

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Charge Injection Technologies, Inc.	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N07C-12-134 JRJ
	)	
E.I. DuPont de Nemours and	)	
Company,	)	
	)	
Defendant.	)	

Date Submitted: February 7, 2014
Date Decided: February 27, 2014

OPINION

Upon Plaintiffs' Motion for Protective Order
and for Dissolution of the Stay of Proceedings – **DENIED IN PART,**
DEFERRED IN PART

Ryan P. Newell, Esquire, Connolly Gallagher LLP, The Brandywine Building, 1000 West Street, Suite 1400, Wilmington, DE 19801, Amir H. Alavi, Esquire, (*pro hac vice*) (argued), Ahmad, Zavitsanos, Anaipakos, Alvi, Mensing, 1221 McKinney, Suite 3460, Dallas, Texas, 77010. Attorneys for Plaintiff.

Kathleen F. McDonough, Esquire (argued), John A. Sensing, Esquire, Michael B. Rush, Esquire, Potter, Anderson & Corroon LLP, 1313 North Market Street, P.O. Box 951, Wilmington, Delaware, 19899-0951. Attorneys for Defendant.

Jurden, J.

I. INTRODUCTION

Before the Court is Plaintiff Charge Injection Technologies, Inc.'s ("CIT") Motion for Protective Order and for Dissolution of the Stay of Proceedings, stemming from circumstances rarely seen in Delaware courts.

In August 2013, Defendant E.I. du Pont de Nemours and Company ("DuPont") filed an emergency motion to stay all proceedings in this case to allow it to conduct discovery into a potential defense of champerty and maintenance. In that motion, DuPont alleged that CIT obtained financing from an outside source to fund the prosecution of this litigation. DuPont further alleged that there is a strong likelihood that this litigation-financing arrangement violates Delaware's prohibition against champerty and maintenance, which would render CIT's claims subject to dismissal.

CIT now asks for a protective order to prevent DuPont from taking any discovery on the champerty and maintenance defense and to lift the stay, claiming that "the entire legal premise of DuPont's stay request is false."¹ For the reasons set forth below, CIT's motion is **DENIED IN PART, DEFERRED IN PART.**

II. BACKGROUND

CIT instituted this suit against DuPont in December 2007. Between November 2010 and October 2011, there was little activity, apparently because of

¹ Op. Br. in support of Charge Injection Technologies, Inc.'s Mtn. for Protective Order and for Dissolution of the Stay of Proceedings ("Op. Br."), Trans. ID 54390858, at 1.

CIT's failure to pay prior counsel's bills.² On October 31, 2011, the Court granted CIT's original counsel's motion to withdraw.³ On December 1, 2011, CIT's current lead counsel, Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing ("AZA") entered its appearance in the case.⁴ At some point in 2012, CIT obtained litigation financing from Aloe Investments Limited ("Aloe").⁵

In July and August 2013, DuPont uncovered certain facts, including CIT's relationship with Aloe, that caused DuPont to believe that CIT had engaged in champerty and maintenance in violation of Delaware law. Consequently, on August 12, 2013, DuPont filed its Emergency Motion to Stay Pending Resolution of Issues Relating to Champerty and/or Maintenance (the "Stay Motion"),⁶ requesting a stay of this litigation until the champerty and maintenance issues were resolved. CIT agreed that a stay was warranted,⁷ but sought to carve out a stay exclusion for its then-pending motion to compel. On August 15, 2013, the Court heard argument on CIT's motion to compel and DuPont's Stay Motion. The Court characterized the issues relating to champerty and maintenance as raising "serious

² See Trans. ID 40151517.

³ See Trans. ID 40632788.

⁴ See Declaration of Amir H. Alavi ("Alavi Dec."), Trans. ID 54390858, ¶ 2.

⁵ To date, Aloe is the only litigation investor identified by CIT. DuPont seeks information and documents regarding **all** investors (as defined in DuPont's discovery requests). E.I. duPont de Nemours and Company's Br. in Opp. to Charge Injection Technologies Motion for Protective Order and for Dissolution of the Stay of Proceedings, Trans. ID 54514336, ("Ans. Br."), at 1, n.1.

