EFiled: Aug 16 2012 06:31PM EDT
Transaction ID 45951906
Case No. 5334-VCN

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August 16, 2012

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Re: *New Jersey Carpenters Pension Fund v. infoGROUP, Inc., et al.*
C.A. No. 5334-VCN
Dated Submitted: July 17, 2012

Dear Counsel:

Plaintiff New Jersey Carpenters Pension Fund (the "Plaintiff"), a former shareholder of Defendant *info*GROUP, Inc. ("*info*GROUP"), brought this action against *info*GROUP, its former chairman, Defendant Vinod Gupta ("Gupta"), and the other former members of its board of directors (the "*info*GROUP

Defendants").[1] In essence, the Plaintiff alleges that Gupta, desperate for liquidity, forced a merger between *info*GROUP and CCMP Capital Advisors ("CCMP") on terms unfair to *info*GROUP's former shareholders. The *info*GROUP Defendants are alleged to have abandoned their fiduciary duties in the face of pressure from Gupta. The Plaintiff's Second Amended Complaint (the "Complaint") has survived a motion to dismiss.[2] Before the Court are four discovery motions.

1. Plaintiff's Motion to Compel Directed to Gupta

Because the Plaintiff's claim depends to a large extent on its allegations that Gupta lacked liquidity and took steps—to the detriment of *info*GROUP's shareholders—to solve this problem, the Plaintiff seeks to inquire into Gupta's personal financial condition. As with several of the discovery disputes brought to the Court, the depth and the breadth of the discovery requests—perhaps more so than the nature of the information sought—form the basis of the vigorous debate. The Plaintiff wants financial records from August 2008, when Gupta apparently first floated the notion of selling *info*GROUP, until July 2010, when the merger with CCMP closed. Gupta has provided a summary of his financial condition as of

[1] The term "Defendants" includes *info*GROUP, Gupta, and the *info*GROUP Defendants.
[2] *New Jersey Carpenters Pension Fund v. info*GROUP, *Inc.*, 2011 WL 4825888 (Del. Ch. Oct. 6, 2011).

February 28, 2010, essentially at the time the merger was approved. The key question, as framed by the Complaint, depends upon Gupta's financial circumstances at the time the merger was approved. What happened before and what happened after is substantially less important.[3] An accurate understanding of Gupta's finances, as of the time of the approval of the merger, is relevant and a proper topic for discovery. Gupta's financial statement[4] shows a significant positive asset balance. But, that depends upon an entry labeled—Marketable Securities, which accounts for 78% of his total assets and 92% of his net worth. If the securities were readily marketable, liquidity concerns would be reduced. If the securities designated as marketable were nonetheless difficult to convert into cash, Gupta's liquidity problems could be greater. The proper pathway, first, is to allow the Plaintiff to see and understand what the marketable securities were. That information should allow the Plaintiff to assess Gupta's liquidity needs at the time of approval of the merger. To that end, Gupta shall provide to the Plaintiff—subject to the confidentiality order—a full listing of the "marketable securities." Because the temporal scope of this reporting would be limited, Gupta will not be,

[3] Gupta left the board of *info*GROUP on March 8, 2010.
[4] Affidavit of Kent A. Bronson (Apr. 2, 2012) Ex. 4.

at least at this time, required to provide comparable financial information for other times. Gupta, however, shall also provide the underlying records to substantiate entries on the summary that he has provided, including the additional information required with respect to the marketable securities. The Plaintiff is entitled to sufficient records and documents to test the accuracy of the summary or compilation supplied by Gupta.

* * *

The next issue raised by the Plaintiff with respect to Gupta's discovery responses is whether Gupta must provide documents (including emails) from after his vote on the merger (March 8, 2010) until the merger was completed (July 1, 2010). Although he was no longer subject to fiduciary duties as an *info*GROUP director, communications after events that occurred when he was burdened by fiduciary obligations may inform an understanding of his actions taken while a fiduciary. Gupta does not seriously dispute this notion.

