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

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

Dear Counsel:

When parties have reached a negotiated settlement, the litigation enters a new and unusual phase where former adversaries join forces to convince the court that their settlement is fair and appropriate. In a class action suit, the court's duty to ascertain the settlement's fairness is especially significant, because the potential claims of an entire class of plaintiffs will be extinguished by the release.

Occasionally, members of the class come forward to object to the proposed settlement. Delaware law requires that these objectors have some opportunity to review the discovery obtained by the class counsel during the course of the litigation.

Objectors to the proposed settlement in this class action suit now seek access to the discovery documents that have already been produced throughout the course of the litigation in order to ascertain the fairness and good faith of the proposed settlement. The defendants have asked this Court to limit or refuse such discovery because of the confidential nature of the materials. Because adequate discovery into the already developed record is essential to the objectors' ability to fairly present their objection to the court, I will allow discovery, subject to a new, modified confidentiality order described below.

I. BACKGROUND

On September 6, 2007, counsel for the plaintiffs informed the Court that the parties had reached a stipulation of settlement in this class action suit. Two days later, the Court entered a Scheduling Order setting a Settlement Hearing for October 22, 2007 at 11:00 a.m. to determine whether the class of plaintiffs should be finally certified[1] and whether the settlement should be approved. Between September 26 and October 4, 2007, a number of objections to the proposed settlement were filed. Those filing the objections now seek discovery in order to prepare their formal objections.

Specifically, objectors are seeking materials prepared for the mediation that ultimately led to this settlement.[2] The defendants have agreed to turn them over, but only if access is limited to the objectors' Delaware counsel, Mr. Valihura. Defendants have strenuously urged this Court to deny such access to objectors' out-of-state counsel, Mr. Mirow and Ms. Wescott. Defendants' rationale for this argument is twofold. First, they cite a confidentiality order previously entered by this Court that restricts access of confidential materials to any of the plaintiffs (or their agents) in actions pending in other courts.[3] Defendants note that Mr. Mirow and Ms. Wescott are counsel in actions pending elsewhere whose plaintiffs are

[1] This Court previously approved provisional certification for the class on May 11, 2007.

[2] The settlement reached in this matter was largely the product of an over fifteen hour mediation conducted under the supervision of Vice Chancellor Lamb pursuant to Court of Chancery Rule 174.

[3] *See* Confidentiality Order of Feb. 12, 2007, ¶¶ 7–8.

specifically mentioned in the previously entered confidentiality order.[4] Second, defendants argue that Mr. Mirow in particular has a history of discovery abuses in other *fora* and suggest that these past incidents make it especially dangerous to allow him to review confidential materials in this case.

Mr. Valihura informed the Court during a teleconference of October 5, 2007, that if the Court follows defendants' suggestion and denies access to his out-of-state co-counsel, he will seek to withdraw his representation due to his inability to meaningfully review the materials on an expedited basis. Objectors argue that a new confidentiality order prohibiting the out-of-state counsel from using the confidential materials disclosed here in their other actions should be sufficient to ameliorate defendants' concerns.

II. ANALYSIS

The objectors argue that the Court should grant unrestricted access for two reasons. First, objectors contend that the Court's review of this settlement will be governed by the heightened standard articulated in *In re MAXXAM, Inc.*[5] Second, objectors note, although *In re Amsted Industries, Inc. Litigation* limits the scope of discovery in settlement hearings, it explicitly allows discovery into the "court file of the case, all discovery that has already been taken and any other pertinent information generally available."[6] I will address these arguments in turn.

A. The Heightened Review of In re MAXXAM *Will Not Apply in this Action.*

Objectors argue that this case is controlled by the Court's earlier decision in *In re MAXXAM, Inc.* There, then-Vice Chancellor Jacobs was deeply concerned that the defendants had deliberately chosen a "friendly" plaintiff with whom to negotiate a settlement for the specific purpose of relegating another group of plaintiffs (who owned fourteen percent of the company) to the status of objectors.[7]

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[4] *See PennMont Securities v. DiDonato*, No. 06-1646 (E.D. Pa.) (alleging insider trading claims in connection with transactions involved in the *Ginsburg* litigation; plaintiff is represented by Mr. Mirow); *Feinberg v. Benton*, No. 05-4847 (E.D. Pa.) (same); *PennMont Securities v. Frucher*, No. 05-6686 (E.D. Pa.) (alleging RICO and other common law claims; plaintiff is represented by Ms. Wescott); *McGowan Investors LP v. Frucher*, No. 06-2558 (E.D. Pa.) (alleging securities law violations; plaintiff is represented by Mr. Mirow).

[5] 659 A.2d 760 (Del. Ch. 1995).

[6] *In re Amsted Indus., Inc. Litig.*, 521 A.2d 1104, 1108 (Del. Ch. 1986).

[7] *MAXXAM*, 659 A.2d at 776.

Objectors here purportedly represent ten percent of the settlement class, and they claim that because they were not part of the settlement negotiations, the agreement should be "carefully scrutinized."[8]

There are manifold distinctions, however, between the present settlement and the situation in *MAXXAM*. Here, this settlement does not appear to be an agreement between genial pseudo-adversaries. On the contrary, it seemingly represents the end result of an arduous and contentious process. The parties briefed and argued several motions,[9] engaged in significant discovery, and endured a long, difficult mediation. This is hardly the case where a friendly plaintiff willingly cooperated with defendants who wanted to disadvantage a more difficult group of plaintiffs.

