2021 WL 6203224 (Del.Ch.) (Trial Motion, Memorandum and Affidavit)
Chancery Court of Delaware.

Daniel M. CORMIER, Plaintiff,
v.
Stephen S. BURNS, Shane Brown, Keith A. Feldman, Caimin Flannery, Michael D. Gates, David T. Hamamoto, Judith A. Hannaway, Steven R. Hash, Mickey W. Kowitz, Darren Post, Jane Reiss, Andrew C. Richardson, Julio C. Rodriguez, Martin J. Rucidlo, Phil Richard Schmidt, Dale G. Spencer, Angela Strand, Chuan D. Vo, and Mark A. Walsh, Defendants,
and
Lordstown Motors Corp., Nominal Defendant.

No. 2021-1049-MTZ.
December 28, 2021.

Lordstown's Motion for Continued Confidential Treatment

Potter Anderson & Corroon LLP, Michael A. Pittenger (#3212), Jonathan A. Choa (#5319), Nicholas D. Mozal (#5838), Justin T. Hymes (#6671), 1313 N. Market Street, 6th Floor, Wilmington, DE 19801-6108, (302) 984-6000, Of Counsel: Douglas W. Greene, Baker & Hostetler LLP, 45 Rockefeller Plaza, New York, NY 10111-0100, (212) 847-7090, Douglas L. Shively, Baker & Hostetler LLP, Key Tower, 127 Public Square, Suite 2000, Cleveland, OH 44114, (216) 621-0200, for Nominal Defendant Lordstown Motors Corp.

Pursuant to Court of Chancey Rule 5.1(f)(2), nominal defendant Lordstown Motors Corp. ("Lordstown") hereby moves for continued confidential treatment of certain information redacted from the public version of the Verified Shareholder Derivative Complaint (Dkt. 5) (the "Complaint"), for the reasons set forth below.

BACKGROUND

1. This is a stockholder derivative action that is largely contingent on the outcome of a securities class action pending in the Northern District of Ohio and derivative actions pending in the Northern District of Ohio, the Delaware Court of Chancery, and the District of Delaware against Lordstown and certain of Lordstown's current and former officers and directors. *See In re Lordstown Motors Corp. Sec. Litig.,* No. 4:21-cv-00616 (PAG) (N.D. Ohio) ("Securities Action"); *Thai v. Burns et al.,No.* 4:21-cv-01267 (N.D. *Ohio), Amin v. Hamamoto,* C.A. No. 2021-1085-LWW (Del. Ch.), *In re Lordstown Motors Corp. Shareholder Derivative Litig., No.* 21-00604-SB (D. Del.) (collective, the "Derivative Actions"). On September 10, 2021, non-party George Troicky ("Troicky") filed an amended consolidated securities class action complaint in the Securities Action. That complaint names, among others, several of the Defendants in this action (specifically, Lordstown and defendants Burns, Brown, Flannery, Hamamoto, Rodriguez, Post and Schmidt). Briefing on Defendants' motion to dismiss is underway.

2. On October 14, 2021, Troicky moved the district court to lift the mandatory discovery stay imposed pursuant to the Private Securities Litigation Reform Act (the "Reform Act"). On November 30, 2021, the district court denied Troicky' s motion. All discovery is currently stayed in the Securities Action pending disposition of the motion to dismiss.

3. Plaintiff here primarily claims that the individual defendants exposed nominal defendant Lordstown to potential liability in the securities class action by making (or failing to prevent) the allegedly misleading statements at issue in that case i.e., statements concerning pre-orders for Lordstown's forthcoming Endurance electric pick-up truck, and Lordstown's timeline for

producing that vehicle. Plaintiff asserts several causes of action against the individual defendants, almost all of which are based on the same allegedly misleading statements that form the basis of the Securities Action and Derivative Actions.

4. Before filing this action, Plaintiff made a demand pursuant to 8 *Del. C.* § 220 (the "Demand") to inspect certain documents of Lordstown. Plaintiff and Lordstown entered into a confidentiality agreement governing the inspection and handling of all information designated by Lordstown as confidential in connection with the Demand (the "Confidentiality Agreement"). The Confidentiality Agreement recognized that the documents sought by Plaintiff included "non-public, confidential, proprietary" and/or "commercially sensitive information."