Gupta's objection is the burden, i.e. expense, of searching for documents over a three-month period from more than two years ago. He focuses on an agreement reached by counsel during the preliminary injunction phase. Discovery

then was limited to the period before he left the board. In essence, Gupta argues that a deal is a deal. As persuasive as such an argument may be generally, it fails here because of the nature of expedited discovery and the short timeframe leading up to the preliminary injunction hearing. That discovery process in that context frequently must be truncated. The accommodations necessarily undertaken in light of situational realities cannot be sustained once the more typical litigation schedule applies. The cost of a party's "re-do" of discovery (or, perhaps more accurately, extension of the discovery period) cannot be classified as an undue burden under Court of Chancery Rule 26, and the search of Gupta's records over the approximately final three months must be performed.[5]

* * *

The Plaintiff also seeks all communications between Gupta and *info*GROUP's board members and officers. Gupta has produced all documents that "related to the merger" in the judgment of his attorneys. To search again, according to Gupta, would yield only irrelevant documents. Gupta represents that

[5] To the extent that there is a dispute about Gupta's production of documents from the Blackrock litigation, that question has been resolved. Transcript of Oral Arg. (July 17, 2012) ("Tr.") at 4-5. Similarly, there appears to be substantial agreement with respect to the production of the Database LLC litigation documents. Pl.'s Mot. to Compel Discovery Compliance by Def. Vinod Gupta, at 12 n.11.

all communications involving board members have been produced. The Court accepts that representation. Gupta, however, has not separately produced communications of senior executives, not involving board members.

How Gupta dominated the *info*GROUP Defendants, if he did, is one of the most important issues in this case. Senior executives—especially those involved directly in the merger negotiations—could be expected to have addressed this issue, and perhaps others, in communications. Thus, although the likelihood of uncovering any communication particularly useful may be relatively small, the likelihood is sufficient to sustain discovery. The problem, as the parties seem to recognize, is the scope of the search. This certainly does not need to be a search of employees generally; instead, the appropriate balance is a search of key executives who were actively involved in the merger negotiation process. The Court does not have sufficient information to identify, with any degree of confidence, the set of executives who would be appropriate for such inquiry. Counsel are requested to discuss and attempt to agree upon a list of the appropriate high ranking employees. If they are unable to resolve this question, a return to the Court will, unfortunately, appear to be unavoidable.

Accordingly, the Plaintiff's motion regarding Gupta's discovery responses is granted in part and denied in part.

2. Plaintiff's Motion to Compel Directed to the *info*GROUP Defendants[6]

The Plaintiff and the *info*GROUP Defendants debate the proper scope of discovery in many dimensions: the cast of *info*GROUP employees to be subjected to discovery, the timeline, and the breadth of the topics. The Plaintiff seems to concede that its requests could be narrowed, and the *info*GROUP Defendants seem to concede that they do not have a viable, absolute bar to all of the discovery now sought by the Plaintiff.

The Plaintiff's motion was not prompted by an abject breach of the *info*GROUP Defendants' discovery obligations. For example, it appears that the requests for production of communications involving the *info*GROUP Defendants were satisfied.[7] Although the Plaintiff accuses the *info*GROUP Defendants of trying to concoct a senior executive discovery immunity doctrine, the *info*GROUP Defendants' pending opposition derives first from the breadth of the Plaintiff's range of individuals targeted for discovery: all employees. *info*GROUP employees

[6] From time to time in this letter opinion, the terms "*info*GROUP Defendants" will, as evidenced by context, also include *info*GROUP.
[7] Tr. 28-29, 32.

generally are not likely to have had access to the matters which define this litigation, especially Gupta's relationship with Board members. Yet, discovery of some employees can readily be justified. This collection of individuals will be those employees who were senior enough to have interacted regularly with the Board and who were involved substantially in the "deal process." Beyond that, discovery would be unduly burdensome and unlikely to lead to the discovery of admissible evidence.

The Plaintiff and the *info*GROUP Defendants also quarrel about the appropriate timeframe. The Plaintiff wants to start in August 2008 when Gupta lost his position as *info*GROUP'S Chief Executive Officer; the *info*GROUP Defendants argue that December 2008, when Gupta first made public his interest in a sale of the Company, should control. Perhaps there was something before Gupta's plans became public, but that is simply too remote to support a review of records from that period. Starting when the plan became public should suffice. As for the end of the appropriate discovery period, the Plaintiff looks to the close of the merger in July 2010 while the *info*GROUP Defendants contend that the conclusion of the go-shop period at the end of March 2010 is the appropriate

marker.[8] The *info*GROUP Defendants assert that Gupta's influence was of little moment after the vote and completion of the go-shop period. They may well be correct that the likelihood of a probative harvest wanes after the go-shop period, but they remained fiduciaries and how they discharged their duties until the merger closed, especially if, as the Plaintiff alleges, they had been coerced by inappropriate pressures to support the merger, cannot be excluded as an appropriate period for inquiry.