B. Clearly Established Precedent Requires that Objectors Have Access to the Materials Already Produced through Discovery

Settling—rather than fully litigating—a dispute offers both parties the distinct advantage of avoiding costly discovery. It would, therefore, directly contravene that advantage if the court permitted the full scope of discovery available under Rule 26(b) in the context of a settlement hearing. Consequently, discovery in a settlement hearing is necessarily limited to the immediate issues being addressed.[10]

Objectors to a proposed settlement generally may take discovery into only (1) the good faith of the class representative (how negotiations were initiated, how they proceeded, when various aspects of the settlement were reached) and (2) the competence of the settlement (the timing of the settlement in the context of the litigation, the soundness of judgment to settle the case).[11] With respect to the

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[8] *Id.* at 776–77.

[9] *See, e.g.*, *Ginsburg v. Phila. Stock Exch., Inc.*, C.A. No. 2202-CC, 2007 WL 1662661 (Del. Ch. May 31, 2007) (denying defendants' motion for partial summary judgment); *Ginsburg v. Phila. Stock Exch., Inc.*, C.A. No. 2202-CC, 2007 WL 1703421 (Del. Ch. May 20, 2007) (granting plaintiffs' motion to compel); *Ginsburg v. Phila. Stock Exch., Inc.*, C.A. No. 2202-CC, 2007 WL 1275869 (Del. Ch. Apr. 18, 2007) (granting defendants' motion for protective order).

[10] *In re Mobile Comm'n Group Consol. Litig.*, C.A. No. 10627, 1989 WL 122038, at *1 (Del. Ch. 1989) ("discovery in this setting must be regulated with the special task of the settlement hearing in mind").

[11] *In re Amsted Indus., Inc. Litig.*, 521 A.2d 1104, 1108 (Del. Ch. 1986); a*ccord* 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1796.1 (supp. 2007) ("It is important to ensure that opponents have access to sufficient

latter, objectors should be able to ascertain the settlement from the vantage point of the class representative: "[t]hus, what they knew when; how settlement negotiations commenced, proceeded and concluded; and what motivated or animated their choices would be core areas of legitimate inquiry."[12] To effect this, the Court will permit the objectors to review "the court file in the case, all discovery that has already been taken and any other pertinent information generally available."[13] This rule serves the dual purpose of limiting discovery in the context of a settlement hearing and permitting objectors to fairly consider the judgment of the class representative in agreeing to settle.

Here, the objectors are only seeking access to the documents prepared for the mediation before Vice Chancellor Lamb. This is only a subset of the existing court file and will require no new or additional document production, interrogatories, or depositions. Defendants contend that these documents are confidential and that permitting access to objectors' out-of-state counsel will prejudice them in other actions pending elsewhere because of the potential for abuse. While I believe defendants' concerns are sincere and rational, they are insufficient to overcome this Court's need to allow objectors an opportunity to fully and fairly present their objections to the proposed settlement. Moreover, defendants' interests can be adequately protected by a new confidentiality order.

C. A Modified Confidentiality Order Will Protect Defendants from Misuse of the Confidential Materials.

The Court's decision today to allow objectors' out-of-state counsel to access the confidential mediation materials is subject to their agreeing to be bound by a new confidentiality order. Under this new order, objectors' counsel are strictly prohibited from using any of the confidential information disclosed in the mediation materials in other cases. Counsel will of course be subject to the jurisdiction of this Court should enforcement of the order be necessary.

Defendants worry that this order is insufficient; they contend that prior abuses by objectors' counsel will only be repeated. The Court declines to join defendants in such pessimistic speculation. Moreover, the Court is confident that

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information to be able to present the facts underlying their resistance to a particular settlement proposal. In that way, the court can test the true fairness of the proposal.").

[12] *Mobile Comm'n Group*, 1989 WL 122038, at *1.

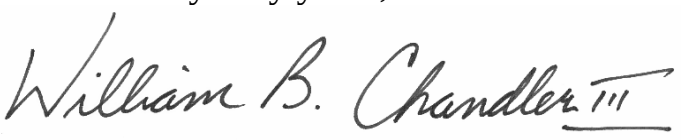
[13] *Amsted*, 521 A.2d at 1108.

its broad and potent equitable power to enforce its orders will ensure that defendants' interests are adequately protected.[14]

Therefore, the objectors are hereby granted access to the mediation materials they have requested, subject to the condition that they remain confidential within the context of this litigation. Objectors may not use the materials disclosed here in any other action in this state or any other jurisdiction. Objectors are further granted three additional days to submit their formal objection to the proposed settlement.

IT IS SO ORDERED.

Very truly yours,



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[14] *See* Ct. of Chancery R. 70(b) (describing "[c]ontempt and other remedies for disobedience of Court order"); *cf. Bullen v. Davies*, 209 A.2d 81, 85 (Del. 1965) ("We think it clear that the Court of Chancery, when the right to equitable relief has been established, has broad powers to tailor its relief to fit the circumstances, and to protect so far as possible the interests of the litigants.").