⁶ Trans. ID 53689757.

⁷ Op. Br. 1.

allegations” and potentially involving a “game-ending motion.”⁸ The next day, the Court advised the parties that the case would be stayed for 90 days.

Prior to filing its Stay Motion, DuPont had served CIT with discovery requests on the champerty and maintenance issue. CIT’s interrogatory responses identified Aloe as an investor, and stated that CIT had no relationship to Aloe prior to January 1, 2007.⁹ CIT refused to produce any documents in response to DuPont’s document requests, including the litigation-financing agreement between CIT and Aloe (the “Financing Agreement” or “Litigation-Financing Agreement”), claiming such documents are “protected as attorney work product and/or subject to attorney/client privilege,” “the requests are overly broad and unduly burdensome,” and “the requests are irrelevant because the champerty and maintenance defenses are meritless.”

Although CIT is withholding documents on privilege grounds, it has refused to produce a privilege log as required by Delaware law.¹⁰ During the parties’ meet-and-confer process, CIT disclosed to DuPont that it did not assign any part of its claims to Aloe, and that it retains full control over litigation strategy and settlement.¹¹ CIT claims that the purpose of this disclosure was to “put the

⁸ Aug. 15, 2013 Hr’g Tr., Trans. ID 53997996, at 47:15-16, 48:10-11.

⁹ CIT’s Objections and Answers to DuPont’s Seventh Set of Interrogatories, Sept. 4, 2013, at 5.

¹⁰ During the parties’ meet-and-confer, CIT’s counsel told DuPont it would produce a list of “categories” into which potentially privileged documents would fall. To date, CIT has not produced such a list.

¹¹ Alavi Dec., ¶ 13, Ex. A thereto.

Court's, and DuPont's, mind at ease that nothing remotely improper has occurred."¹² CIT's disclosures, however, did not put DuPont's mind at ease, but rather, heightened DuPont's concern that CIT might be engaging in champerty and maintenance. Frustrated by CIT's refusal to produce any documents and/or a privilege log, DuPont filed a motion to compel CIT to produce documents responsive to its document requests relating to champerty and maintenance.¹³ That same day, CIT filed the instant motion for protective order.

Briefing on the motion for protective order is complete and the Court heard oral argument on February 17, 2014. Following oral argument, the Court requested that CIT provide a copy of the Financing Agreement for the Court's *in camera* inspection. The Court has completed its *in camera* inspection of the Financing Agreement. The Court convened a teleconference on February 25, 2014, during which it asked CIT to submit a redacted version of the Financing Agreement for the Court's *in camera* review, and advised the parties that it will likely order CIT to produce a redacted version to DuPont after the Court's review.¹⁴ The Court further advised that it does not find that the entire Financing Agreement is attorney work product.

¹² Op. Br. 2.

¹³ See Trans. ID 54394124.

¹⁴ The Court noted that the bulk of the Financing Agreement does not appear to fall under the work product doctrine and DuPont has substantial need of the Agreement. See Op. Br. 19-20.

III. DISCUSSION

Pursuant to Delaware Superior Court Civil Rule 26(c), the Court, “for good cause shown” may prevent disclosure of discoverable materials to protect a party from “annoyance, embarrassment, oppression, or undue burden or expense.”¹⁵ CIT asserts three basic arguments as to why there is good cause for entry of a protective order here. First, CIT argues champerty and maintenance are “dying doctrines” throughout the country and have been dead in Delaware for forty years. Second, CIT asserts that the Litigation-Financing Agreement does not constitute champerty and maintenance. Third, CIT argues that DuPont’s discovery requests improperly seek discovery of information protected by the work-product doctrine, attorney-client privilege, and “common interest doctrine.” This opinion will address CIT’s first two arguments. The third argument will be addressed in a separate opinion or order.