5. Plaintiff filed the Complaint on December 2, 2021, confidentially pursuant to Rule *5.1*. Simultaneously, Plaintiff filed a letter explaining the circumstances of the confidential filing. Among other things, Plaintiff explained that:

> The Complaint references information that nominal defendant, Lordstown Motors Corp. ("Lordstown"), designated confidential and that plaintiff received pursuant to a Confidentiality Agreement. As a condition to the receipt of this information, plaintiff obligated himself to maintain the confidentiality of the material subject to certain provisions for filing such information with the Court. Accordingly, sealing of the complaint is necessary both to protect from public disclosure the information that Lordstown has designated confidential and for plaintiff to meet his contractual obligations.

6. On December 9, 2021, Plaintiff filed a public version of the Complaint containing limited redactions of confidential information produced in response to the Demand (the "Redacted Information").

7. On December 20, 2021, Troicky filed a notice in this Court challenging the Redacted Information (the "Notice"). On the same day, Troicky also challenged the redactions in the *Amin* complaint, which relates to a de-SPAC merger with a predecessor entity to Lordstown and involves largely the same set of facts and circumstances at issue here. Upon receipt of the Notice, Lordstown re-reviewed the redactions and the confidential material underlying the statements therein.

8. Lordstown has attached hereto as Exhibit A a proposed Revised Public Version of the Complaint, in which certain information that was redacted in the original Public Version is no longer redacted. Lordstown requests leave to file the Revised Public Version of the Complaint. [1] The remaining limited redactions in the Revised Public Version of the Complaint are necessary to prevent undue harm to Lordstown for two principal reasons.

9. First, unsealing of the Redacted Information would expose Lordstown to significant competitive harm. The Redacted Information references highly confidential information presented to and discussed by the Lordstown Board of Directors (the "Lordstown Board") concerning (i) proprietary and business sensitive engineering, production, and design information and strategy, the public disclosure of which could be improperly used by Lordstown's competitors; and (ii) sensitive communications with potential suppliers and customers the disclosure of which could be improperly used by those suppliers and customers and Lordstown's competitors.

10. Second, unsealing of the Redacted Information would prejudice Lordstown (and the individual defendants in this case) by allowing Troicky to improperly obtain discovery in circumvention of the stay in the Securities Action.

ARGUMENT

I. THE RELEVANT STANDARD

11. Under Court of Chancery Rule 5.1 (f)(2), if a challenge is made to the confidential treatment of a confidential filing, including a public version of a court document with redactions to preserve confidentiality, any person may seek continued confidential treatment by "filing a motion within five days after the filing of a challenger's notice." Ct. Ch. R. 5.1(f)(2).

12. The right of public access to court records is not absolute. *See In re John E. du Pont,* 1997 WL 383008, at *2-3 (Del. Ch. June 20, 1997) ("Although there is a general presumption of access to civil proceedings and records, courts have the discretion and power to close hearings and keep records under seal when appropriate."). Issues regarding the right of access rest within the sound discretion of the Court. *Id.; Nixon v. Warner Commc 'ns, Inc.,* 435 U.S. 589, 599 (1978) (ruling that the decision to allow access to private records rests in the sound discretion of the trial court in light of the relevant facts and circumstances of the particular case).

13. Thus, the Court of Chancery Rules specifically permit parties to protect confidential information from public view "where good cause exists for Confidential Treatment." Ct. Ch. R. 5.1(b)(1). Good cause exists where "the public interest in access to Court proceedings is outweighed by the harm that public disclosure of sensitive, nonpublic information would cause." Ct. Ch. R. 5.1(b)(2). "[T]rade secrets," "sensitive proprietary information," and "sensitive financial [and] business information" constitute information eligible for Confidential Treatment under Rule 5.1. Ct. Ch. R. 5.1(b)(2); *see also Kronenberg v. Katz,* 872 A.2d 568, 608 (Del. Ch. 2004) ("Because it is necessary for the judiciary to protect the legitimate privacy and commercial interests of litigating parties, it is understood that reasonable limitations can be placed on public access to judicial records.")

