

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN RE MORROW PARK HOLDING LLC : CONSOLIDATED
: No. 2017-0036-TMR

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Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Monday, October 22, 2018
10:02 a.m.

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BEFORE: HON. TAMIKA MONTGOMERY-REEVES, Vice Chancellor

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TELEPHONIC RULINGS OF THE COURT ON PLAINTIFF VILLAGE
GREEN RESIDENTIAL PROPERTIES LLC'S MOTION FOR RELIEF
FROM PROTECTIVE ORDER AND COMPELLING DEFENDANT CCI AND
MOTION TO RELEASE THE BOND AND COMPATRIOT'S MOTION TO
INCREASE THE INJUNCTION BOND

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0522

1 APPEARANCES: (Via teleconference)

2 MICHAEL J. FARNAN, ESQ.
Farnan LLP

3 -and-

4 MARC L. NEWMAN, ESQ.
of the Michigan Bar
The Miller Law Firm, P.C.

5 -and-

6 CHRISTOPHER E. KENTRA, ESQ.
of the Illinois Bar
Burke, Warren, MacKay & Serritella, P.C.
7 for Plaintiff/Counterclaim Defendants

8 RICHARD P. ROLLO, ESQ.
ANTHONY M. CALVANO, ESQ.
Richards, Layton & Finger, P.A.

9 -and-

10 ALAN S. LOEWINSOHN, ESQ.
of the Texas Bar
11 Loewinsohn Flegle Deary Simon LLP
for Counterclaim Plaintiffs/Third-Party
12 Plaintiffs CCI Historic, Inc., Compatriot
Capital Inc., VG ECU Holdings LLC, and Village
13 Green Holdings LLC

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1 THE COURT: Good morning, everyone.

2 ALL COUNSEL: Good morning, Your
3 Honor.

4 THE COURT: Thank you so much for
5 jumping on the line. I wanted to go ahead and give
6 you an answer on the motion for relief from the
7 confidentiality order and compelling production of
8 documents from defendant CCI, and on the motions
9 related to the bond, the motion to increase the bond
10 and the motion to release the bond.

11 I'm going to start with the
12 confidentiality order motion. As you-all know,
13 pending before me is VGRP's motion for relief from the
14 confidentiality order and compelling defendant CCI.
15 Plaintiff seeks an order stating that the terms of the
16 June 5th, 2017, confidentiality order do not allow CCI
17 and its affiliates -- and I will refer to CCI and the
18 affiliates as Compatriot -- to claw back certain
19 documents that Compatriot produced to VGRP.

20 For the reasons that I will explain, I
21 deny that motion.

22 Compatriot has made eight productions
23 between June 24th and July 21st, 2017. It had
24 produced a total of 156,791 documents at the time of

1 the hearing. On three occasions it clawed back
2 privileged documents that were inadvertently produced.
3 It seeks to claw back a total of 2,904 documents from
4 those productions.

5 VGRP argues that Compatriot produced
6 the documents due to willful indifference and not due
7 to any inadvertent production.

8 First, plaintiff argues that the
9 confidentiality agreement in place sets the standard
10 for evaluating the merits of an attempt to claw back
11 materials and that the standard is inadvertence under
12 Jefferson v. Dominion Holdings. In Jefferson, when
13 considering whether a production of discovery
14 materials was inadvertent, this Court looked to "(1)
15 the reasonableness of the precautions taken to prevent
16 the inadvertent disclosure, (2) the time taken to
17 rectify the error, (3) the scope of the discovery and
18 the extent of disclosure, and (4) the overall
19 fairness, judged against the care or negligence with
20 which the privilege is guarded."

21 Plaintiff argues that the timeline of
22 events in the correspondence demonstrates that
23 Compatriot's productions were not inadvertent, but,
24 rather, the result of willful indifference.

1 Specifically, VGRP states that "CCI's production
2 process gave little to no attention to the documents
3 being produced. CCI apparently elected not to bother
4 to review documents for privilege; and it allowed this
5 to be repeated another seven times, until it claimed
6 to discover it when VGRP filed one of the documents."
7 Plaintiff argues that inadvertence requires a level of
8 attentiveness that Compatriot did not show. Plaintiff
9 argues that Compatriot was so negligent or reckless
10 that the Court should deem the production intentional.
11 Thus, plaintiff argues that the production was not
12 inadvertent under Jefferson and cannot be clawed back.

