



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

POLITAN CAPITAL MANAGEMENT)
LP and POLITAN CAPITAL NY LLC,)
))
Plaintiffs / Counterclaim-)
Defendants,)
))
v.)
))
MASIMO CORPORATION,)
))
Defendant / Counterclaim-Plaintiff,)
))
and)
))
JOE E. KIANI, H. MICHAEL COHEN,)
ADAM P. MIKKELSON, CRAIG B.)
REYNOLDS, and JULIE A. SHIMER,)
Ph.D.,)
))
Defendants.)

C.A. No. 2022-0948-NAC

PUBLIC VERSION FILED
DECEMBER 2, 2022

**DEFENDANT MASIMO CORPORATION’S
MOTION TO COMPEL THE PRODUCTION OF
DOCUMENTS AND INFORMATION FROM PLAINTIFFS**

Politan¹ filed this action against Masimo Corporation and its directors because Politan does not want to comply with the procedures of Masimo’s Bylaw Amendments for the nomination of directors and instead wants Masimo to capitulate to its demands for two board seats, including one for Politan’s founder,

¹ Capitalized terms are defined in Masimo’s requests for production (“RFPs”) and interrogatories. Emphasis is added and citations, quotations and footnotes are omitted unless otherwise stated.

Quentin Koffey. In its counterclaim, Masimo seeks a declaration that the Bylaw Amendments are valid and asserts affirmative defenses, including based on Politan's inequitable conduct. In its answer, Politan doubles down on its baseless allegations and rhetoric. There can be no reasonable dispute that Masimo is entitled, through discovery, to test the allegations of Politan's complaint and answer, and to obtain evidence squarely relevant to Masimo's counterclaim and affirmative defenses. Yet Politan—having chosen to file this litigation and place these matters at issue—refuses to provide relevant discovery.

First, Politan improperly objects to twelve RFPs and eight interrogatories on the ground that, if it responds to these requests, it will be providing Defendants with the same information sought in the Bylaw Amendments themselves. Politan does not cite a single case in support of this position. Masimo is aware of none. This is not a books-and-records action in which the relief requested is access to documents; it is a dispute over the enforceability of Masimo's Bylaw Amendments. The evidence Politan improperly withholds is directly relevant to that question.

Second, Politan improperly objects to fifteen RFPs and fifteen interrogatories on the purported ground of "business strategy immunity." But this objection is seldom-applied and is not supported by the facts of this case.

Third, Politan objects to thirteen RFPs and nine interrogatories because these requests purportedly seek confidential information. But the parties have agreed on a stipulated protective order and mere confidentiality is no basis for refusal to produce relevant discovery.

Fourth, Politan objects to nineteen RFPs and thirteen interrogatories on purported relevance grounds, despite each of these requests seeking facts and information directly related to the claims and defenses asserted.

None of Politan's objections is well-founded and this Court should enter the attached Proposed Order compelling Politan to provide the withheld information.

FACTUAL BACKGROUND

Masimo served its RFPs and interrogatories on October 31, 2022 and Politan served its responses and objections to the RFPs on November 9, 2022 ("RFP R&Os") and to the interrogatories on November 16, 2022 ("Interrogatory R&Os"). Exhibits A-D. The parties met and conferred on November 18, 2022 and November 23, 2022 and exchanged correspondence regarding the discovery requests. Exhibit E, at 11-16. Politan has refused to produce documents or information in response to nineteen RFPs and thirteen interrogatories, including all requests calling for facts and information about Politan's limited partners, which are directly relevant to whether the Bylaw Amendments were adopted for

legitimate corporate purposes and in the best interest of Masimo’s stockholders, including to create stockholder transparency by identifying relevant conflicts of interest and other impediments to board service. *Id.* at 1-2.

LEGAL STANDARD

“Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case” Ct. Ch. R. 26(b). “Relevance must be viewed liberally, and discovery into relevant matters should be permitted if there is any possibility that the discovery will lead to relevant evidence.” *In re Oxbow Carbon LLC Unitholder Litig.*, 2017 WL 959396, at *1 (Del. Ch. Mar. 13, 2017). Generic and unsupported objections are insufficient. A party objecting to discovery “must show specifically how each discovery request is burdensome or oppressive by submitting affidavits or offering evidence revealing the nature of the burden.” *Id.* at *4.

ARGUMENT

Masimo’s RFPs and interrogatories are tailored to obtain facts and information directly relevant to the claims and defenses at issue in this action, and Politan’s objections are unavailing. This Court should enter the attached Proposed Order compelling Politan to respond fully to Masimo’s requests.

