not talking about getting into some person's computer at this stage of the game other than very specifically related to a particular worksheet or something of that nature. That's what was requested, at least as I understand it." *Id.* at 10.

order, however, precluded WSP from pursuing production of a laptop during the normal discovery period before the eventual trial. Thus, WSP had ample opportunity to request forensic inspection of the Vesey Laptop between the time I granted the preliminary injunction on April 3, 2008 and the beginning of trial on October 20, 2008.³⁹

In the latter regard, I note that WSP filed another motion to compel at the end of the regular discovery period, which arguably raised the laptop issue again. I heard argument on that motion on September 29, 2008, approximately three weeks before trial. In that argument, WSP's counsel advanced essentially the same misreading of this Court's February 21, 2008 order that appears in its Rule 60(b)(2) motion. I rejected the argument then for the same reasons stated above. Moreover, in denying WSP's September 2008 request for an order compelling production of computer equipment, including the alleged Vesey Laptop, based on the February 21 order, I stated that "I made that order back [on] . . . February 21st of 2008. If somebody doesn't comply with an order, then counsel certainly know how to seek relief from the noncompliance, either by a motion to compel or a motion for contempt, or some other thing. It's too late, as far as I'm concerned, to come in at the last minute like this and seek some sort of relief of that nature."⁴⁰

³⁹ Post-Trial Op., 2009 WL 3161643, at *4; *see also* D.I. 82 (Scheduling Order).

⁴⁰ Sept. 29, 2008 Tr. at 20 (unofficial copy).

Thus, I find that WSP has not met its burden to show that it could not have discovered through reasonable diligence prior to trial the additional information allegedly on the Vesey Laptop, including information related to Exhibit P-6.

3. Whether the newly discovered evidence is so material and relevant, and not merely cumulative or impeaching in character, that it will probably change the result if a new trial is granted?

As to the third and fourth factors relevant to a motion under Rule 60(b)(2), WSP contends that the Phantom Laptop is the Vesey Laptop it sought earlier in this litigation and is material. First, it argues that the information on the laptop will help to discredit Concord's witnesses, especially Vesey.⁴¹ The information allegedly will substantiate the testimony of WSP, Neary, and Woislaw about issues regarding waiver, laches, consent, and the definition of "competition" relating to the Ryerson contract.⁴² A court will not reopen a judgment under Rule 60(b), however, based on newly discovered evidence that is merely impeaching or cumulative in character.⁴³ Thus, this argument provides no basis for reopening the judgment.

WSP next avers that the Phantom Laptop could be used to show that oxyfuel and HD plasma processing serve different market segments and WSP's HD plasma was not

⁴¹ DOB 5; DRB 3.

⁴² DOB 5; DRB 3.

⁴³ *Norberg v. Sec. Storage Co. of Wa.*, 2002 WL 31821025, at *2 (Del. Ch. Dec. 9, 2002); *see also Copper v. State*, 840 A.2d 641 (Del. 2003) (TABLE) ("Although a claim of newly-discovered evidence may provide the foundation for a motion for new trial under Superior Court Criminal Rule 33, we note that Copper's 'newly-discovered' evidence appears to be for impeachment purposes only and, thus, would not warrant a new trial.").

competitive with Concord's oxyfuel process. According to WSP, the laptop hard drive is likely to contain documents, including nonprivileged communications with persons affiliated with Concord regarding the different market segments of oxyfuel and HD plasma processing, that would help WSP prove Concord knew that it could not compete for work such as the Ryerson work and, therefore, the APA was never breached.

The information sought by WSP, assuming it could be used for these purposes, would not be material or likely to affect the outcome of the trial; it would be purely cumulative. Indeed, in the Post-Trial Opinion, I accepted the contention that oxyfuel and HD plasma serve different market segments for purposes of interpreting the terms "competitive" and "type of business" in the definition of "Competitive Business" found in § 1 of the APA. Specifically, I found that "[t]he evidence shows that in many instances HD plasma and oxyfuel are not both appropriate for the same job" and "the cost of using HD plasma far exceeds the cost of using oxyfuel for jobs that do not require close tolerances."⁴⁴ The Opinion makes clear, for example, that even if Concord's oxyfuel cutting would not have been capable of covering the Ryerson project because it serves a different market segment than WSP's HD Plasma equipment, I still would have found WSP to have engaged in a business "competitive with the type of business engaged in" by Concord as that term is used in § 7.7(b). Because I found that the "type of business" engaged in by Concord was steel cutting in general, and not just oxyfuel cutting, and that "competitive" meant two businesses vying for a relationship with the

⁴⁴ Post-Trial Op., 2009 WL 3161643, at *7-8.

same client, in this case Ryerson, the fact that Concord could not have met the Ryerson project's cutting specifications, as I assumed it could not, would not have changed my finding that WSP violated the Non-Competition covenant if a new trial were granted.

