## COURT OF CHANCERY OF THE STATE OF DELAWARE

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September 28, 2012

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Re: Czarninski Baier de Adler v. Upper New York Investment Company, LLC C.A. No. 6896-VCN

Date Submitted: June 29, 2012

## Dear Counsel:

This proceeding is at an early stage. The primary task is jurisdictional discovery. In essence, the Plaintiff asserts that Delaware is the appropriate venue because Delaware entities were formed as an integral part of a complex scheme to defraud the Plaintiff, a resident of Israel, of her interest in a valuable family business located in Ecuador.

The parties agree that a protective order regarding Defendants' "confidential" and "highly confidential" discovery materials is appropriate. The parties have almost agreed on the form of that order. They disagree on two points and have come to the Court for guidance.

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Plaintiff Vivian Czarninski Baier de Adler ("Vivian") asks that her husband be allowed to review "confidential" information and that her lawyers in Israel and Ecuador be allowed, as are her lawyers in the United States, to review "highly confidential" information. Defendants argue that there is no reason for the husband to have access to "confidential" information and that routine practice allows access only to the party, and not to her spouse. They also argue that "highly confidential" information should not be shared with lawyers practicing in other countries because this Court has no effective means of enforcing the terms of the protective order over them and because the discovery rules here may differ materially from discovery rules in other countries.

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As for her husband, who is not an attorney, information from the Defendants

will inform Vivian's discussions with him and enhance the value of his advice.<sup>1</sup>

Vivian argues that this request is reasonable because her husband generally handles

family business and litigation matters and the outcome of this litigation (worth

potentially \$100 million) will have a major impact on him as well.<sup>2</sup> In addition,

Vivian is worried that her "discussions around the dinner table regarding this

litigation do not unwittingly disclose" Defendants' confidential information.<sup>3</sup>

As for her counsel in Israel and Ecuador, Vivian argues that they are "key

members of her legal team" and thus, their inability to review "highly confidential"

information would be "materially prejudicial" to her. 4 Neither her attorney in

Israel, Eldad Koresh ("Koresh"), nor her attorney in Ecuador, Xavier Castro

Muñoz ("Castro"), is eligible for *pro hac vice* admission in this Court, but each has

submitted a declaration stating that he will (i) abide by the terms of the protective

order and (ii) submit to the jurisdiction of this Court for any enforcement

<sup>1</sup> Pl.'s Mot. for Entry of a Protective Order at ¶ 7. Thus far, Defendants have marked all discovery material as "confidential."

 $<sup>^{2}</sup>$  Id. at ¶¶ 5-7, 9.

 $<sup>^{3}</sup>$  *Id.* at ¶ 7.

<sup>&</sup>lt;sup>4</sup> *Id*. at ¶ 12.

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proceedings related to any alleged violation of the protective order.<sup>5</sup> Vivian

contends that Koresh's fully-informed participation is especially important because

he is a trusted advisor,<sup>6</sup> he manages Vivian's litigation team in this dispute, and he

was responsible for engaging counsel in the United States and Ecuador to work on

Vivian's behalf.<sup>7</sup> As for Castro, Vivian considers him essential because of his

critical role in interpreting documents in Spanish,8 advising on Ecuadorian law,

and interfacing with Ecuadorian counsel representing certain Defendants.<sup>9</sup>

Vivian argues that Defendants have the burden of persuading this Court that

their confidential information should be restricted and they have failed to do so.<sup>10</sup>

Vivian contends that Defendants' only explanations for restricting access have

been "vague and conclusory references" to personal and financial harm.

According to Vivian, Defendants have not adequately described the "confidential"

or "highly confidential" information or how any of the Defendants would be

<sup>5</sup> *Id.* at ¶ 13.

<sup>6</sup> Koresh has advised Vivian and her husband on all their legal matters since 1988. *Id.* at ¶ 15.

' Id.

<sup>8</sup> Presumably, a lawyer is not needed to translate documents from Spanish to English. A lawyer fluent in Spanish, however, may be able to explain nuances—factual and legal—that might otherwise be lost in translation.

<sup>9</sup> *Id.* ¶¶ 18-19.

