

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

WILLIAM B. CHANDLER III
CHANCELLOR

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: May 24, 2007
Decided: May 30, 2007

Jessica Zeldin
Rosenthal, Monhait & Goddess, P. A.
919 Market Street, Suite 1401
P.O. Box 1070
Wilmington, DE 19899-1070

Paul J. Lockwood
Skadden, Arps, Slate, Meagher & Flom LLP
One Rodney Square
P.O. Box 636
Wilmington, DE 19899

William M. Lafferty
Morris, Nichols, Arsht & Tunnell
1201 North Market Street
Wilmington, DE 19801

David C. McBride
Young Conaway Stargatt & Taylor, LLP
100 West Street, 17th Floor
Wilmington, DE 19899

Allen M. Terrell, Jr.
Richards, Layton & Finger, P.A.
P.O. Box 551
Wilmington, DE 19899

Edward M. McNally
Morris James LLP
P.O. Box 2306
Wilmington, DE 19899

Joel E. Friedlander
Bouchard Margules & Friedlander, P.A.
222 Delaware Avenue, Suite 1400
Wilmington, DE 19801

Peter J. Walsh
Potter Anderson & Corroon
P.O. Box 951
Wilmington, DE 19899

Re: *Ginsburg v. Philadelphia Stock Exch., Inc., et al.*
Civil Action No. 2202-CC

Dear Counsel:

Before me is plaintiff's motion to compel, which seeks to require the Strategic defendants to produce documents related to communication by and among the Strategic Investor defendants that pre-date January 1, 2004, and post-date the filing of this lawsuit, and to provide information regarding order flow from the Strategic Investor defendants to exchanges other than PHLX. For the

reasons set forth below, defendants have failed to demonstrate that this information is not subject to discovery.

I. RELEVANT TEMPORAL SCOPE OF DISCOVERY

Plaintiff's original discovery requests sought documents relating to communications between the Strategic Investor defendants after January 1, 2004. Defendants insisted that the time period is overbroad and, unilaterally, limited their responses to communications between January 1, 2005 (the year in which PHLX first began negotiating the stock sales challenged in this transaction) and June 6, 2006. Plaintiff did not consent to this limitation, but proceeded to negotiate this and other disputes as the discovery process proceeded, and then filed a motion to compel on May 8, 2007. Defendants object that the discovery request seeks documents far removed from the subject of this litigation and, in any event, that plaintiff's challenge comes too late. I cannot agree.

Plaintiff enjoys a broad and far-reaching discovery right. Court of Chancery Rule 26(b)(1) allows for discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." Plaintiff's theory is that, before their acquisition of stakes in PHLX, the defendants arranged among themselves to provide Strategic Investor defendants with a significant ownership stake in PHLX under similar, and quite favorable, terms. The discovery record contains testimony by at least one defendant that conversations between PHLX and employees of individual Strategic Investor defendants took place in 2004.¹ Communications between the Strategic Investor defendants during this time period are certainly relevant to the question of collusion. Similarly, there is no reason to suspect that any arrangement between defendants terminated on the day that plaintiff filed his lawsuit, and that later communications are irrelevant.

Defendants' lamentations over the burdens of plaintiff's request ring similarly hollow. True, the Strategic Investor defendants may expend more effort producing documents than they might have had they simply honored plaintiff's discovery request at the outset. That is the gamble a litigant takes when a request for document production is unilaterally narrowed by the receiving party. Plaintiff never conceded to defendants' narrower scope, and the Court is well aware of the

¹ See Reply Br. in Supp. of Pl.'s Mot. to Compel. Ex. B at 39.

protracted negotiations that have occurred throughout this litigation.² Plaintiff has not let his discovery demands sit idle, and there is no unfairness in a decision to require defendants to hand over information properly requested. The Court is not asking defendants to do twice the work required of them, but rather insisting that they may not take half measures.

II. ORDER FLOW TO OTHER EXCHANGES

Defendants' refusal to provide information regarding the routing of order flow to exchanges other than PHLX is similarly meritless. As an initial matter, defendants seem to have misunderstood the Court's denial of their earlier motion to dismiss, describing the "only issue in this case" as "whether the Exchange's sale of equity to the Strategic Investors exceeded the charter's ownership authority."³ Although that issue was, indeed, the cornerstone upon which the Court based its denial of the motion to dismiss, no part of the motion was ever granted; nor has any part of plaintiff's complaint been eliminated. The adequacy of the consideration provided by the Strategic Investor defendants remains an important factor for consideration at trial, if for no other reason than as a factor to be used in the calculation (and mitigation) of any eventual damages. Plaintiff maintains that the Strategic Investor defendants colluded with each other and the directors of PHLX to transfer the organization away from plaintiff investors for illusory consideration. He is entitled to demonstrate that any increase in order flow supposedly received as consideration in fact amounts to nothing more than passive or organic growth.

Nor may defendants rely upon this information's confidential and sensitive nature as a basis to deny a discovery request. The Court has already provided defendants with a confidentiality order binding upon all parties and their agents, including the ability to designate information as "attorney's eyes only." I have shown no hesitation to grant protective orders when necessary. Similarly, the fact that plaintiff might have sought to obtain this data from a third party does not obviate defendants' duty to honor the discovery request. The order flow in question originates from defendants, and defendants may be expected to produce the information themselves. If they find it more convenient to enlist the aid of a

² Plaintiff has resolved the dispute on this issue with UBS, and Citadel has agreed to produce communications that post-date the complaint.

³ Answering Br. in Opp'n to Pl.'s Mot. to Compel at 10.

third party, they may do so, but plaintiff is not required to take additional discovery from a third party in order to obtain information in defendants' possession.⁴

Plaintiff's motion to compel is granted in its entirety. Defendants have five days to comply with this Court's Order.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in black ink and is positioned above the printed name.

William B. Chandler III

WBCIII:aar

⁴ Defendants never suggest that they do not possess the information sought by plaintiff. Instead, they point to the fact that information provided by defendants regarding order flow with PHLX originated with the exchange, and that the information for all Strategic Investor defendants is centrally stored with a third party. Plaintiff is under no obligation to seek third-party information when defendants actually possess the information at issue. Of course, if defendants find it easier to comply with plaintiff's request by requesting that the third party produce order flow reports, they are free to do so. Absent an explicit denial that they possess the requested information, however, this Court has no reason not to compel production.