13 Second, plaintiff avers that
14 Compatriot has not complied with the confidentiality
15 order because Compatriot appears to be shielding all
16 of Mark Van Kirk's documents, despite Van Kirk not
17 being Compatriot's lawyer and being a business
18 executive as well as a lawyer. Plaintiff says this
19 shows a lack of good faith.

20 Plaintiff requests that this Court
21 find that privilege does not apply to the documents in
22 question, require Compatriot to pay the expense of an
23 in camera review by the Court or a Court-appointed
24 special master, and/or require Compatriot to cover the

1 cost of the most recent clawback. Plaintiff's motion
2 asks this Court to compel Compatriot to produce a
3 privilege log, but that claim is moot because
4 Compatriot produced a privilege log itself. In the
5 event that these claims are barred by the
6 confidentiality order, plaintiff seeks a modification
7 of the order to allow these claims.

8 Before addressing the substance of
9 plaintiff's arguments, Compatriot argues that the
10 terms of the confidentiality agreement --
11 specifically, paragraphs 17 and 19 -- bar plaintiff
12 from using facts and circumstances of disclosure to
13 support a motion to compel, which is what Compatriot
14 says is happening here.

15 Moving to plaintiff's specific
16 argument, Compatriot first argues that the Jefferson
17 standard for inadvertence weighs in favor of
18 Compatriot because, one, Compatriot took reasonable
19 precautions; two, Compatriot acted promptly to remedy
20 the inadvertent production; three, the volume of the
21 inadvertently produced documents was low given the
22 scale of the total production; and four, fairness
23 weighs in favor of Compatriot.

24 Second, Compatriot argues that Mark

1 Van Kirk's dual role as a lawyer and executive does
2 not justify global waiver of privilege over his
3 documents.

4 Thus, Compatriot asks that I deny the
5 motion in its entirety.

6 I do not resolve the parties' dispute
7 regarding paragraphs 17 and 19 of the confidentiality
8 order because Compatriot wins this motion even under
9 plaintiff's interpretation.

10 In its motion, plaintiff argues that
11 the limitation on a party's use of "fact or
12 circumstance of the inadvertent production"
13 presupposes that the production was inadvertent. That
14 is, plaintiff argues that this Court must first
15 determine that the production is inadvertent under
16 Jefferson before plaintiff is barred from asserting
17 the fact of the production as a ground for waiver.

18 Even if plaintiff is correct that
19 there's a difference in paragraph 19(c) of the
20 confidentiality order between "Inadvertent Production
21 Material" and "inadvertent production" such that
22 Inadvertent Production Material -- which the discovery
23 documents in question must at least be treated as --
24 can be produced in a way that is not inadvertent,

1 under the terms of Jefferson, which would allow
2 plaintiff to argue the facts and circumstances of the
3 production as a ground for waiver, I still find in
4 Compatriot's favor on the basis of the Jefferson
5 factors.

6 As to the first factor, Compatriot
7 took reasonable and customary precautions to prevent
8 inadvertent production. Its procedures included using
9 key word searches to generate a pool of responsive
10 documents, using a different set of key word searches
11 to set aside some of those responsive documents as
12 potentially privileged and subjecting those documents
13 to a separate review. It then reviewed the remaining
14 responsive documents for privilege before production
15 and flagged families of any documents marked as
16 privileged and subjected those to an additional level
17 of review. This is all standard practice. The
18 breakdown here seems to have occurred not due to a
19 lack of sufficient process or protocol, but due to the
20 failure of a vendor and one paralegal to follow the
21 established and acceptable protocols.

22 As to the second factor, Compatriot
23 took a reasonable amount of time to rectify the error.
24 Given the number of documents that Compatriot had to

1 review, I'm not convinced that the turnaround
2 constitutes undue delay in this case.

3 As to the third factor, the volume of
4 documents being produced and later clawed back is
5 considerable, but the number is not so great to
6 justify a waiver of attorney-client privilege,
7 especially when considered against the overall number
8 of documents produced thus far.