10 Pl.'s Reply in Supp. of her Mot. for Entry of a Protective Order ("Pl.'s Reply Br.") ¶ 12.

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harmed if her husband or her foreign counsel viewed the documents in accordance

with her proposed protective order. 11 She further contends that where, as here, a

case does not involve trade secrets or other proprietary business information, there

are no compelling or extraordinary circumstances that would warrant either a two-

tiered protective order or a limited "attorneys' eyes only" restriction within the

second tier (both of which Vivian has already agreed to). 12

In response, Defendants object to Vivian's discovery requests, suggesting

that they "virtually mirror[] discovery that [she] previously sought, but was unable

to obtain, in Ecuador." Defendants urge the Court not to tolerate this "end-run,"

to use their term, around the rules of other tribunals. 14

As for her husband's access to "confidential" information, Defendants

contend that the "well-settled standard in the context of [confidentiality] orders . . .

is that parties are not permitted to share such information with their spouses." In

addition, Defendants argue that Vivian has failed to provide a "compelling reason"

<sup>11</sup> *Id*. at ¶ 15.

 $^{12}$  *Id.* at ¶ 11.

<sup>13</sup> Defs. Joint Resp. to Pl.'s Mot. for Entry of a Protective Order ("Defs.' Joint Resp.") ¶ 2.

Whether confidential and highly confidential categories are appropriate and whether Vivian's discovery requests are unduly broad are not questions currently before the Court.

<sup>15</sup> Defs.' Joint Resp. ¶ 4.

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for why the Court should allow her to share their confidential information with her

husband. 16 Defendants further contend that Vivian's potential carelessness in

"unwittingly" disclosing confidential information should be a basis for denying her

access to that information, not expanding access to a third-party.<sup>17</sup> And, because

Vivian has highly competent legal counsel, Defendants contend, she should "rely

only on her professional legal advisors with respect to confidential information,"

rather than her husband. 18 Finally, Defendants insinuate that Vivian and her

husband are apt to abuse the discovery process by pointing to a surreptitious ploy

to obtain discovery information.<sup>19</sup>

As for the lawyers' in Israel and Ecuador, Defendants' posit, as a threshold

consideration, the fact that they have not yet designated any documents as "highly

confidential" and they may not do so, which would render this second issue

<sup>16</sup> *Id.* at ¶ 5.

 $<sup>^{17}</sup>$  Id. at ¶ 7. To be clear, Defendants do not seek to deny Vivian access to confidential information.

 $<sup>^{18}</sup>$  *Id.* at ¶ 5.

 $<sup>^{19}</sup>$  Id. at ¶ 8. Defendants' allege that Vivian and her husband surreptitiously recorded a conversation among her mother, her brothers, and her son and then attempted to introduce into evidence the transcript and recording of that conversation. The evidence obtained from this discovery ploy was ultimately deemed inadmissible in an Israel proceeding.

moot.<sup>20</sup> Defendants' next argue that any "highly confidential" information, if ever designated as such, could be used against them in actions pending in foreign jurisdictions. Even if Koresh and Castro abide by the letter of the protective order, Defendants contend, they might unintentionally (or unavoidably) use that information in these pending actions to Defendants' detriment.<sup>21</sup> Finally, they argue that even though Koresh and Castro have agreed to submit to the jurisdiction of this Court, their presence outside of the United States (and the fact that they presumably have no assets within the United States) may render enforcement of any protective order difficult, if not impossible.<sup>22</sup>

\* \* \*

A party may seek, and this Court may enter, a protective order in accordance with Court of Chancery Rules  $5(g)^{23}$  and 26(c). The "burden of proving that

 $^{20}$  *Id.* at ¶ 11.

 $<sup>^{21}</sup>$  *Id.* at ¶ 12.

 $<sup>^{22}</sup>$  *Id.* at ¶ 13.

<sup>&</sup>lt;sup>23</sup> Ct. Ch. R. 5(g)(2) ("Documents shall not be filed under seal unless and except to the extent that the person seeking such filing under seal shall have first obtained, for good cause shown, an order of this Court specifying those documents or categories of documents which should be filed under seal . . . .")

<sup>&</sup>lt;sup>24</sup> Ct. Ch. R. 26(c) ("Upon motion by a party . . . and for good cause shown, the Court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including 1 or more of the

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particular information is confidential and entitled to restrictions on use and public

access is placed on the party seeking confidential treatment."25 "Where

designations of confidentiality have been made pursuant to a protective order, the

burden is on the designating party to show good cause why its designations should

be sustained if the non-designating party objects." That burden is satisfied by a

showing that "disclosure of the information would work a clearly defined and

serious injury."<sup>27</sup> Accordingly, Defendants, as the designating party, bear the

burden to show good cause why their restrictive designations should bind both

Vivian's husband and her out-of-country lawyers.

A. May Vivian Share Confidential Information With Her Husband?

Notably, Defendants do not argue that Vivian's husband should not be

allowed access to their confidential information because any specific harm is likely

following: . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way . . . . ")

<sup>&</sup>lt;sup>25</sup> Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 6.02, at 6-6 (2011).