Finally, WSP has not carried its burden to show that the Phantom Laptop would be material under the circumstances. First, it is questionable whether the Phantom Laptop even is the Vesey Laptop, let alone that it contains material information.⁴⁵ Second, WSP offered only conclusory statements indicating that the laptop contains "critical electronic documents"⁴⁶ without explaining why such documents would be material. Thus, I hold that WSP has not carried its heavy burden to demonstrate that the alleged newly discovered evidence is material and not merely cumulative or impeaching in character.⁴⁷

4. Whether it is reasonably possible that the newly discovered evidence can be produced for a merits-based evaluation?

Even assuming that the Phantom Laptop is the Vesey Laptop and the information allegedly contained on it is material, I find that it is unlikely such evidence would be made available for a merits-based evaluation because it is improbable that it has been

⁴⁵ It is not clear from the record on WSP's motion that the Phantom Laptop is, in fact, likely to be the Vesey Laptop. The Bankruptcy Order's vague reference to three laptops that Concord had within its possession at a time or times during its operations prior to filing for Chapter 11 bankruptcy protection provides little support for WSP's contention that the Phantom Laptop is "undoubtedly" the Vesey Laptop. DOB 4. Furthermore, even if it is the Vesey Laptop, I find that WSP has failed to demonstrate that information allegedly contained on its hard drive would likely affect the outcome of the trial had it been offered into evidence.

⁴⁶ DOB 5.

⁴⁷ See *Glinert v. Wickes Cos., Inc.*, 1992 WL 165153, at *686 (Del. Ch. July 14, 1992).

preserved.⁴⁸ In fact, the Bankruptcy Order clearly states that Concord represented that “all confidential information was deleted from the third laptop computer [*i.e.*, the Phantom Laptop] before it was abandoned to the person assisting in the clean-up of the Essington Facility.”⁴⁹ But, the information was preserved in other locations. For example, Concord points out that Vesey, in his deposition, informed WSP that when he exchanged an older laptop containing Exhibit P-6, the Concord IT Department moved all relevant files on the laptop onto Concord’s servers so that the physical laptop would not contain discoverable information.⁵⁰ Thus, I find it unlikely that if the Phantom Laptop is, in fact, the Vesey Laptop, it still would contain the evidence WSP posits would be found on its hard drive.

5. Whether undue prejudice will inure to the nonmoving party and whether granting this motion will advance considerations of judicial economy?

WSP argues that little prejudice will inure to Concord because WSP seeks only to conduct forensic analysis on the three Bankruptcy Laptops identified in the Bankruptcy Order. As discussed *supra* Part II.C.2, WSP failed to take the actions it reasonably could have to inspect the alleged Vesey Laptop during pretrial discovery. Discovery of electronically stored information (“ESI”) is ubiquitous in litigation today.⁵¹ It is

⁴⁸ *Norberg v. Sec. Storage Co. of Wa.*, 2002 WL 31821025, at *4 (Del. Ch. Dec. 9, 2002) (finding that it is more than reasonably possible that newly discovered evidence would be produced because it had been preserved).

⁴⁹ *See* DOB Ex. 7.

⁵⁰ PAB 7-8.

⁵¹ *See Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1187 (Del. Ch. 2009).

important that litigants not defer discovery of such information until the last minute. Yet, as demonstrated by WSP's motions to compel production of the laptop in this case, that is essentially what they did. I did not condone that approach at the time, and see no reason to do so now.

Were I to grant WSP the ability to inspect the Bankruptcy Laptops at this time notwithstanding the previous entry of a final judgment, Concord would be forced to expend significant additional time and money on this matter. Moreover, based on the tenuous connection between the Phantom Laptop and the Vesey Laptop and the immateriality of the information likely contained therein, considerations of judicial economy also weigh against granting WSP's motion.

III. CONCLUSION

For the reasons stated above, WSP's motion to reopen the judgment of September 30, 2009 is denied.

IT IS SO ORDERED.