A. Politan’s Confidentiality, Business-Strategy, and Ultimate Issue Objections Are Invalid

Politan refuses to produce relevant documents and information on purported grounds of (i) confidentiality; (ii) the business strategy immunity; and (iii) that disclosure would somehow be akin to granting Masimo a victory on the merits of this litigation. Each objection should be rejected.

1. Politan’s Confidentiality Objections Fail

In its RFP R&Os and its Interrogatory R&Os, Politan objects to RFPs 1, 3-4, 11-16, 18, 24, 27, and 30 and interrogatories 2-7, 12, 14-15, and 17 on the basis that the requested information is confidential. RFP R&Os at 13-16, 19-28, 32, 34-37; Interrogatory R&Os at 14-21, 26-31. Politan also objects to Masimo’s discovery requests because producing the requested information “would result in the violation of contractual obligations” Politan purportedly owes these third parties. RFP R&Os at 4; Interrogatory R&Os at 3. Politan has not identified third parties it invokes.

As an initial matter, Politan is refusing to produce information it claims would violate contractual obligations, but has not committed to producing those very contracts. RFP R&Os at 14-16. This game of “hide the ball” is improper. *Klig v. Deloitte LLP*, 2010 WL 3489735, at *7 (Del. Ch. Sept. 7, 2010).

The mere fact that information may be confidential is insufficient to shield that information from discovery. *See, e.g., Ginsburg v. Philadelphia Stock Exch., Inc.*, 2007 WL 1703421, at *2 (Del. Ch. May 30, 2007) (“Nor may defendants rely upon this information’s confidential and sensitive nature as a basis to deny a discovery request.”). This principle applies even where an agreement purportedly prohibits disclosure of information. *See Dawson v. Pittco Capital Partners, L.P.*, 2010 WL 692385, at *1 (Del. Ch. Feb. 15, 2010) (ordering production of confidential arbitration documents).

Politan chose to bring this action against Defendants, knowing “that discovery might involve the production of confidential and sensitive commercial, financial, or business information.” *Surf’s Up Legacy Partners, LLC v. Virgin Fest, LLC*, 2021 WL 5049459, at *3 (Del. Super. Nov. 1, 2021). A standard two-tier confidentiality stipulation has been entered by the Court. Dkt. 31. This is more than sufficient to protect any legitimate confidentiality interest Politan or other third parties may have. *See Bragdon v. Bayshore Prop. Owner’s Ass’n, Inc.*, 2019 WL 340720, at *1 (Del. Ch. Jan. 25, 2019) (“The confidentiality order provides sufficient protection.”).

2. Politan's Business Strategy Immunity Argument Fails

Politan objects to providing documents and information in response to RFPs 11-16, 18-19, 21-22, 24-27, and 30 and interrogatories 2-5, 7, and 15-24 on the ground that these requests “appear[] to be an improper attempt to use discovery in this Action to gain an advantage in its anticipated proxy contest with Politan.” RFP R&Os at 19-37; Interrogatory R&Os at 14-18, 20-21, 29-40. In doing so, Politan appears to be relying on the seldom-applied “business strategy immunity.” RFP R&Os at 3; Interrogatory R&Os at 3. The Court should reject this purported ground to withhold discovery and compel Politan to produce relevant and responsive information.

The business strategy immunity applies in narrow circumstances where a party can demonstrate that the “information disclosed may not be used for proper legal purposes, but rather for practical business advantages.” *Hexion Spec. Chems., inc. v. Huntsman Corp.*, 959 A.2d 47, 53 (Del. Ch. 2008). But, this Court is “reluctant to allow parties to withhold relevant evidence by invoking the business-strategy privilege, even when the disclosure might benefit one of the parties outside of litigation.” *Glassman v. Crossfit, Inc.*, 2012 WL 4859125, at *5 (Del. Ch. Oct. 12, 2012) (rejecting business strategy immunity objection).

Politan’s mere speculation that Masimo might “attempt to use discovery . . . to gain an advantage in its anticipated proxy contest with Politan,” is nothing more than innuendo. Crucially, the entry of the confidentiality order in this action, which (among other things) prevents use of any discovery material outside this litigation, is sufficient to allay any legitimate concerns Politan may have that discovery may be requested for an improper purpose. Dkt. 31; *see also Glassman v. Crossfit, Inc.*, 2012 WL 4859125, at *5 (“The parties have also mitigated risks to [plaintiff] by agreeing to a Confidentiality Order to prevent public disclosures of sensitive materials.”). !

3. Politan’s Ultimate Issue Objection Is Not Found in Delaware Law

Politan also objects to RFPs 1, 3-4, 11-14, 18-19, 25, and 30-31 and interrogatories 2, 4-5, 17-18, and 21-23 because they purportedly seek the “very information sought by the Bylaw Amendments that Politan seeks to invalidate in this Action.” RFP R&Os at 13-16, 19-24, 27-29, 32-33, and 36-47; Interrogatory R&Os at 14, 15-18, 30-39. Although to date, Politan has refused to identify any relevant case law supporting this objection, it may be attempting to draw a misguided analogy to case law from Delaware books and records actions. The Court should reject this objection.