<sup>&</sup>lt;sup>26</sup> *ID Biomedical Corp. v. TM Technologies, Inc.*, 1994 WL 384605, at \*2 (Del. Ch. July 20, 1994); Wolfe & Pittenger, *supra*, at § 6.02, 6-6 n. 16.

<sup>&</sup>lt;sup>27</sup> Id. (quoting Proctor & Gamble Co. v. Nabisco Brands, Inc., 111 F.R.D. 326 (D. Del. 1986).

to ensue.<sup>28</sup> Instead, Defendants' primary argument is that the standard for confidentiality orders allows access for the party, but not for the spouse."<sup>29</sup>

First, the two cases cited by Defendants offer little with respect to protective orders or the sharing of confidential information between two spouses.<sup>30</sup> Second, by relying upon the sample confidentiality stipulations provided with the Guidelines to Help Lawyers Practicing in the Court of Chancery (the "Guidelines"), the Defendants conveniently overlook the express limitation that they are not to be "cited as authority in the context of any dispute before the Court."<sup>31</sup> In addition, the circumstances here—involving a spouse seeking the

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Defendants only speculate that Mr. Adler might violate the terms of the protective order, not that he will or is even likely to. In *Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv.*, this Court stated: "[s]peculation [as to a potential competitor] does not provide a proper basis for the institution of a protective order." 1994 WL 369514, at \*2 (Del. Ch. Jun. 30, 1994). Defs.' Joint Resp. ¶ 4. Defendants cite two cases, *Robbins v. Carter*, 2010 WL 3447661, at \*1, 3 (Del. Super. Aug. 31, 2010), and *Garyantes v. Garyantes*, 1999 WL 1456958, at \*7 (Del. Fam. Aug. 24, 1999), for the proposition that "confidential information cannot be shared between spouses simply by virtue of their marital relationship."

<sup>&</sup>lt;sup>30</sup> In *Garyantes*, the couple was divorced, and contrary to Defendants' interpretation, the husband was actually providing his ex-wife with confidential information, and her request for a monthly report was denied only because it was "vague and unnecessary." *See Garyantes v. Garyantes*, 1999 WL 1456957, at \*1 (Del. Fam. July 13, 1999); *Garyantes v. Garyantes*, 1999 WL 1456958, at \*7. In *Robbins*, the court dismissed tort claims against an employer where defendant (a woman) allegedly disclosed to her ex-husband confidential medical information concerning the plaintiff (the ex-husband's girlfriend). 2010 WL 3447661, at \*1, 3.

<sup>&</sup>lt;sup>31</sup> See http://courts.delaware.gov/chancery/docs/guidelines.pdf, at 1. These sample confidentiality stipulations are found in Exs. 7 & 8.

advice and guidance of her husband about how to litigate a matter of family wealth does not share many similarities with the more typical entity fiduciary duty cases routinely pursued in this Court. Even if the Guidelines constituted a standard of general applicability (which they do not), this case is different. It is about Vivian's financial interest in her late father's (now her family's) business. To deny her access to her husband's insights about the family business should not be undertaken lightly.

Defendants' remaining arguments against access for her husband are equally unpersuasive. Vivian's concern that she might "unwittingly" disclose Defendants' confidential information does not reflect a "cavalier attitude" toward that information, as Defendants suggest. It reflects her reasonable and personal concerns about compliance. Defendants' allegations that Vivian and her husband engaged in "surreptitious discovery practices" is largely irrelevant because even if true, it does not necessarily raise an inference that Vivian or her husband are likely to violate the terms of her proposed protective order. Finally, Defendants' jurisdictional out-of-reach argument, that is, the husband is outside the

jurisdictional reach of this Court, although technically accurate, fails to account for the reality that international business and litigation have become the norm.

Because they have not shown good cause for why the husband should not be allowed access to Defendants' confidential information (but, of course, with limits on what he may do with that information), Defendants have failed to meet their burden. Although a non-party spouse carve-out may be appropriate in some cases, while inappropriate in others, this Court is persuaded that Vivian's request is reasonable and appropriate under the circumstances. For a spouse to confide in her husband and to seek his guidance on litigation matters are not unusual, especially in an intra-family dispute involving millions of dollars. Moreover, Vivian's request is understandable given that she has consistently relied upon her husband to handle family business and litigation matters. Because their interests are presumably unified, it is relatively unlikely that the husband would risk tainting Vivian's stature before this Court by independently violating a protective order. And, to the extent that Defendants need to restrict highly sensitive information from the husband, they may do so because he will not have access to their "highly

confidential" information.<sup>32</sup> Thus, for the foregoing reasons, the Court will allow Vivian's husband access to Defendants' "confidential" information provided that he signs a declaration that he is willing to abide by the terms of the protective order and submit to the jurisdiction of this Court.

