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Re: *Grunstein v. Silva*
C.A. No. 3932-VCN
Date Submitted: June 22, 2012

Dear Counsel:

On March 19, 2012, CFG produced to Defendants 5,000 pages of pleadings and court filings (the “Court Documents”) from an action pending in Maryland—*Capital Funding Group Inc. v. Walker & Dunlap, LLC*, Case No. 327075 (Cir. Ct. Md. Feb 17, 2010) (the “Maryland Action”).¹ On April 23, 2012, CFG produced to Defendants 238,000 pages worth of its own documents that it had already

¹ The background facts have been set out before. *Grunstein v. Silva*, 2011 WL 378782 (Del. Ch. Jan. 31, 2011); *Grunstein v. Silva*, 2009 WL 4698541 (Del. Ch. Dec. 8, 2009). Those facts will not be restated here. The Court will generally employ the same nomenclature as was used in its previous opinions addressing this prolonged dispute.

produced in the Maryland Action (the “Discovery Documents” and, together with the Court Documents, the “Maryland Documents”). CFG placed a “Highly Confidential” designation on the Maryland Documents, and as a result, only four lawyers at Dechert LLP (“Dechert”), one of the law firms representing the Defendants, are allowed to view those documents.

* * *

The Defendants have moved to vacate the “Highly Confidential” designation on all of the Maryland Documents. In the alternative, the Defendants contend that CFG initially produced all of the Maryland Documents as Highly Confidential, but agreed to go back and determine which documents were actually entitled to that designation, and the Defendants seek to hold CFG to that agreement. The Defendants further contend that they have asked CFG if additional Dechert attorneys could review the Maryland Documents and that CFG has refused unless those attorneys certify “that neither . . . [they] nor any of their current or former clients are involved in healthcare or financing and that they won’t represent clients

in those areas [during the pendency of this case].”² The Defendants argue that other Dechert attorneys should be allowed to review the Maryland Documents without having to make that certification.³

CFG contends that it only agreed to produce the Maryland Documents, many of which may be irrelevant to this case, because the Defendants agreed that those documents could be produced with Highly Confidential designations. CFG argues that the Defendants should be held to that agreement. With regard to the certification it is demanding of Dechert attorneys, CFG argues that Dechert represents parties in litigation in New York between Rubin Schron and Grunstein (the “New York Litigation”), and that Dechert may also represent other actual or potential customers or competitors of CFG. Therefore, CFG argues that Dechert attorneys who view the Maryland Documents must make the certification that CFG has proposed in order to assure that CFG’s confidential information is adequately protected from improper use and disclosure.

² Defs.’ Mot. to Vacate Highly Confidential Designations (“Defs.’ Mot. to Vacate”), DX 11.

³ Originally, the Defendants also objected to CFG’s designation of certain interrogatory responses, supplemental document productions, and depositions as Highly Confidential. *See id.* at ¶¶ 4-5. The parties have resolved those objections.

* * *

The Court Documents, documents created for the Maryland Action, have been designated Highly Confidential pursuant to an order entered by the Circuit Court of Maryland. The Defendants may be correct that the parties to the Maryland Action decide whether to designate specific Court Documents as Highly Confidential, and thus, that the Circuit Court of Maryland has not “determined” which Court Documents are Highly Confidential. Nevertheless, the parties to the Maryland Action are able to designate Court Documents as Highly Confidential because of a protective order entered by the Circuit Court of Maryland. The Circuit Court of Maryland has authorized the procedure by which the Court Documents, documents created for the Maryland Action, have been designated Highly Confidential. This Court is necessarily wary of de-designating documents as Highly Confidential when a court of another state, for which those documents were created, has given its imprimatur to the Highly Confidential designation.⁴

⁴ See, e.g., *Aveta Inc. v. Bengoa*, 986 A.2d 1166, 1181 (Del. Ch. 2009) (“I was and remain mindful of the importance of comity towards courts in other jurisdictions, and I did not want to issue an order that would tread on the prerogatives and jurisdiction of my judicial colleague in Puerto Rico.”).