9 As to the fourth factor, Compatriot's
10 errors have been the cause, according to plaintiff, of
11 difficulty for plaintiff. But again, I don't think
12 this is sufficient to justify a global waiver of
13 attorney-client privilege when weighed against the
14 other Jefferson factors.

15 Considering these four factors, I find
16 that the material at issue was inadvertently produced
17 under the terms of Jefferson. Compatriot took
18 reasonable precautions to prevent the inadvertent
19 disclosure. Compatriot implemented a multilevel
20 system of review for responsiveness and privilege,
21 including using search terms to identify potentially
22 responsive documents, using different search terms to
23 check for privilege, identifying families of documents
24 for additional privilege review, and using humans to

1 check for privilege issues. The fact that there were
2 errors does not mean that the process was not
3 reasonable.

4 Compatriot took a reasonable amount of
5 time to rectify the error. Given the size of the
6 production involved, the amount of work Compatriot had
7 to do to fix the mistakes, and the speed at which this
8 litigation has proceeded, Compatriot's timetable is
9 not unreasonable under these circumstances.

10 The scope of the clawback was not so
11 large as to overcome the other Jefferson factors. It
12 would not be fair overall to Compatriot to impose a
13 global waiver of privilege, as plaintiff suggests,
14 based on the mistakes in reviewing documents for
15 privilege and in overseeing vendors conducting the
16 production.

17 Because the material was inadvertently
18 produced under Jefferson, I will not find that
19 Compatriot waived privilege. Also, because Compatriot
20 has now produced a privilege log, plaintiff may
21 challenge the privilege designation of individual
22 documents following standard practices and procedures
23 to assert any challenges with respect to the privilege
24 log.

1 At oral argument, plaintiff and
2 Compatriot agreed that Compatriot would send plaintiff
3 a new set of documents removing all the clawed back
4 documents, and that plaintiff would upload this new
5 set of documents onto its document review system in
6 place of the old documents. They further agreed that
7 plaintiff would not use any copies of the old, clawed
8 back documents that remained on its computer network,
9 but there isn't a need to certify that all copies are
10 destroyed.

11 I'm satisfied that these measures
12 sufficiently address the potential costs that were
13 identified, so I'm not going to shift costs at this
14 time.

15 For those reasons, plaintiff's motion
16 for relief from the protective order is denied; the
17 motion to compel defendant CCI is denied; and the
18 motion to amend the confidentiality order is denied.

19 That brings me to the pending motions
20 related to the bond. Pending before me are plaintiff
21 VGRP's February 28, 2018, motion to refund the cash
22 bond amount securing the January 20th, 2017,
23 preliminary injunction and defendants', which I will
24 refer to as Compatriot's, March 28, 2018, motion to

1 increase the injunction bond in connection with the
2 preliminary injunction and status quo order entered on
3 January 20th, 2017.

4 As you-all know, and are familiar
5 with, Court of Chancery Rule 65(c) provides that "[n]o
6 restraining order or preliminary injunction shall
7 issue except upon the giving of security by the
8 applicant, in such sum as the Court deems proper, for
9 the payment of such costs and damages as may be
10 incurred or suffered by any party who is found to have
11 been wrongfully enjoined or restrained."

12 The security, usually a bond, fixes
13 the maximum amount that an enjoined party may recover.
14 Because actual damages are uncertain, and because a
15 wrongfully enjoined party has no recourse other than
16 the security, the Court should err on the high side of
17 setting a bond. The party seeking the bond, however,
18 must support its application with facts of record or
19 some realistic as opposed to a yet-unproven legal
20 theory from which damages could flow to the party
21 enjoined.

22 The amount of a bond is a matter of
23 discretion, but the Court must satisfy itself that
24 there is a credible basis for the estimated damages.

1 When the Court errs on the high side, the damage it
2 does is small, because the cost of a bond typically is
3 a very small fraction of its face value.
4 Unfortunately, an error in the other direction
5 produces irreparable injury, because the damages for
6 an erroneous preliminary injunction cannot exceed the
7 amount of the bond.