B. May Vivian's Ecuadorian and Israeli Counsel Have Access to Defendants' Highly Confidential Information?

Defendants next argue that Vivian and her Israeli and Ecuadorian counsel should not be permitted access to their "highly confidential" information. This "attorneys' eyes only" designation is disfavored by this Court and is only appropriate where "compelling circumstances warrant protection of the information." Protection may be warranted, for example, in "trade secret

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<sup>&</sup>lt;sup>32</sup> This is unavoidably a conclusion of general applicability. Nothing set forth here should be viewed as precluding Defendants from seeking special protection for documents or information which they can show deserve such protection.

<sup>&</sup>lt;sup>33</sup> Cincinnati Bell Cellular Sys. Co., 1994 WL 369514, at \*3; see Wolfe & Pittenger, supra, at § 6.02, 6-7. This designation is disfavored by this Court because it "can create difficult obstacles for a litigating party." *Id.* "An 'attorneys only' restriction prevents an attorney from giving complete advice to enable the client to make proper decisions with respect to the litigation, and it also restricts the ability of the client to understand the strength or weakness of its case." *Philadelphia Gear Corp. v. Power Transmission Servs., Inc.*, 1991 WL 29957, at \*4 (Del. Ch. Mar. 6, 1991).

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litigation in which the litigants are direct competitors, or where extremely sensitive

information of a personal nature is involved."<sup>34</sup>

Because Vivian and her husband will not be permitted access to information

marked "highly confidential," at issue is only whether Vivian's lawyers—Koresh

and Castro—from outside the United States should be permitted access to that

sensitive information.

As an initial matter, Defendants have not designated any documents "highly

confidential." The parties disagree over whether this issue should be addressed

now or tabled until any conflict actually arises. This Court is also hesitant to rule

on a discovery matter where it is unclear what "highly confidential" information is

at stake. In addition, the degree of harm that Defendants might suffer if Koresh or

Castro breach the proposed protective order is not readily apparent from

Defendants' assertions of harm. However, because the parties have argued this

<sup>34</sup> Wolfe & Pittenger, *supra*, at § 6.02, 6-7.

<sup>&</sup>lt;sup>35</sup> Pl.'s Mot. for Entry of Protective order ¶ 7 n. 2.

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issue and there is a reasonable probability that Defendants will utilize the "highly confidential" designation, <sup>36</sup> the Court will address this argument now.

Defendants' principal argument for restricting access to Koresh and Castro is that because both are actively pursuing legal action on behalf of Vivian against some of the Defendants in Israel and Ecuador, they could use this "highly confidential" information against Defendants in these actions. On behalf of Vivian, Koresh is currently engaged in proceedings regarding the management of Vivian's father's estate and is in the process of obtaining a list of estate assets from her brothers who are also Defendants in this action.<sup>37</sup> Castro has engaged in prefiling discovery and has petitioned for, among other things, a deposition of one of Vivian's brothers on written questions.<sup>38</sup>

These multiple international actions are clearly part of a coordinated strategy by Vivian to recoup the millions of dollars allegedly stolen by her brothers from their father's estate. In this broad sense, these international actions are each related

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<sup>&</sup>lt;sup>36</sup> Defs.' Joint Resp. ¶ 11 (Defendants anticipate utilizing the "highly confidential" designation if Vivian presses for information that Defendants have objected to producing).

<sup>&</sup>lt;sup>37</sup> Reply Decl. of Eldad Koresh ("Koresh Reply Decl.") ¶¶ 12-14.

Reply Decl. of Xavier Castro Muñoz ("Castro Reply Decl.")  $\P$  10. In Ecuador, evidently there is no discovery phase of civil actions; a party can petition the court for pre-filing discovery to uncover evidence on which to base a complaint. *Id.* at  $\P$  7.

petition is similar to Vivian's jurisdictional discovery requests in this action.<sup>39</sup> In contrast, the action taken in Israel, involving estate matters, is different in nature

(but not necessarily in facts) from this Delaware action, which has claims of fraud and unjust enrichment.

There is some risk that Koresh and Castro, with access to Defendants' highly confidential information, could use this information, intentionally or unintentionally, against them in the actions pending in Israel and Ecuador, and then frustrate, and perhaps evade, the enforcement of a protective order. For the following reasons, however, the Court is not persuaded that this risk warrants protection beyond the terms of the proposed protective order.