Moreover, if there is a unique set of facts that would compel treading on the jurisdiction of another state's court, this is not it. The Defendants' primary complaint with regard to the Court Documents is that an affidavit, sworn by Dwyer (the "Dwyer Affidavit"), and attached to the complaint in the Maryland Action, contains important facts about CFG. The Defendants received the Court Documents on March 19, 2012. Approximately seven weeks later, on May 10, 2010, one of the Defendants' lawyers, who is authorized to view the Court Documents, deposed Dwyer pursuant to Court of Chancery Rule 30(b)(6).⁵ Most, if not all, important facts in the Dwyer Affidavit could have been brought out through the Rule 30(b)(6) deposition of Dwyer, and the Defendants no longer claim that that deposition is improperly designated.⁶ Therefore, the Court will not de-designate any of the Court Documents.

* * *

The Discovery Documents, unlike the Court Documents, were not created for the Maryland Action. The Discovery Documents are CFG documents that happened to be produced in the Maryland Action. Therefore, although those

⁵ Defs.' Mot. to Vacate, DX 18.

⁶ *See supra* note 3.

documents have been designated Highly Confidential in the Maryland Action, that designation does not bind this Court, at least as to those documents designated by CFG. CFG does not argue otherwise. Rather, it argues that it only agreed to produce all of the Discovery Documents because the Defendants agreed to accept those documents subject to the Highly Confidential designations entered in the Maryland Action. There is some evidence to support that position.⁷ There is, however, also some evidence supporting the Defendants' position that CFG would produce all of the Discovery Documents as Highly Confidential, and then go back, look at the Discovery Documents, and determine which were actually entitled to Highly Confidential treatment.⁸

“Discovery is subject to the exercise of the sound discretion of the Court of Chancery.”⁹ Although the agreement reached between CFG and the Defendants is

⁷ See Answering Br. of Plaintiffs in Opp'n to Defs.' Mot. to Vacate Highly Confidential Designations, PX 22 (CFG's Maryland counsel explaining that “[y]es, we agree that you may use the documents produced in our case in your case subject to the Highly Confidential designations and the restrictions that such designations place on the use of a document in either case.”).

⁸ See Defs.' Mot. to Vacate, DX 14 (CFG's counsel in this action explaining that “[u]ntil we have had a chance to review them, all of the documents produced to date by Capital Funding Group in the Maryland action . . . are designated as ‘Highly Confidential’ under the Delaware protective order.”).

⁹ *Miles v. Cookson*, 677 A.2d 507, 508 (Del. Ch. 1995) (citing *Dann v. Chrysler Corp.*, 166 A.2d 431, 432 (Del. Ch. 1960)).

probably closer to what the Defendants suggest, many of the Discovery Documents produced in the Maryland Action are likely irrelevant to this action. Thus, CFG (or, more specifically, its counsel) is to review, within 30 days of the date of this letter opinion, all of the Discovery Documents that refer to Beverly and to determine in good faith whether those documents are entitled to be designated Highly Confidential. With regard to all of the other Discovery Documents, the Defendants may request that CFG de-designate any document that they believe in good faith is relevant (or could likely be used to discover admissible evidence) and not entitled to Highly Confidential treatment.

* * *

The last (at least for now) dispute is over what certification Dechert attorneys must provide in order to review the Maryland Documents. An attorney's professional responsibilities will often be sufficient assurance that she will not improperly use or disclose confidential information. The Court, however, does recognize the unique circumstances of this case, including Dechert's representation of parties in the New York Litigation. The certification that CFG has requested, however, would carry too much risk of unknowing and unintentional violation.

The Court adopts the following formulation: Dechert attorneys may review the Maryland Documents if they certify that during the pendency of this case they will neither be involved in the New York Litigation, nor represent any client in a matter involving the purchase or sale (including financing) of any nursing home or adult assisted living center.

* * *

In sum, the Court will not de-designate any of the Court Documents as Highly Confidential; CFG, through its counsel, is to review, within 30 days of the date of this letter opinion, all of the Discovery Documents that refer to Beverly, and determine whether those documents are entitled to be designated Highly Confidential; and Dechert attorneys may review the Maryland Documents if they certify that during the pendency of this case they will neither be involved in the New York Litigation nor represent any client in a matter involving the purchase or sale (including financing) of any nursing home or adult assisted living center.

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IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K