The *info*GROUP Defendants' potential liability rests on how they discharged their fiduciary duties. The relevant evidence for that precise question is what did they know when they acted? What the key employees knew, however, can also aid the review not only of the *info*GROUP Defendants' actions, but also those of Gupta. The search must have some rational, discernable boundary because burdensome and likely irrelevant meandering should be avoided. The Court is wary of defining the perimeter but, in this instance, it is a task that seemingly cannot be avoided. These are the topics, perhaps imprecisely delineated, that the

[8] This appears to be the one, limited period for which the records of the *info*GROUP Defendants have not been reviewed.

Court concludes from the record before it, constitute appropriate areas of inquiry of the *info*GROUP employees:[9]

1. Instances of Gupta's lobbying or pressuring the *info*GROUP Defendants with respect to the sale of the Company;

2. Instances where Gupta threatened or otherwise intimidated employees of *info*GROUP;

3. Indications that Company employees, after assessing *info*GROUP's financial performance and prospects, thought that it was inappropriate at the time to sell *info*GROUP;

4. Investigations and discussions into leaks of Company confidential information.[10]

5. Discussions among two or more *info*GROUP Defendants or between an *info*GROUP Defendant and Gupta involving any post-*info*GROUP employment plans;

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[9] It is possible—maybe even likely—that the Court has omitted critical areas of inquiry. If so, the Court is confident that such shortcomings will be brought to its attention. In addition, any such efforts should be undertaken before the discovery efforts required by this letter opinion are initiated.

[10] Although the Court has considered the relevant set of employees to be those senior employees intimately involved in the "deal," it may be that there were other employees whose job function caused them to focus on the source of release of confidential Company information.

6. Communications from March 8, 2010 to June 29, 2010 about any entity's interest in potentially acquiring *info*GROUP;

7. Communications involving customer due diligence provided to any bidders or potential bidders during the auction process;

8. Communications related to the merger, or the shareholder's vote on June 29, 2010;

9. Indications as to whether any *info*GROUP Defendant thought the merger consideration was inadequate;

10. Indications that *info*GROUP was taking any actions outside the ordinary course of business in response to the auction process.

To the foregoing extent, the Plaintiff's motion is granted; otherwise, it is denied.

* * *

In early 2009, *info*GROUP's Executive Vice President for Business Conduct and General Counsel (the "General Counsel") investigated possible leaks of confidential company information.[11] Potential litigation against the source of the

[11] Affidavit of Thomas J. McCusker (June 19, 2012) at ¶¶ 4-7.

leaks was among the possible actions.[12] As part of that investigation, the Company's outside counsel retained a handwriting expert, Sylvia Kessler, to assist in that effort. The results of her handwriting analyses were set forth in the Kessler Report, which was shared only with *info*GROUP's counsel (both in-house and outside) and certain *info*GROUP directors. The Plaintiff has accused Gupta of leaking confidential company information and now seeks the production of the Kessler Report to bolster its claim. The Plaintiff has proof to support its allegations, but the Plaintiff anticipates that the Kessler Report would constitute compelling evidence of Gupta's wrongful conduct.

The Company invokes both the attorney-client privilege and the work product doctrine to shield the Kessler Report from disclosure. The parties dispute whether the Kessler Report is fairly subject to either privilege. The Kessler Report is clearly subject to the work product doctrine. It was prepared at the direction of counsel in anticipation of possible legal action; its confidential status has been maintained.[13] That litigation did not ensue is not dispositive of the question.

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[12] *Id.* ¶ 5.
[13] *Rembrandt Techs. LP v. Harris Corp.*, 2009 WL 402332 (Del. Super. Feb. 12, 2009); *see also Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365, 368 (Del. 2011).