Both discovery petitions seek similar information such as the ownership, control, and leadership of various entities allegedly controlled by her brothers. However, the Ecuadorian petition (containing only 44 questions) is not nearly as extensive or broad as Vivian's discovery request. As for the proceedings in Israel, Koresh states that: "Vivian's requests that [her two brothers] provide a list of estate assets and give depositions concerning their lists do not 'virtually mirror' her jurisdictional discovery requests in this case." Koresh Reply Decl. ¶ 15.

At least at this stage of the proceeding, where no documents have been designated as highly confidential, the Court is not convinced that Defendants have a reason to bar foreign counsel access to their highly sensitive information. However, Defendants may seek enhanced protection for documents or information if they can justify that approach. *See supra* note 32.

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Much of this risk (if not all of it) derives from the fact that these

international actions are related and Defendants' highly confidential information

might be useful, to some extent, in all of the proceedings. There is no specific risk

that arises simply because a lawyer is not readily amenable to the jurisdiction of

this Court.<sup>41</sup> Moreover, Defendants cite no authority for barring a person from

having access to confidential information under a protective order solely because

he or she resides in a foreign country. Koresh and Castro have given assurances

(under penalty of perjury) that they will be bound by the terms of the proposed

protective order and submit to the jurisdiction of this Court for any enforcement

proceedings related to any alleged violation of the protective order. Defendants

have not conjured up any reason why this Court should doubt their declarations.<sup>42</sup>

By the terms of the protective order sponsored by Vivian, neither Koresh nor

Castro is to use any of Defendants' "highly confidential" materials in any

proceeding other than this one. Defendants suggest that it would be next to

<sup>41</sup> Certainly a general risk exists that a foreign lawyer will evade enforcement of a foreign jurisdiction, even if, as here, the lawyer consents to the Court's personal jurisdiction over him. However, as explained above, the perhaps difficult task of bringing him before this Court is not enough by itself to impose substantial and burdensome limitations on lawyers from outside the United States.

<sup>&</sup>lt;sup>42</sup> Nor does the Court have any reason to think otherwise.

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impossible to keep restricted materials out of their thought processes in the other

actions.<sup>43</sup> The actual use of "highly confidential" materials, if that should occur,

can be addressed. That such information might inform a tactical decision in other

proceedings, even though it is not disclosed, is possible to an extent. Without an

understanding of what types of information would fall in the "highly confidential"

category, it is difficult to assess either the likelihood or the potential consequences

of such limited use.

There are also practical reasons for granting Koresh and Castro access.

First, both are Vivian's counsel and each has at least a small, but important role in

the Delaware action, especially Koresh. Second, the disputes in three countries are

not independent of one another. Efficiency would seemingly be enhanced by all

lawyers working with the same "facts."

Finally, Vivian's efforts to take discovery here cannot be considered an

"end-run" around discovery limitations before other tribunals. Appropriate

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<sup>43</sup> *ID Biomedical Corp.*, 1994 WL 384605, at \*5 (company seeking access to confidential information for its in-house scientists puts technology of its competitor at risk because company's scientists "would have the information in their heads and would be able to use the information to [the company's] competitive benefit and [competitors'] corresponding competitive detriment.").

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discovery in this proceeding may overlap with discovery sought, but not likely to

be obtained, elsewhere. The merits of discovery propounded in this Court must be

assessed, first, by focusing upon what is appropriate for this proceeding. The

multiple-venue litigation among the parties would seem inevitably to overlap, and

the uncertainties of overlapping discovery efforts, subject to different discovery

rules, would seem to be unavoidable. Regardless, the Defendants have not shown

that those uncertainties justify limiting the access of Koresh and Castro to "highly

confidential" materials beyond the limitations imposed on lawyers in the United

States.

For the foregoing reasons, the Court concludes that Defendants have not

provided a persuasive reason why Vivian's foreign counsel should be denied

access to their "highly confidential" information.<sup>44</sup>

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In summary, subject to the matters set forth above, Vivian's husband will be

allowed access to materials designated by Defendants as "confidential" and

<sup>44</sup> See supra note 40.

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Vivian's lawyers from outside the United States will be allowed access to materials

designated by Defendants as "highly confidential."

With these two conclusions, it would appear that the protective order

proposed by Vivian should be entered. Before that is done, however, counsel are

requested to confirm that the Court's understanding is accurate or to advise it if

other modifications should be addressed.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc: Register in Chancery-K