II. "GOOD CAUSE" EXISTS FOR CONTINUED CONFIDENTIAL TREATMENT OF THE LIMITED REDACTIONS IN THE COMPLAINT

14. Good cause exists for the continued confidential treatment of the Redacted Information. As discussed below, the Redacted Information is comprised entirely of Lordstown Board communications and other materials that discuss highly sensitive and proprietary business information, the disclosure of which could harm Lordstown competitively. This information was produced to Plaintiff subject to a negotiated and customary confidentiality agreement in response to Plaintiff's Section 220 Demand.

15. Separately, the Notice is a ploy to evade the mandatory discovery stay in the Securities Action. In effect, Troicky seeks to improperly piggyback on Plaintiff's Section 220 demand to obtain information he is not entitled to under the federal securities laws. Allowing Troicky access to such discovery would reward his gamesmanship, prejudice Lordstown's (and the individual defendants)' rights in the Securities Action, and undermine the standards and purposes of Section 220.

III. UNSEALING OF THE REDACTED INFORMATION WOULD EXPOSE LORDSTOWNTO SIGNIFICANT COMPETITIVE HARM

16. All of the redactions applied in the Complaint cover sensitive and proprietary information quoted in or directly derived from confidential information within Lordstown, including Lordstown Board materials, presentations, and discussions. Such information is sensitive as it reflects the Board's strategic thinking, process, and deliberations. Specifically, the redacted information references highly sensitive information provided to and discussed by the Board or others within Lordstown regarding Lordstown's engineering, production, and design development and its relationships and communications with potential purchasers and suppliers.[2] Such information, e.g., vehicle component and assembly strategy, proposed points of negotiation with suppliers, and problem-solving and trouble-shooting solutions, could be used by Lordstown's competitors in the competitive and rapidly evolving market of electric vehicles. Additionally, the redactions cover sensitive competitive information relating to specific letters of intent, including counterparty names, quantities, and other identifying information.

IV. UNSEALING OF THE REDACTED INFORMATION WOULD SUBJECT LORDSTOWN TO UNDUE PREJUDICE IN THE SECURITIES ACTION

17. Although it is sufficient that Lordstown has established good cause exists for the continued confidential treatment of the Redacted Information, the harm from disclosure of the information is exacerbated by the fact that Troicky's sole motivation for challenging confidentiality the desire to circumvent the federal court discovery stay. The Notice is nothing more than an attempt to improperly derive discovery vicariously through Plaintiff's Section 220 Demand. Ordering disclosure of the Redacted Information would be repugnant to the purposes of both the Reform Act and Section 220 and would prejudice Lordstown's rights in the Securities Action.

18. The Reform Act requires that:

> [A]ll discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

15 U.S.C. § 78u-4(b)(3)(B). This rule reflects Congress's desire "to minimize the incentives for plaintiffs to file frivolous securities ... actions in the hope [] that ... the plaintiff will find during discovery some sustainable claim not alleged in the complaint." *Desmarais v. First Niagra Fin. Grp., Inc.,* 2016 WL 768257, at *1 (D. Del. Feb. 26, 2016). Indeed, "the [Reform] Act addresses improper discovery methods that may be employed by a plaintiff as 'fishing expeditions[.]'" *In re Heckmann Corp. Sec. Litig.,* 2011 WL 10636718, at *3 (D. Del. Feb. 28, 2011). Consistent with these purposes, Congress made clear that only "exceptional circumstances" could justify modifying the mandatory discovery stay before a motion-to-dismiss decision. *See* H.R. Conf. Rep. No. 104-369, at 37, reprinted in 1995 U.S.C.C.A.N.

19. Here, the Northern District of Ohio found that no exceptional circumstances existed to warrant "a lifting of the PSLRA's stay provision." *In re Lordstown Motor Corp. Sec. Litig.,* 2021 WL 5604446, at *2 (N.D. Ohio Nov. 30, 2021). Yet Troicky remains undeterred. He asks this Court to give him what the Reform Act denies.

