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Re: Louisiana Municipal Police Employees' Retirement System
v. Countrywide Financial Corporation
C.A. No. 2608-VCN
Date Submitted: November 9, 2007

Dear Counsel:

I have Countrywide's Motion to Clarify, Alter, or Amend, or for
Reargument of, the Court's October 2, 2007 Opinion and Order (the "Motion").¹

The Order directed Countrywide to allow inspection, under 8 *Del. C.* § 220, of

¹ The Court's Memorandum Opinion and Order (the "Order") appears at 2007 WL 2896540 (Del. Ch. Oct. 2, 2007).

I also have Countrywide's application under Court of Chancery Rule 173 for oral argument of the Motion. That request is denied because oral argument would serve no useful purpose.

certain of its books and records relating to the granting of options. The Motion was prompted by two footnotes.²

I.

By footnote 62 of the Order, the Court observed that Countrywide had not asserted any privilege with respect to any document that might be subject to a Section 220 order. That footnote was factually accurate and without any specific consequence. Nonetheless, the parties have joined debate as to whether Countrywide has waived the right to raise any privilege. Although it may be premature, resolution of this question will be necessary and, one hopes, efficiency will be served by addressing it now.

Countrywide points out that claims of privilege are routinely addressed in Section 220 actions following the determination that documents must otherwise be made available for inspection.³ The question, however, is not when the issue will be addressed, but when the privilege should be asserted.⁴ Prudence would suggest that any defendant in a Section 220 action which anticipates that any of the

² See Abner Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647 (1985) (“I consider footnotes in judicial opinions an abomination.”). I do not share that view.

³ See, e.g., *Khanna v. Covad Commc’ns Group, Inc.*, 2004 WL 187274 (Del. Ch. Jan. 23, 2004).

⁴ The question of whether any particular document is privileged necessarily cannot be answered until the document (or its general category) is identified.

documents that are subject to the demand would be privileged should assert the privilege as promptly as possible.⁵ The failure to assert any privilege in a timely manner raises the risk that the privilege will be deemed to have been waived.⁶

There is, however, no absolute rule prescribing when privilege in a Section 220 action must be asserted. A finding of waiver may reasonably be viewed as unduly harsh, especially under these circumstances in which I accept Countrywide's representation that it did not understand any obligation to raise any privilege until after the decision on the merits. Accordingly, under these circumstances, the interests of justice are served if Countrywide is allowed an opportunity to assert any privilege that it might properly have with respect to the documents, the inspection of which the Court has ordered. To that extent, the Order is clarified.

II.

By footnote 57 of the Order, the Court acknowledged that Countrywide had claimed the need for confidential treatment of documents in the pretrial order. It further noted that Countrywide, however, had chosen, both at trial and in its post-

⁵ Practice is not necessarily inconsistent with prudence. *See, e.g., Khanna v. Covad Commc'ns Group, Inc.*, C.A. No. 20481 (Del. Ch.) (Pretrial Order ¶¶ III B (9) & IV (2) (B)).

⁶ *See, e.g., Wolhar v. Gen. Motors Corp.*, 712 A.2d 457, 462-64 (Del. Super. 1997).

trial brief, to do nothing more to inform the Court of either the reasons why confidentiality would be necessary or the appropriate scope of any confidentiality order. The last clause of footnote 57 provided that the Court “will not impose a confidentiality order on the documents required to be provided” In retrospect, the Court recognizes that the last clause should have been drafted more carefully. The intent was to set forth the obvious: without any basis for determining whether confidentiality is appropriate and without any guidance as to how sharing of the documents should be limited, the Court could not craft an appropriate confidentiality provision. Thus, the Order would not contain a confidentiality element. The use of the word “will” may fairly be read as extending into the future without consideration of any further developments. That was not the footnote’s purpose. Instead, it was simply to make clear that the Order itself would not contain a confidentiality provision. Thus, to that extent, footnote 57 is clarified.

Again, the parties debate whether Countrywide’s claim for confidential treatment of its documents has been waived. At least with respect to confidentiality, as footnote 57 recited, the pretrial order reflected Countrywide’s desire that confidential treatment be given to its documents. Because of the reasons generally set forth above with respect to Countrywide’s claims of

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privilege, the Court concludes that Countrywide has not waived its right to seek to limit access of others to the documents it produces.⁷

* * *

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

⁷ As Countrywide argues, nonpublic documents shared as the result of a Section 220 action are customarily given confidential treatment. *See, e.g., Disney v. Walt Disney Co.*, 857 A.2d 444, 447 (Del. Ch. 2004). The need for confidential treatment is generally readily apparent. In this instance, however, the documents sought are several years old and do not involve the ongoing business of Countrywide. There, of course, may be valid reasons for confidential treatment of these documents, but one cannot conclude reflexively that the need is readily apparent.