8 Plaintiff argues that the
9 circumstances of the case have fundamentally changed
10 since the bond was ordered and that those changes mean
11 that the bond is no longer justified. Plaintiff's
12 argument hinges on the notion that the bond's purpose
13 is to cover the difference between plaintiff's
14 preferred price for the corporate membership interests
15 and Compatriot's preferred price for the corporate
16 membership interests.

17 Compatriot emphasizes the importance
18 of Rule 65(c), pointing out that the bond will set an
19 absolute cap on the amount they can recover for a
20 wrongful injunction under any circumstances, and so to
21 release the bond would prevent them from recovering
22 anything under those circumstances. It argues that
23 the purpose of the bond is not to cover the difference
24 between the proposed prices, but to protect it against

1 damages arising from an improvidently issued
2 injunction.

3 The dispute over the bond centers on
4 the question of the bond's purpose. The bond's
5 purpose is to secure the enjoined party -- here,
6 Compatriot -- against damages arising from an
7 improvidently issued injunction. The bond is not an
8 escrow account to cover the difference between the
9 parties' preferred sale prices.

10 I find that the sale process underway
11 in the Pennsylvania action will not moot the need for
12 a bond. The Pennsylvania action and the accompanying
13 sale do not remove the possibility that Compatriot was
14 harmed by an improvidently issued injunction, so the
15 need for the bond remains. Also, the two actions
16 relate to two different property interests. The
17 Pennsylvania action relates to the underlying
18 apartments, while the Delaware action relates to the
19 sale of the membership interests. For those reasons,
20 the Pennsylvania sale will not end the Delaware
21 action, and the bases for damages still apply.

22 The parties contest the following
23 specific bases of potential damages in the request to
24 increase the bond.

1 Compatriot argues that if plaintiff
2 ultimately purchase Compatriot's membership interests
3 pursuant to operating agreement Section 10.10,
4 Compatriot is potentially entitled to interest on the
5 proceeds it would have received almost two years ago
6 but for the injunction. That interest is estimated at
7 1.45 million to date, or 2 million, 2.6 million, or
8 3.2 million in 6, 12, and 18 months respectively.

9 Plaintiff states the parties'
10 disagreement over the terms of the release that was to
11 accompany the sale under the terms of Section 10.10 of
12 the operating agreement means that there would not
13 have been a sale regardless of the injunction. Since
14 the injunction did not prevent the sale, Compatriot is
15 not entitled to interest that would have accrued since
16 then.

17 I find Compatriot's claim to interest
18 from the proceeds of an earlier sale credible.
19 Although Compatriot executives testified that
20 Compatriot would not have provided the release VGRP
21 thought it was entitled to, VGRP, faced with the
22 possibility of losing the right to buy the property,
23 credibly could have accepted Compatriot's preferred
24 form of release. Compatriot's claims of damages up to

1 \$3.2 million on this basis are reasonable.

2 Compatriot next argues that if
3 Compatriot ultimately purchases plaintiff's membership
4 interests in MP Holding and MP Managing pursuant to
5 Section 10.10, Compatriot is potentially entitled to
6 recover any increased transaction costs it incurs
7 based on rising interest rates in the general economy
8 and the effects on its financing costs. These costs
9 are not quantified.

10 Plaintiff argues that Compatriot has
11 enough cash on hand to purchase the membership
12 interests outright, so any change in financing
13 conditions during the pendency of the litigation and
14 preliminary injunction would not be a proper basis for
15 damages.

16 I find that Compatriot has not
17 quantified any potential damages related to the
18 increased transaction costs resulting from the
19 injunction in case Compatriot ultimately buys
20 plaintiff's membership interest based on Section
21 10.10, and so I do not increase the bond based on
22 this.

23 Compatriot next argues that if
24 Compatriot purchases the apartments under the

1 Pennsylvania sale order for more than the appraised
2 value, which they would have paid under the operating
3 agreement if VGRP had not exercised its purchase
4 option, they can potentially recover the difference.
5 These damages again are not quantified.

6 Plaintiff argues that Compatriot
7 failed to mitigate its damages and should not be able
8 to use those damages as a basis for an injunction bond
9 and injunction damages claim.

10 I find that since Compatriot did not
11 quantify any potential damages it may face if it
12 purchases the property under the Pennsylvania Court's
13 sale order for an amount in excess of the appraised
14 value, I can't say that there's a credible basis to
15 increase the bond. So I do not consider that basis to
16 increase the bond.

