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Re: *Chammas v. NavLink, Inc.*
C.A. No. 11265-VCN
Date Submitted: August 18, 2015

Dear Counsel:

Extensive discovery can bog down a books and records action which is supposed to be handled on a summary schedule. Moreover, discovery under Court of Chancery Rule 26 is not the appropriate means of gaining access to the same books and records which are the objectives of an 8 *Del. C.* § 220 action. Yet, even though this is a books and records action, the director plaintiffs likely have legitimate discovery needs, and their needs may vary with the nature of the defenses that the company interposes.

Defendant NavLink, Inc. ("NavLink") seeks a protective order limiting discovery sought by Plaintiffs George Chammas ("Chammas") and Laurent Delifer ("Delifer"). Chammas and Delifer are founders and directors of NavLink and have kinsmen who are pursuing a derivative fiduciary duty action (the "Plenary Action") against other directors (and their sponsors) of NavLink.[1] Plaintiffs seek inspection in their capacity as directors of NavLink. According to NavLink, the only issue for which discovery would be appropriate is whether they have a proper purpose,[2] but NavLink neglects to consider adequately that it has asserted affirmative defenses.[3]

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[1] *Chammas v. AT&T Corp.*, CA. No. 11015-VCN. An underlying theme of NavLink's arguments is that discovery is being pursued in this action because the Plenary Action is not yet to the stage where discovery can routinely be taken.

[2] The other two issues which NavLink concedes would be appropriate for discovery in a books and records action—whether the Plaintiffs are directors and whether they made proper demand—are not topics which Plaintiffs are pursuing through discovery.

[3] The affirmative defenses include unclean hands; that the scope of the demands exceeds any proper purpose; that the action is moot because of NavLink's agreement to produce certain documents; laches; and that the documents requested here are sought to aid prosecution of the Plenary Action.

* * *

NavLink's motion challenges Plaintiffs' discovery in broad, general terms.[4] Five items are identified in NavLink's proposed protective order, and the Court has no better platform for its analysis.

1. Vacating the Depositions of NavLink's Top Two Executives.

Plaintiffs have not demonstrated that both principal officers of NavLink are needed for deposition.[5] NavLink does have a small management team, and Plaintiffs' desire to depose a person knowledgeable about the issues properly subject to discovery in this books and records case is understandable. Moreover, there is no reason why a Rule 30(b)(6) deposition should not meet Plaintiffs' reasonable needs. It may be that, given their different roles, it will be necessary to make both executives available for deposition. For now, the proper approach is to work through the Rule 30(b)(6) process with designation of the topics and then

[4] The Court has been asked to rule on a motion for a protective order, as framed. It is not necessarily endorsing the scope of Plaintiffs' discovery.
[5] It appears likely that NavLink's Rule 30(b)(6) witness will be one of its two principal officers.

designation of the proper witness or witnesses.[6] This assumes that NavLink does not intend to call either of its principal executives as witnesses at trial. If either or both will be called, then the deposition(s) of the witness-officers should go forward.[7]

2. Precluding Discovery into Matters "Outside of a Challenged Proper Purpose."

That relief, as framed by NavLink, is denied because discovery beyond the narrow scope proposed by NavLink is appropriate. Even NavLink seems to concede that discovery into its affirmative defenses is proper. It argues that it has agreed to produce (although it appears that is has not yet produced) documents relating to the affirmative defenses. It is not clear that production of documents would obviate the need for interrogatories or deposition testimony.[8]

[6] Counsel may want to revisit the scope of the Rule 30(b)(6) topics in light of this letter opinion.

[7] The Court sees no reason why the deposition(s) should require more than one day.

[8] NavLink has promised to deliver a wide range of documents. If those documents had already been produced, it is at least conceivable that the scope of the current discovery dispute would have been narrowed.

Some limited discovery is necessary in order to address NavLink's contention that certain categories of documents which Plaintiffs seek do not exist and that production of other categories would be too costly and unduly burdensome. Focused discovery in order to gain an understanding of NavLink's email systems, how it maintains electronically-stored information, and the extent of its retention policies is appropriate.

3. Precluding Discovery into Company Emails and Communications.

Full-blown electronic discovery is clearly not warranted. No electronic discovery is sought from before September 2014. The number of possible custodians is limited, and the topics can be limited to proper purpose and the affirmative defenses asserted by NavLink.

4. Protection of Attorney-Client and Work Product Information Since the Amended Complaint Was Filed in the Plenary Action.

Plaintiffs are directors. They are engaged in litigation with NavLink and they are affiliated with individuals who are prosecuting the Plenary Action. As to those two litigation matters, their interests are adverse to NavLink's interests, and discovery is not appropriate. Otherwise, they have fiduciary duties as directors and

to meet those fiduciary duties, they should have access to information appropriate and necessary for them to perform their duties. Thus, the protective order is limited to attorney-client communications and work product items pertinent to the two pending actions.

5. Scope of Confidentiality Order.

The parties also disagree about the reach of a confidentiality order. They acknowledge that one is appropriate, but NavLink wants the order to govern all production, whether through discovery or as a result of the outcome of the Section 220 action. The confidentiality order, for present purposes, should be limited to those matters produced during discovery. Whether books and records ordered to be produced through the Section 220 action, if any, should be subject to confidentiality restrictions is a question that needs to be resolved as part of the Section 220 merits-based process. Perhaps there will be documents produced as a result of discovery that should also be produced as part of the Section 220 relief, but, if that occurs, the Section 220 implementing order is the proper place for addressing post-litigation confidentiality treatment.

* * *

NavLink's broad-stroke objections have made it difficult for the Court to draw appropriate lines for limiting discovery. A cursory review of Plaintiffs' discovery requests demonstrates that they could be read as seeking discovery far beyond that which is either common or necessary for a Section 220 action.

NavLink objects to certain discovery that it believes the Plaintiffs have requested. Plaintiffs respond by stating they have not requested that discovery. These areas of possible discovery are easily resolved by making clear that NavLink need not respond to the following (assuming that Plaintiffs did request this discovery):

1. Requests for production of documents that encompass the books and records sought in this Section 220 action.[9]

2. Discovery related to claims asserted in the Plenary Action.

[9] *See U.S. Die Casting & Dev. Co. v. Sec. First Corp.*, 1995 WL 301414, at *3 (Del. Ch. Apr. 28, 1995).

* * *

NavLink's motion for a protective order is granted to the extent set forth above. Otherwise, it is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K