

**COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE**

WILLIAM B. CHANDLER III  
CHANCELLOR

COURT OF CHANCERY COURTHOUSE  
34 THE CIRCLE  
GEORGETOWN, DELAWARE 19947

Submitted: May 5, 2006  
Decided: May 10, 2006

Carmella P. Keener  
Rosenthal, Monhait & Goddess, P.A.  
919 North Market Street, Suite 1401  
Wilmington, DE 19801

Srinivas M. Raju  
K. Tyler O'Connell  
Richards, Layton & Finger, P.A.  
One Rodney Square  
P.O. Box 551  
Wilmington, DE 19899

Re: *TCMP3 Partners LLP v. Centerpoint Corp., et al.*  
Civil Action No. 170-N

Dear Counsel:

Plaintiff TCMP3 Partners LLP (“TCMP3”) has brought a motion to enforce the written agreement dated February 3, 2006 (the “Mediation Agreement”), that was the result of a mediation conducted by Vice Chancellor Lamb (the “Mediator”) pursuant to Court of Chancery Rule 174 (“Rule 174”). In that motion, and attached as exhibits, TCMP3 has included communications with the Mediator that are allegedly protected by the confidentiality obligations of Rule 174. Parties to TCMP3 in the Mediation Agreement, Bion Environmental Technologies, Inc. (“Bion”) and Bion Dairy Corporation (“Bion Dairy” and, together with Bion, “Bions”) have brought a motion to enforce those confidentiality obligations. For the reasons set forth below, I grant Bions’ motion.

TCMP3 and Bions engaged in a series of mediation conferences that culminated on February 3, 2006 with the Mediation Agreement. According to Bions, the Mediation Agreement contains a condition precedent to the performance of its obligations—that a settlement be reached with the Trident Rowan Group, Inc. (“TRG”) defendants, prior to the performance of obligations set forth in the

Mediation Agreement. According to TCMP3, only the effectiveness of the Mediation Agreement is contingent upon a TRG settlement, but certain obligations requiring Bions' performance (particularly the delivery of a Rule 144K letter) were to be performed prior to any TRG settlement. I will not address this dispute now, and I only describe it to illuminate subsequent events. In April, after two months of failed bilateral negotiations, the parties communicated with the Mediator regarding the parties' different readings of the Agreement, and the Mediator conveyed his own opinion (together, the "April Communications"). Still unable to resolve their differences with Bions, TCMP3 brought the motion to enforce the Mediation Agreement, and included multiple references to the April Communications, and attached certain such communications as exhibits.

Disclosure of the April Communications is a clear violation of Rule 174. Rule 174(d) states in pertinent part that:

Any communication made in or in connection with the mediation that relates to the controversy being mediated, whether made to the mediator or a party, or to any person if made at a mediation conference, is confidential.

The rule additionally carves out from confidentiality protection:

(2) Statements, memoranda, materials, and other tangible evidence otherwise subject to discovery, which were not prepared specifically for use in the mediation conference.

First, TCMP3 argues that the April Communications were not made at a mediation conference. Second, TCMP3 argues that the April Communications are subject to the carveout quoted above. In respect to its first argument, TCMP3 misreads the rule. The portion of Rule 174(d) TCMP3 relies on provides for the confidential treatment of communications made to *any person* "if made at a mediation conference."<sup>1</sup> TCMP3 ignores the far broader confidential treatment accorded by the same subpart of the rule to communications to *the mediator or a party* "made in or in connection with the mediation that relates to the controversy being mediated."<sup>2</sup> Because the April Communications were between parties and the Mediator, the April Communications are subject to the broader confidential treatment.

In respect to its second argument, TCMP3 is incorrect that the carveout includes the April Communications. The April Communications were in fact

---

<sup>1</sup> See *Wilmington Hospitality, L.L.C. v. New Castle Co.*, 788 A.2d 536 (Del. Ch. 2001), *appeal refused*, 781 A.2d 697 (Del. 2001).

<sup>2</sup> See *id.*

prepared specifically for us in a mediation conference, as that term is defined by Rule 174:

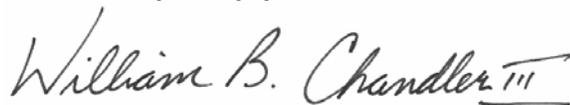
(3) “Mediation conference” means that process, which may consist of one or more meetings or conferences, pursuant to which the mediator assists the parties in seeking a mutually acceptable resolution of their dispute through discussion and negotiation.

In April, due to an ambiguity in the Mediation Agreement, enforcement of the Mediation Agreement was in dispute. The April Communications restarted the process pursuant to which the Mediator would attempt to assist the parties in seeking a resolution of their dispute. Because the Mediator is not empowered to adjudicate,<sup>3</sup> the April Communications could only be further attempts to employ the Mediator as a facilitator to a negotiated resolution. Additionally, the parties clearly indicated that they were engaged in a process to resolve the dispute by marking every April Communication with the disclaimer “CONFIDENTIAL MEDIATION COMMUNICATION.” Consequently, the April Communications are protected by the confidentiality obligations of Rule 174, and Bions’ motion is hereby granted.

In order to further this stalled process along, I will utilize the version of TCMP3’s motion as redacted by Bions’ counsel and included in Exhibit H to Bions’ motion to enforce Rule 174. Consequently, I welcome Bions’ prompt answer to TCMP3’s motion to enforce the Mediation Agreement, and TCMP3’s subsequent reply.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in black ink and is positioned below the typed name.

William B. Chandler III

WBCIII:bsr

---

<sup>3</sup> Rule 174(f) (“The mediator shall have no authority to make or impose any adjudication, sanction, or penalty upon the parties.”)