A. Are the Doctrines of Champerty and Maintenance Dead in Delaware?

According to CIT, the champerty and maintenance doctrines were never incorporated into the common law of Delaware as freestanding defenses, and existed solely by virtue of a criminal statute enacted in 1742 (and repealed in 1972) which rendered “champertous” arrangements unlawful.¹⁶ CIT maintains that the

¹⁵ Super. Ct. Civ. R. 26(c).

¹⁶ See Op. Br. 7; 58 Del. Laws Ch. 497 (1972), repealing 11 Del. C. § 371 (1953) (codified the 1742 criminal statute); Op. Br. 8. The Court rejected this same argument in *Hall v. State*, 655 A.2d 827, 830 (1994)

repeal of the champerty statute “reflects the nationwide trend toward discarding champerty as an outmoded relic of feudal England.”¹⁷ In response, DuPont points out that since the criminal statute was repealed in 1972, there have been several Delaware cases discussing the champerty and maintenance doctrines.¹⁸ Indeed, decisions of the Delaware Supreme Court, the Court of Chancery, and the Superior Court make clear that contrary to CIT’s argument, champerty and maintenance are alive and well in Delaware.¹⁹ Absent a ruling from the Delaware Supreme Court holding that these doctrines are dead, this Court will continue to recognize them.

(Acknowledging that after the criminal statute was repealed, champerty and maintenance continue “to have vitality” in Delaware common law).

¹⁷ Op. Br. 8.

¹⁸ See Ans. Br. 7 (“...former Justice Moore and Justice Jacobs of the Delaware Supreme Court, former Chancellor Chandler and Vice Chancellor Lamb of the Court of Chancery, and former Judge Babiarz and former Judge Ableman of the Superior Court, would be taken aback to learn they had considered a ‘dead’ doctrine when they analyzed the doctrines of champerty and maintenance, all in cases pending since the repeal of the criminal statute”) (citations omitted).

¹⁹ See *Compaq Computer Corp. v. Horton*, 631 A.2d 1, 5, n.1 (Del. 1993) (Holding that shareholder’s conduct did not constitute champerty because he did “not seek a bargain with a third party to carry on the litigation in...[his] absence at the third party’s own risk and expense in consideration of receiving part of the proceeds” and did not constitute maintenance because he was “not soliciting others as officious intermeddlers who as non-parties would help maintain the costs of the suit”); *Orloff v. Shulman*, 2005 WL 5750635, at * 11 (Del. Ch. Nov. 23, 2005) (Noting that “...the offense of champerty...consists of ‘an agreement between the owner of a claim and a volunteer that the latter may take the claim and collect it, dividing the proceeds if they prevail; the champertor to carry on the suit at his own expense’”) (citations omitted); *In re Emerging Commc’ns, Inc. S’holders Litig.*, 2004 WL 1305745, at *29 (Del. Ch. June 24, 2004) (Holding that assignments at issue were not champertous) (citing, *inter alia*, *Compaq*); *Kingsland Holdings, Inc. v. Bracco*, 1996 WL 104257, at * 5, n.2 (Del. Ch. Mar. 5, 2006) (Holding that assignment at issue was not champertous because it was an assignment of a judgment for valuable consideration, not assignment of an underlying claim); *Street Search Partners, L.P. v. Ricon Int’l, LLC*, 2006 WL 1313859, at * 3 (Del. Super. 2006) (Noting that an “agreement is not champertous where the assignee has some legal or equitable interest in the subject matter of the litigation independent from the terms of the assignment”) (citations omitted); *Hall v. State*, 655 A.2d at 830 (Discussing and defining champerty and maintenance, and citing *Compaq*, noting that “the doctrine continues to have vitality in this state”) (citation omitted).