20. Delaware courts have long rejected such end-arounds. *See e.g., Beiser v. PMC-Sierra, Inc.,* 2009 WL 483321, at *3 (Del. Ch. Feb. 26, 2009) (dismissing with prejudice Section 220 action because the party filed the action "only after the court in the Federal Action denied his request to lift the stay under the PSLRA" and concluding that "[a]ttempting to obtain discovery for use in a case where such discovery is clearly prevented by federal law, without more, will not satisfy the 'proper purpose' requirement of Section 220"). [3]

21. Allowing Troicky to circumvent the stay and obtain discovery to which he is not entitled would upend Section 220 law and policy too. Mandating that such confidential information be publicly disclosed simply due to its citation in a complaint, particularly where a corporation has demonstrated good cause for continued confidential treatment, would increase the economic risks (among others) posed to Delaware corporations and the burdens associated with books-and-records reviews and productions. As a result, it would also adversely impact the inspection rights of stockholders. Parties must be able to rely on confidentiality agreements reached in connection with Section 220 demands. *See e.g., Disney v. Walt Disney Co.,* 2005 WL 1538336, at *4 (Del. Ch. June 20, 2005) ("Delaware courts have repeatedly 'placed reasonable restrictions on shareholders' inspection rights in the context of suit brought under 8 *Del. C.* § 220, and [have] made disclosure contingent upon the shareholder first consenting to a reasonable confidentiality agreement.'"); *Saito v. McKesson HBOC, Inc.,* 2002 WL 31657622, at *6 (Del. Ch. Nov. 13, 2002) (recognizing that defendant had "a reasonable expectation of privacy in its disclosure ... of documents secured by a confidentiality agreement").

V. THE PUBLIC INTEREST IN ACCESS IS MINIMAL

22. Continued confidential treatment of the few limited redactions will not "greatly disadvantage the public's ability to understand the nature of the dispute before this *Court.*" *Al Jazeera Am., LLC v. AT & TServs., Inc.*, 2013 WL 5614284, at *7 (Del. Ch. Oct. 14, 2013). The vast majority of the Complaint is public, and that public information extensively details the nature and particulars of each of Plaintiff's claims. The redactions are narrow and limited to the highly sensitive information produced to Plaintiff in response to his Section 220 demand. The harm to Lordstown clearly outweighs any purported public interest in the redacted information.

CONCLUSION

For the foregoing reasons, Lordstown respectfully requests that the Court enter the enclosed order permitting the continued Confidential Treatment of the information redacted in the Complaint.

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Dated: December 28, 2021

Footnotes

1 Lordstown has also filed a motion for continued confidential treatment of the information redacted in a proposed revised public version of the complaint in the related *Amin* action pending before Vice Chancellor Will.

2 In this public filing, Lordstown is unable to describe in further detail the harm it will suffer without revealing the substance of the information it seeks to protect from public disclosure. Lordstown is willing to provide on a confidential basis any additional information the Court may require.

3 Lordstown recognizes that some decisions of this court have not adopted the Reform Act's automatic discovery stay as an independent basis to grant a motion for continued confidential treatment over the challenge of a securities plaintiff. *See e.g., In re Pattern Energy Grp. Inc. Stockholders Litig.,* C.A. No. 2020-0357-MTZ (Del. Ch. Aug. 12, 2020) (Transcript). Lordstown submits, however, that this case is distinguishable because, here, Troicky's motion to lift the Reform Act stay in the securities class action already has been denied, making Troicky's attempted end-run around the stay even more egregious. In addition, federal policy in this area is so strong that Congress enabled federal courts to enjoin discovery proceedings in state-court actions that work to violate the discovery stay. 15 U.S.C. § 78u-4(b)(3)(D); *see also In re Cardinal Health, Inc.,* 365 F. Supp. 2d 866 (S.D. Ohio 2005) (staying discovery in state-court derivative action relating to issues raised in the federal securities complaint); *In re DPL Inc., Sec. Litig.,* 247 F. Supp. 2d 946, 947 (S.D. Ohio 2003) (same).