Where, as in a books and records proceeding, the ultimate relief sought is corporate documents, this Court has held that parties cannot seek production of the at-issue documents unless and until the Court issues an order on the merits of the action. *See generally Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 353 (Del. 2020). But it is clear that this objection has no bearing where, as here, the action concerns the enforceability of Masimo’s *Bylaw Amendments* and whether Politan must comply with them, *not* Masimo’s entitlement to the books and records of Politan. For example, in *Ephrat v. MedCPU, Inc.*, a party attempted to resist discovery because it claimed providing the requested documents would be tantamount to granting “the ultimate relief sought.” C.A. No. 2017-0493-MTZ, at *91 (Del. Ch. Nov. 20, 2018) (TRANSCRIPT) (Exhibit F). The Court overruled that objection and ordered production, observing that there is a fundamental difference between the relief sought in a books and records action (where document production is the ultimate goal) and a plenary action (where document discovery may be *related*—but not identical—to the relief sought). *Id.*

This Court should do the same and order Politan to produce the requested discovery. Here, the central issue before the Court therefore is whether the Bylaw Amendments were adopted for legitimate corporate purposes and in the best interests of Masimo’s stockholders, and whether Politan must comply with them.

See infra 12-15. Thus, the information that Masimo seeks in discovery is directly relevant to the claims and defenses at issue in this action, and Politan should not be permitted to withhold otherwise squarely relevant documents and information simply because the Bylaw Amendments require disclosure of certain of this information. *See Ephrat*, 2017-0493-MTZ, Tr. at *91; *see also New Castle Cnty. v. Christiana Town Ctr., LLC*, 2004 WL 1835103, at *3 (Del. Ch. Aug. 16, 2004) (“Here, [plaintiff] is seeking access to the site in question in order to let an expert formulate an opinion to support their case. This is a thoroughly ordinary and relevant application given the nature of the allegations. The fact that [plaintiff] ultimately seeks access in order to remediate possible violations is distinct from allowing access during discovery so that an expert may observe and test the site.”).

B. Politan Must Produce Discovery Related To Politan’s Undisclosed Investors And Backers (Defendants’ RFPs 1, 3-4, 13-16, 18, 25, and 30-31; Interrogatory Nos. 2, 12, 17, and 21-23)

Politan objects to providing documents and information concerning its investors and financial backers on the purported grounds of relevance and burden. Neither objection holds water.

1. The Information Sought is Relevant

To demonstrate relevance, a requesting party need only “provide some minimal explanation as to why the discovery satisfies the requirements of relevance and conditional admissibility.” *In re Appraisal of Dole Food Co., Inc.*,

114 A.3d 541, 551 (Del. Ch. 2014). It then falls on the objecting party to demonstrate why the information sought is irrelevant or overly burdensome. *Id.*

Here, documents and information concerning Politan’s investors and financial backers are directly relevant to the claims and defenses at issue. Indeed, Politan’s complaint is replete with allegations seeking to show that the Masimo board’s concerns regarding those investors’ motivations are invalid, and that the Bylaw Amendments therefore were not adopted for the legitimate business purpose of creating stockholder transparency about, *inter alia*, undisclosed conflicts of interest. For example, the complaint asserts *six* separate times that Politan’s investors are “passive,” in purported support of Politan’s assertion that its investors’ identities are not relevant to Masimo’s stockholders when voting on Politan’s director nominees.² Verified Compl. ¶¶13, 88, 94, 96, 136, 144 (Dkt. 1). And, Politan has represented that the firm and its investors have no agenda

² During a meet and confer, Politan said it would produce documents “sufficient to show” that its limited partners are passive. This is insufficient as it would enable Politan to cherry-pick documents supporting their assertions while denying Masimo contextual documents rebutting these investors’ passivity. *See Theravectys SA v. Immune Design Corp.*, 2014 WL 7332539, at *2 (Del. Ch. Dec. 23, 2014) (rejecting plaintiff’s contention that its document production was “sufficient to show” all aspects the manufacturing process at issue, and holding that defendant “has the right to examine these relevant documents to determine for itself whether they provide utility.”).

regarding Masimo except for increasing stockholder value. *Id.* ¶¶ 28, 66-69, 88, 136-37. Masimo is entitled to test these unproven assertions through discovery. *See Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, C.A. No. 7906-VCG, at *21-22 (Del. Ch. Mar. 9, 2016) (TRANSCRIPT) (Exhibit G) (granting discovery into a fund’s investors); OptimisCorp v. Waite, 2015 WL 357675, at *5 (Del. Ch. Jan. 28, 2015) (“Discovery enables the parties to uncover the factual bases for the allegations in a complaint.”).!*