B. Does the Litigation Financing Arrangement Constitute Champerty and Maintenance?

Because CIT has refused to produce any documents in response to DuPont's targeted discovery on champerty and maintenance, DuPont is unable to discover exactly what the litigation-financing arrangement is between CIT and Aloe, or between CIT and any other investor. DuPont maintains that CIT's refusal to produce any documents – even in redacted form – or a privilege log, “is telling.”²⁰ CIT counters that it has provided DuPont with sufficient facts to establish that its litigation-financing arrangement does not constitute champerty or maintenance.²¹

Under Delaware law, maintenance “is an officious intermeddling in a suit which in no way belongs to the intermeddler by maintaining or assisting either party to the action, with money or otherwise, to prosecute it or defend it.” Stated differently, it is “the intermeddling in a suit by a stranger, one having no privity or concern in the subject matter and standing in no relation of duty to the suitor.”²² Champerty is “an agreement between the owner of a claim and a volunteer that the latter may take the claim and collect it, dividing the proceeds with the owner, if they prevail; the champertor to carry on the suit at his own expense.”²³ “Champerty cannot be charged against one with an interest in the matter in

²⁰ Ans. Br. 14.

²¹ *See id.*

²² *Hall*, 655 A.2d at 829 (citations omitted).

²³ *Id.* (quoting *Hamilton v. Gray*, 31 A.2d 315 (Vt. 1895)).

controversy.”²⁴ An agreement is not champertous “where the assignee has some legal or equitable interest in the subject matter of the litigation independent from the terms of the assignment.”²⁵

CIT argues that Aloe is not an “officious meddler” because CIT sought out Aloe (not the other way around), and because CIT entered the Financing Agreement years after it initiated suit.²⁶ CIT’s contention that a third party cannot be an “officious intermeddler” if they were contacted by the plaintiff is undermined by *Compaq*²⁷ and CIT has cited no authority supporting its contention that champerty and maintenance are inapplicable if the third party invests after suit is filed.

CIT argues there is no champerty because it “did not assign any or all of its claims to the Finance Provider, and [...] maintains control over the litigation.”²⁸ DuPont argues that Aloe can still have “effective control” over the litigation even without a provision in the Financing Agreement expressly granting it control.²⁹ According to DuPont, the absence of an explicit control provision in the Financing Agreement does not prove that Aloe is not exercising control over CIT or the

²⁴ *Emerging Comm. Inc. S’holders Litig.*, 2004 WL 1305745, at *29.

²⁵ *Street Search Partners*, 2006 WL 1313859, at * 3 (citation omitted).

²⁶ See Op. Br. 12-14.

²⁷ See 631 A.2d at 5. In *Compaq*, Horton, a Compaq shareholder, sought the support of other Compaq shareholders to seek redress for their alleged injuries and to prevent further mismanagement by Compaq’s board. The Delaware Supreme Court held that Horton’s actions did not constitute maintenance because he did not solicit others who as non-parties would maintain the costs of the suit.

²⁸ Op. Br. 15.

²⁹ Ans. Br. 16.

litigation.³⁰ Further, according to DuPont, whether the Financing Agreement constitutes champerty does not depend on whether there was an assignment, but rather whether the financier is impressibly assisting a party in prosecuting the litigation. DuPont argues that without discovery, it is not possible to know whether the arrangement constitutes champerty and/or maintenance. The Court has reviewed the Financing Agreement. DuPont has not. The Court cannot and will not decide this issue based solely on CIT's counsel's representations and an *in camera* review of the Financing Agreement. Consequently, the Court defers ruling on this issue at this time.

IV. CONCLUSION

For the reasons stated above, the Court **DENIES** CIT's motion to dissolve the stay, **DENIES** CIT's motion insofar as it seeks a blanket protective order allowing it to withhold all documents sought by DuPont in connection with DuPont's potential champerty and maintenance defenses without producing a privilege log in accordance with Super. Ct. Civ. R. 26(b)(5), and **DEFERS** ruling on whether the Financing Agreement constitutes champerty and maintenance. The Court will confer with counsel (and issue further orders) after it reviews *in camera* CIT's proposed redactions to the Financing Agreement and the privilege log accompanying the proposed redacted version.

³⁰ *Id.*

IT IS SO ORDERED.

Jan R. Jurden, Judge

cc: Prothonotary