The parties also debate the proper standard for assessing a claim under the work product doctrine. The Plaintiff contends that *Garner v. Wolfinbarger*[14] and its progeny, which all agree would provide the framework for assessing a claim of attorney-client privilege in the context of fiduciary litigation, applies. Under *Garner*, the party seeking access must satisfy a good faith standard which requires a showing of "(i) [that] the claim is colorable; (ii) the necessity or desirability of information and its availability from other sources; and (iii) the extent to which the information sought is identified as opposed to blind fishing expedition."[15] In contrast, Court of Chancery Rule 26(b)(3) sets a more stringent standard for access generally to materials protected under the work product doctrine. Discovery of such materials may only be achieved if the party is able to show that it "has a substantial need for" the documents at issue and that it "cannot acquire a substantial equivalent of the materials by other means without undue hardship."[16]

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[14] 430 F.2d 1093 (5th Cir. 1970).
[15] *Ryan v. Gifford*, 2007 WL 4259557, at *3 n.4 (Del. Ch. Nov. 30, 2007).
[16] *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622, at *11 (Del. Ch. Nov. 12, 2002).

Although the Delaware Supreme Court has indicated in what appears to have been dictum that the *Garner* good faith standard governs discovery of work product materials,[17] this Court has, in the years following that decision, held that *Garner* does not apply to work product materials.[18] In *Saito*, this Court explained that whether a party may discover work product is determined solely by looking to Court of Chancery Rule 26(b)(3), and thus, that the *Garner* good cause standard is inapplicable to the issue of whether work product is discoverable:

> Under Chancery Court Rule 26(b)(3), a party may discover non-opinion work product if it shows it has a *substantial need* for the materials and it cannot acquire a substantial equivalent without *undue hardship*. . . . Plaintiff has failed to meet the substantial need/undue hardship test in this instance. In his opening brief, plaintiff applies the *Garner* factors to the work product, even though this Court has held that there is no *Garner* exception to the work product privilege.[19]

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[17] *Zirn v. VLI Corp.*, 621 A.2d 773, 782 (Del. 1993); *see also Aguinaga v. John Morrell & Co.*, 112 F.R.D. 671, 682 (D. Kan. 1986).

[18] *Saito*, 2002 WL 31657622, at *11-12; *In re Fuqua Indus., Inc. S'holder Litig.*, 2002 WL 991666, at *3 (Del. Ch. May 2, 2002); *see also Carlton Invs. v. TLC Beatrice Int'l Hldgs, Inc.*, 1996 WL 535407, at *1 n.1 (Del. Ch. Sept. 17, 1996).

[19] 2002 WL 31657622, at *11 (citing *Fuqua Indus.*, 2002 WL 991666, at *3). *See also id.* at *12 ("Just as Saito has failed to establish his substantial need/undue hardship for non-opinion work product, he has similarly failed to meet the higher burden required to receive opinion work product. Thus, the motion to compel these documents is denied.").

The rationale for looking only to Rule 26(b)(3) comes from the text of the rule itself:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable . . . [, which were] prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . *only upon a showing* that the party seeking discovery has substantial need of the materials . . . and . . . is unable without undue hardship to obtain the substantial equivalent . . . .[20]

Thus, Rule 26(b)(3), by its own terms, is the only framework that the Court should use in determining whether work product is discoverable.

The United States Court of Appeals for the Fifth Circuit, the same Court that authored *Garner*, has offered a similar explanation as to why the Federal Courts should only look to Federal Rule of Civil Procedure Rule 26(b)(3), which is substantially similar to Court of Chancery Rule 26(b)(3), when determining whether work product is discoverable:

> The plain language of . . . [Federal Rule of Civil Procedure 26(b)(3) is inconsistent with *Garner*. In adopting the rule, a good cause standard was rejected in favor of the substantial need/undue hardship test. . . . Since the good cause standard is the standard in *Garner,* it follows that *Garner* should not apply to work product discovery.[21]

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[20] Ct. Ch. R. 26(b)(3) (emphasis added).
[21] *In re Int'l Sys. and Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1240 (5th Cir. 1982).

Therefore, *Garner* is inapplicable to work product discovery, and the Plaintiff must show substantial need and undue hardship to be entitled to the Kessler Report.

The Plaintiff has not satisfied this burden. Assuming that the Kessler Report would confirm Gupta's role in the leaks, the Plaintiff already has proof of his role.[22] Presumably, the Kessler Report would strengthen its position, but there usually, if not always, is room for additional proof of a contested fact. That a privileged document would help does not amount to a showing that a party has a substantial need for it. Similarly, that the Plaintiff apparently already has acquired the substantial equivalent of the information in the Kessler Report, even before launching the next round of depositions, undercuts any claim of undue hardship.