Further, in its counterclaim, Masimo asserts that it adopted the Bylaw Amendments, in part, because it had concerns that Politan was not being transparent regarding Politan’s motivations for seeking a stake in Masimo, and that Politan’s undisclosed investors may have interests adverse to Masimo. Verified Counterclaim ¶¶ 2-3, 13-14, 51-53, 65, 88-89, 111-16 (Dkt. 6). The question whether Masimo’s adoption of the Bylaw Amendments was a legitimate response to the articulated threats posed by Politan is plainly at issue in this case and subject to discovery. *See OptimisCorp, 2015 WL 357675, at *5.* Politan’s undisclosed investors may also have relevant information and be appropriate witnesses in this case, making their identities discoverable. *See, e.g., Construction Res. Mgmt. v.*

Littleton, 2008 WL 4117186, at *4 (Del. Super. Aug. 28, 2008) (“If the identity of a person is desired, the discovery process exists to provide that information.”).

Masimo has also asserted as an affirmative defense that Politan is not entitled to relief because of its own inequitable conduct, including its materially false disclosures in its Schedule 13D filings with the U.S. Securities and Exchange Commission. Verified Counterclaim at p. 127 (Dkt. 6). Politan denied this in its Answer to Masimo’s Counterclaim. Politan’s Answer to Verified Counterclaim at ¶¶ 15, 52 (Dkt. 12). Masimo is thus entitled to discovery on the question. Politan’s articulated positions with regard to discovery concerning its limited partners are indefensible and obstruct the fair adjudication of this action.

Last, while Politan asserts a boilerplate burden objection regarding these requests, it has not substantiated any burden. *See Oxbow*, 2017 WL 959396, at *4 (“The objecting party must show specifically how each discovery request is burdensome or oppressive by submitting affidavits or offering evidence revealing the nature of the burden.”).

C. This Court Should Instruct Politan to Produce Discovery Regarding Background Information on Politan and Quentin Koffey (Defendants’ RFPs 11-12, 24, and 26; Interrogatory Nos. 3 and 5)

Masimo has alleged that Politan may have undisclosed conflicts of interest, which give rise to an unclean hands affirmative defense. Verified Counterclaim at

¶¶1-2, 13-14, 79, 88, p. 127 (Dkt. 6). Politan claims in its answer that Quentin Koffey is qualified to serve on Masimo's board and that his history of activism benefits investors. Politan's Answer to Verified Counterclaim at 4-5 (Dkt. 12.). Masimo is entitled to test these assertions in discovery, but Politan improperly has refused to produce relevant documents and information.

D. This Court Should Instruct Politan to Produce Discovery Regarding Politan's Actions Toward Masimo in Relation to the Proxy Campaign (Defendants' RFP Nos. 19-20, 22, and 27; Interrogatory Nos. 6, 14-16, and 24)

In its counterclaim, Masimo pleads that: (1) Politan discussed a potential proxy fight with other Masimo stockholders, then misrepresented to Masimo that it had engaged in no such discussions (Verified Counterclaim ¶¶ 12, 59, 64, Dkt. 6); and (2) Politan has refused to provide any information regarding its plans for Masimo should it be granted representation on Masimo's board. *Id.* ¶¶ 9, 57-58, 62. These were among the facts Defendants considered in determining to pass the Bylaw Amendments, and give rise to Masimo's unclean hands defense. *Id.* ¶¶ 64-65, p. 127. Politan denies these allegations in its answer, thus creating a factual dispute that is subject to discovery. Politan's Answer to Verified Counterclaim at 34-35 (Dkt. 12). Yet Politan improperly has refused to produce documents and information concerning its actions toward Masimo in relation to the proxy campaign.

Likewise, Masimo has alleged in its Counterclaim that the Bylaw Amendments were adopted, in part, because of Masimo's reasonable belief that Politan is seeking to nominate unqualified directors—including Politan's founder, Quentin Koffey, to Masimo's board. Verified Counterclaim ¶¶ 1, 10, 39, 62. Politan counters, in its answer, that Koffey is qualified. Politan's Answer to Verified Counterclaim at 4-6. Defendants are entitled to discovery into Koffey, his prior campaigns, and Politan's proposed board candidates in order to test Politan's claims.

CONCLUSION

This Court should grant Masimo's motion and enter the attached Proposed Order.

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2022, my firm served true and correct copies of *Public Version of Defendant Masimo Corporation's Motion to Compel the Production of Documents and Information from Plaintiffs* upon the following counsel of record via File & ServeXpress:

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