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Re: Rhodes v. SilkRoad Equity, LLC
C.A. No. 2133-N
Date Submitted: January 17, 2007

Dear Counsel:

This matter grows out of a business arrangement among, *inter alia*, Plaintiff Wijnant van de Groep and Defendant Andrew J. Filipowski regarding a business known as InterAct Public Safety Systems ("InterAct"). The Plaintiffs, in their Amended Verified Complaint (the "Complaint"), assert seven causes of action

ranging from breach of fiduciary duty to breach of contract to breach of the North Carolina Unfair Trade Practices Act.[1]

One count of the Complaint sets forth van de Groep's claim against Filipowski for slander per se (Count Six): that Filipowski falsely accused van de Groep of writing an unauthorized InterAct check for the personal benefit of van de Groep in the amount of $50,000. Van de Groep alleges that Filipowski made the statement in front of more than 200 InterAct employees.[2]

InterAct has asserted a counterclaim against van de Groep seeking reimbursement of approximately $8,000 which it claims that van de Groep paid with InterAct funds on van de Groep's personal American Express account and without any corporate authority.

Van de Groep has moved under Court of Chancery Rule 41(a)(2) to dismiss voluntarily the slander claim; he has raised this claim in a later filed proceeding in North Carolina. Filipowski, who has filed an answer in this action, opposes the application.

[1] N.C. Gen. Stat. § 75-1.1 (2001).
[2] Compl. ¶¶ 69, 102, 104.

The parties agree that this is a matter committed to the Court's discretion. What is not so clear, however, is which rule informs the exercise of that discretion. One is tempted to look to Court of Chancery Rule 41(a)(2), as van de Groep did, because it addresses voluntary dismissal; that rule, however, deals with the voluntary dismissal of an action.[3] Here, van de Groep desires to continue with the action, but without the defamation claim. Some courts, however, have concluded that Rule 41(a)(2) is not available for dismissal of a claim (as contrasted with dismissal of an action).[4] Instead, dismissal by a plaintiff of an individual claim is to be treated as an amendment of the complaint.[5] The Court, as a matter of discretion, will, under Court of Chancery Rule 15(a), "freely" grant a motion to amend "if justice so requires" unless the moving party has been guilty of undue delay, bad faith, dilatory conduct, or the like.[6]

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[3] Factors guiding the Court in deciding whether to allow a voluntary dismissal of an action over opposition include: "(1) the defendants' effort and expense in preparation for trial; (2) excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action; (3) insufficient explanation for the need to take a dismissal; and (4) the fact that a motion for summary judgment has been filed by the defendant." *Draper v. Gardner Defined Plan Trust*, 625 A.2d 859, 864 (Del. 1993).

[4] *See, e.g., Gronholz v. Sears, Roebuck & Co.*, 836 F.2d 515, 518 (Fed. Cir. 1987) (emphasizing the distinction between Rule 41(a), which applies to dismissal of an "action," and Rule 41(b), which refers to the "dismissal of an action or any claim").

[5] *See, e.g., Loutfy v. R.R. Donnelley & Sons Co.*, 148 F.R.D. 599, 602 (N. D. Ill. 1993).

[6] *See Lillis v. AT&T Corp.*, 896 A.2d 871, 877 (Del. Ch. 2005); *Catamaran Acquisition Corp. v. Spherion Corp.*, 2001 WL 755387, at *3 (Del. Super. May 31, 2001). Another reason for

I conclude that van de Groep's motion to dismiss the slander count should be denied. First, van de Groep voluntarily brought his slander claim here; Filipowski joined issue with the claim here. To allow van de Groep, without any apparent justification, to move the slander aspect of the dispute elsewhere would carry the taste of rewarding forum shopping.[7] "[A]s a general rule, litigation should be confined to the forum in which it is first commenced . . ."[8] Nothing suggests that van de Groep would be denied a fair opportunity to present his claim if the claim is litigated in his original choice of forum. Second, there is a significant risk of inconsistent results if the slander claim is addressed in North Carolina. In his North Carolina action, van de Groep alleges that he never wrote any unauthorized

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denying a motion to amend is the futility of the amendment. That factor, in the context of withdrawing a claim, is of no consequence.

[7] Van de Groep offers several reasons supporting his preference to litigate the slander claim in North Carolina: (1) North Carolina (and Georgia) substantive law will define the defamation tort; and (2) because the allegedly defamatory statements were made in North Carolina (and Georgia), Delaware is an inconvenient forum for the witnesses. That all may be true now, but it was also true (and obvious) when van de Groep filed the Complaint. In addition, witnesses from North Carolina will otherwise be necessary, and this Court is frequently called upon to apply the substantive law of other states. Indeed, one of the Plaintiffs' other claims arises under the North Carolina Unfair Trade Practices Act. Therefore, regardless of the disposition of van de Groep's motion, the Court will still be required to apply North Carolina law.

I acknowledge that van de Groep's claim, one sounding in tort, is a claim properly handled by the law courts. This Court is empowered to consider van de Groep's claim only through implementation of the so-called "clean up" doctrine, but van de Groep is the one who invoked that doctrine initially.

[8] *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970).

InterAct checks for his benefit. Paragraph 48 of van de Groep's complaint in North Carolina,[9] reads in part: "[van de Groep] never wrote any improper checks to himself on InterAct's account, as represented by [Filipowski] and otherwise never embezzled or wrongfully obtained money from InterAct, as represented by [Filipowski]." In InterAct's counterclaim here, van de Groep is alleged to have written improperly two checks to himself. The Answer (to Amended Verified Complaint) and Counterclaim filed in this action, alleges, at Paragraphs 30-34, that van de Groep created, without authorization, two InterAct checks totaling $8,380.30 by which InterAct's funds were used to pay van de Groep's American Express account (and not InterAct's American Express account). Both van de Groep's allegations and the corresponding allegations of the counterclaim cannot survive. Thus, van de Groep, by proceeding in North Carolina, creates a genuine risk that different results will be achieved.

It is frequently said that the plaintiff has the right to pick his forum.[10] Van de Groep did that when he initiated this relatively complex litigation in this venue, but he has offered no reason why Filipowski should be subjected to litigating what

[9] *Wijnant van de Groep v. Andrew J. "Flip" Filipowski*, No. 6CV-06112 (N.C. Super. Ct., Buncombe Co.) (filed Dec. 11, 2006).
[10] *See, e.g.*, *PAC Fin. Corp. v. Patterson Dental Co.*, 1986 WL 7985, at *1 (Del. June 11, 1986) ("[S]peaking generally, a plaintiff has a right to a forum of its own choosing.").

amounts to either the same or a closely related dispute in separate forums. Neither fairness nor the interests of justice can be said to support dismissal, at van de Groep's urging, of his slander claim without prejudice.

Accordingly, van de Groep's motion to dismiss voluntarily Count 6 of the Complaint is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-NC