2021 WL 6203228 (Del.Ch.) (Trial Motion, Memorandum and Affidavit)
Chancery Court of Delaware.

Atri AMIN, Plaintiff,
v.
David HAMAMOTO, Mark Walsh, Andrew Richardson, Steven Hash, Judith Hannaway, and Diamondpeak Sponsor LLC, Defendants.

No. 2021-1085-LWW.
December 28, 2021.

Lordstown's Motion for Continued Confidential Treatment

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Pursuant to Court of Chancey Rule 5.1(f)(2), non-party Lordstown Motors Corp. (“Lordstown”) hereby moves for continued confidential treatment of certain information redacted fromthe public version of the Verified ClassAction Complaint (Dkt. 6) (the “Complaint”), for the reasons set forth below.

BACKGROUND

1. This is a stockholder class action that is largely based on the same events underlying a securities class action pending in the Northern District of Ohio and derivative actions pending in the Northe 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), *Cormier v. Burns,* C.A. No. 2021-1049-MTZ (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, Mr. Hamamoto as a defendant and DiamondPeak as an “other relevant entity.” 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 breached their fiduciary duties to SPAC investors (now Lordstown stockholders) by failing to disclose issues related to: (i) Lordstown's timeline for production of its electric truck, the Endurance; and (ii) purchase orders for the Endurance. These allegations underlie many of the claims asserted in 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.

5. 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."

6. Plaintiff filed the Complaint on December 13, 2021 confidentially pursuant to Rule 5.1. On December 16, 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 *Cormier* derivative complaint. Upon receipt of the Notice, Defendants and 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. First, unsealing of the Redacted Information would expose Lordstown to significant competitive harm. The Redacted Information falls into two broad categories: (i) materials prepared by the DiamondPeak Board of Directors' (the "DiamondPeak Board") retained advisor (the "Advisor Materials"). These materials were prepared by the advisor as part of the DiamondPeak Board's due diligence in the acquisition of Lordstown (the "Acquisition"). The Advisor Materials directly reflect highly sensitive information provided to the advisor by Lordstown and the advisor's sophisticated, confidential, and proprietary analysis of Lordstown's business; and (ii) sensitive communications with potential purchasers of the Endurance. These materials were provided by the advisor to the DiamondPeak Board subject to a confidentiality agreement.

9. More specifically, the Advisor Materials concern: (i) the due diligence process performed by the advisor; and (ii) projections and analyses of Lordstown's sales and revenue, and the production timeline for the Endurance. This diligence material directly reflects information provided by Lordstown to the advisor, which the advisor ultimately presented to the DiamondPeak Board. This information is highly sensitive, reflecting the strategic thinking, process, and deliberations of both the DiamondPeak Board and its advisor, and incorporates highly sensitive business information, the public disclosure of which would be detrimental to Lordstown's business and could be improperly used by Lordstown's competitors. Additionally, public disclosure of the sensitive communications between Lordstown and its potential purchasers would be detrimental to Lordstown's business and could be improperly used by Lordstown's competitors.

10. Second, unsealing of the Redacted Information would prejudice defendant Hamamoto and Lordstown 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. The Redacted Information is comprised of: (i) the Advisor Materials; and (ii) sensitive communications with potential purchasers. The disclosure of this highly sensitive information could harm Lordstown competitively and implicates the confidentiality concerns of the DiamondPeak Board and its advisor. 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 rights in the Securities Action, and undermine the standards and purposes of Section 220.

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

16. Most of the redactions in the Complaint implicate the confidentiality interests of (at least) three parties: Lordstown, the DiamondPeak Board, and the DiamondPeak Board's retained advisor. The Redacted Information reflects the highly sensitive information provided by Lordstown to the advisor during due diligence, which was then presented to the DiamondPeak Board in its deliberations concerning the Acquisition.

17. Specifically, the Redacted Information contains highly sensitive information regarding: (i) the due diligence process; and (ii) projected sales and revenues, and the timeline for production of the Endurance, including the advisor's analyses of how these projections compared to Lordstown competitors, among other strategic considerations.[2] The underlying information and the analyses of the advisor could be used by Lordstown's competitors in the particularly competitive and rapidly evolving market of electric vehicles. *See e.g., Renco Grp., Inc. v. MacAndrews AMG Holdings LLC,* 2013 WL 3369318, at *9 (Del. Ch. June 19, 2013) (redacting information related to projected sales, revenue, and production figures for vehicles); *In re Tr. for Gore,* 2011 WL 13175994, at *2 (Del. Ch. Jan. 6, 2011) ("Nonpublic estimates of the value of a privately held company are generally entitled to confidential treatment."); *Genentech, Inc. v. Amgen, Inc.,* 2020 WL 9432700, at *6 (D. Del. Sept. 2, 2020) (approving continued sealing and redaction of information related to, among other things, "anticipated market share and penetration, sales volume, [and] pricing and discount strategy" and concluding that "[t]he parties have established that in the highly competitive pharmaceutical industry environment, even seemingly minor pieces of information about a pharmaceutical company can be valuable to its competitors").

18. The confidentiality interests of the advisor are also at stake. This advisor was retained on a confidential basis by the DiamondPeak Board to perform due diligence on Lordstown's business in connection with the Acquisition. Much of

the Redacted Information contains the advisor's sophisticated proprietary analysis of Lordstown's business and its strategic recommendations to the Board, all of which DiamondPeak agreed to maintain in confidence. The Advisor Materials, produced in response to the Demand, specifically state that the advisor's identity is to be kept completely confidential and the materials bear the word "Confidential" on every page. These third-party confidentiality interests must be maintained and respected. *See e.g., Cantor Fitzgerald, Inc. v. Cantor,* 2001 WL 422633, at *1 (Del. Ch. Apr. 17, 2001) (holding that "third-party confidential material" would remain sealed and concluding that "it is quite apparent that ... third-party confidential materials ... are matters deserving of protection").

19. The remaining redacted information concerns sensitive communications with potential purchasers of the Endurance, which include the identities of the potential purchasers and details about quantity and pricing. This information could also be used by Lordstown's competitors to the detriment of Lordstown (and could potentially be used by competitors to the potential purchasers to the detriment of the potential purchasers). *See e.g., Renco,* 2013 WL 3369318, at *9 (redacting information related to the identities of potential customers of vehicles, and details about quantity and pricing). Additionally, as discussed further below, this information was produced to Plaintiff in response to his Section 220 Demand subject to a negotiated confidentiality agreement.

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

20. 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 is 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 (and defendant Hamamoto's) rights in the Securities Action.

21. 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.

22. 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.

23. 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]

24. 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

25. 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. Lordstown's 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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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 *Cormier* action pending before Vice Chancellor Zurn.

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).