In sum, the Kessler Report is appropriately treated as work product, and the Plaintiff has not crossed the threshold that otherwise protects such materials.

[22] *See, e.g.*, Compl. ¶¶ 74 a-j.

3. *infoGROUP* Defendants' Motion to Compel Directed to Plaintiff and Gupta's Motion to Compel Directed to Plaintiffs

Both the *info*GROUP Defendants and Gupta seek to compel the Plaintiff to answer their contention interrogatories. This is largely a matter of timing,[23] one committed to the Court's discretion.[24]

Court of Chancery Rule 33(c) provides in pertinent part:

> An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the Court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

The Defendants note that this case is more than two years old and that significant discovery has occurred. They claim to need the answers in order to prepare for the upcoming round of depositions. Finally, the Defendants, the *info*GROUP

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[23] The Plaintiff also complains that some of the interrogatories are overbroad. Perhaps they could be more narrowly tailored, but they can help to establish the nature and extent of the claims against which the Defendants are being called upon to defend. The interrogatories are not objectionable; whether faithful answers will be useful remains to be seen.

[24] *Compare In re The Walt Disney Co. Deriv. Litig.*, 2003 WL 22682621, at *1 (Del. Ch. Oct. 30, 2003) (rejecting the request of plaintiffs who had completed significant discovery to delay contention interrogatories because defendant was entitled to understand before his deposition the factual basis of the claims against him) *with Ryan v. Gifford*, 2008 WL 372507, at *1 (Del. Ch. Feb. 7, 2008) (delaying answers to contention interrogatories until "after the completion of discovery or some later time").

Defendants in particular, claim uncertainty about the nature of the Plaintiff's claims. Contention interrogatories will frequently narrow or clarify the issues.

The Plaintiff contends that it should be allowed to wait until the completion of discovery to answer the contention interrogatories. It argues that an interim response at this time would not only be premature but it would be unnecessarily burdensome. The facts backing up its contentions will, no doubt, expand as a result of ongoing discovery. In short, the Plaintiff argues that it is unreasonable to have to answer such interrogatories at least twice. After all, this is not a case where the Plaintiff was a participant in the events which gave rise to it. Finally, the Plaintiff turns to the Complaint and asserts that it provides the Defendants with sufficient factual background to move forward at this stage.

The Complaint focuses on Gupta's actions and, at times, carries a conclusory air with regard to the actions of the *info*GROUP Defendants. The Plaintiff has had sufficient opportunity, through discovery to date, to develop its case to the point where it can, and should, answer the *info*GROUP Defendants' contention interrogatories.[25] This is necessary from the *info*GROUP Defendants'

[25] Those answers necessarily will be based "upon its present knowledge." *See Carlton Invs. v.*

perspective—they need the answers for purposes of discovery and to determine how to address the allegations and damages claims brought against them.[26] On the other hand, the Complaint provides sufficient information as to Gupta because it is quite detailed in its allegations of his conduct. To require the Plaintiff to provide answers to Gupta's contention interrogatories, at this time, would result in an unnecessary burden on the Plaintiff.

Accordingly, the *info*GROUP Defendants' motion to compel is granted and Gupta's motion to compel is, at least for the time being, denied.[27]

**IT IS SO ORDERED.**

Very truly yours,

***/s/ John W. Noble***

JWN/cap
cc: Register in Chancery-K

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*TLC Beatrice Int'l Hldgs., Inc.*, 1996 WL 132983, at *4 (Del. Ch. Mar. 15, 1996).

[26] Indeed, "the need for response before a scheduled deposition" has been recognized as a reason for not delaying the answers to contention interrogatories. *Ryan*, 2008 WL 372507, at *1.

[27] There is significant overlap between Gupta's contention interrogatories and the *info*GROUP Defendants' contention interrogatories. Gupta will be entitled to rely upon the responses made by the Plaintiff to the *info*GROUP Defendants' contention interrogatories. All Defendants should understand that the Plaintiff's answers to contention interrogatories are, even though this case is been ongoing for some time, properly viewed as "a work in progress" and will likely be revised.