17 Compatriot next argues that if the
18 special master in Pennsylvania sells the property to a
19 party other than Compatriot for a price that is
20 different than the appraised value as determined under
21 Section 10.10, Compatriot could claim damages based on
22 the difference between the values, regardless of which
23 is higher, under different legal theories. And I
24 won't go into all of those.

1 Compatriot suggests that the damages
2 could reach \$5.9 million based on 10 percent of the
3 potential appraised value of \$59 million.

4 While Compatriot may face damages as a
5 result of a sale order for other than the appraised
6 value, I don't see a basis for the 10 percent total of
7 the potential appraised value as the potential
8 damages. Although Compatriot need not prove damages,
9 there must be some reasonable estimate, and I don't
10 see the reasonable estimate here. So I don't use this
11 as a basis to increase the bond.

12 Compatriot next argues that the fees
13 and expenses in the Pennsylvania action have totaled
14 already \$300,000, and will reach 450,000, 600,000, and
15 750,000 in the next 6, 12, or 18 months respectively.

16 Plaintiff responds that the
17 Pennsylvania action was filed by L.A.V., a third party
18 that is not related to plaintiff, so the injunction
19 did not proximately cause the Pennsylvania action.
20 Since the injunction damages require proximate cause,
21 according to plaintiff, and there is no proximate
22 cause, the Pennsylvania action cannot be the basis for
23 injunction damages.

24 I find that Compatriot has credibly

1 claimed that the injunction is a proximate cause of
2 the Pennsylvania action and the costs stemming from
3 that action. I find Compatriot's claims of expenses
4 in the Pennsylvania action are reasonably as high as
5 \$750,000. Again, VGRP credibly could have accepted
6 Compatriot's release absent this Court's injunction.
7 Compatriot need not prove that VGRP would have done
8 so.

9 So for the reasons that I have just
10 explained, I am granting Compatriot's motion and
11 denying plaintiff's motion. Plaintiff shall post a
12 bond in the amount of \$3.95 million within five days
13 of the entry of this ruling. I recognize that
14 plaintiff posted a \$2 million cash bond to satisfy the
15 original order, but they now may post a bond or any
16 other appropriate security instead of cash if they
17 desire.

18 Those are my rulings on the pending
19 motions. To the extent an order is needed, it is so
20 ordered.

21 Now I want to ask you-all about
22 something that I mentioned during the hearing. During
23 the hearing, I mentioned that if you-all did not
24 settle this, I wanted you to confer and to discuss

1 timing for a trial. There have been a lot of motions
2 filed in the two actions pending before me. What I
3 have not seen, or don't know about, is actual progress
4 to move toward resolving this.

5 So did you-all have a chance to talk,
6 and do you have a sense of when you would like trial
7 to happen so that we can get a schedule in place?

8 MR. ROLLO: Your Honor, this is
9 Mr. Rollo on behalf of Compatriot.

10 At the end of last week, we received a
11 proposed schedule -- I believe it was the end of last
12 week -- from the other side. We have not exchanged
13 much beyond that in terms of a proposed trial date.
14 So at this point, we have not had those discussions
15 and completed them, but will promptly do so.

16 THE COURT: Okay. Those discussions
17 have started, though?

18 MR. ROLLO: Yes, ma'am.

19 THE COURT: All right. So I will
20 expect to get a schedule from you shortly. I hope you
21 can agree on a schedule. If you can't, then let me
22 know, and I will set one for you.

23 Is there anything else that you-all
24 need from me today?

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MR. ROLLO: No. Thank you very much,
Your Honor.

MR. FARNAN: No, Your Honor.

THE COURT: All right. Thank you very
much. Have a good day.

(Teleconference concluded at 10:23
a.m.)

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CERTIFICATE

I, DEBRA A. DONNELLY, Official Court Reporter for the Court of Chancery for the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 21 contain a true and correct transcription of the rulings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I hereunto set my hand at Wilmington, this 24th day of October, 2018.

/s/ Debra A. Donnelly

Debra A. Donnelly
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter
Delaware Notary Public