CONFIDENTIAL

DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

Opinion 2006-2
October 6, 2006

This opinion is merely advisory and is not binding on the inquiring attorney or the
Court or any other tribunal

Background Facts

The inquirer, a member of the Delaware Bar (hereinafter "Attorney"), seeks guidance as to the appropriate professional conduct in the context of the facts as stated hereinafter. Attorney represents a client in a personal injury case who is in dire financial straits. The client contacted a litigation loan financing company (hereinafter "Company") to seek a loan secured by anticipated proceeds from a successful suit. The client is seeking to borrow funds from the Company, and in exchange, the Company receives payment upon the successful completion of the suit. Also, it is very likely that the client must pay interest on the loan in an amount far exceeding the typical market rate. If the suit is dismissed or otherwise fails during the litigation or trial process, the Company does not recover the loan amount and the client is free from all debt related to the loan.

In order for the Company to loan funds to the client, the Company requests certain information to independently assess the merits of the suit for itself. This information includes police/ accident reports, medical records, witness statements, expert reports, and information relating to the defendant's insurance carrier and its policy limits. Attorney has received written confirmation from client authorizing the release of the applicable information to the Company. Attorney

does not believe that this arrangement is in his client's best interest.

Attorney requests a review of this proposal and guidance as to whether Attorney's compliance with such arrangement would violate the Delaware Lawyers' Rules of Professional Conduct. Since this issue appears to be a growing concern for many members of the Delaware Bar, the Committee felt a formal opinion would be appropriate.

Conclusion

It is the Committee's opinion that the Attorney may comply with such an arrangement under the proper circumstances (as discussed below). This conclusion does not address the validity of the agreement between the client and the Company. Such issue is beyond the scope of this opinion. However, if the Attorney complies with the client's request, the Attorney must advise the client of the potential consequences of such an arrangement. Only after the Attorney advises the client about the potential consequences, alternative courses of action and otherwise obtains the necessary informed consent of the client, should the Attorney release the information in compliance with the client's wishes. Also, the Attorney should not cosign or guarantee the loan, should not have any interest in the loan company, and should not receive any kind compensation from the loan company. Furthermore, the Attorney should not disclose matters protected by the attorney-client privilege or work product doctrine unless the Attorney obtains the client's consent after full discussion and advice concerning the risk and effects of waiver of those protections.

Discussion

The applicable provisions of the Delaware Lawyers' Rules of Professional Conduct ("LRPC") are Rules 1.6 (Confidentiality of Information), 1.7 (a)(2) (Conflicts of Interest: Current Clients), 1.8 (Conflict of Interest: Current Clients: Specific Rules), and 2.3 (Evaluation for Use by Third Persons.) The relevant portions of those rules are as follows:

Rule 1.6

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . .

Rule 1.7(a)(2)

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Rule 1.8

(b) A lawyer shall not use information relating to the representation of a client to the disadvantage of a client unless the client gives informed consent, except as permitted or required by these rules.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigations, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a

client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

Rule 2.3

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with the other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially or adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Attorney seeks guidance on the proper response to Company's request for information relating to the client and the facts surrounding the lawsuit. On the face, the initial question appears to be whether the Attorney may disclose information relating to the representation of his client to a third party. LRPC Rule 1.6(a) appears to provide the answer. It indicates that a lawyer is permitted to reveal information relating to the representation of a client upon receiving informed consent from the client. In order to satisfy the requirements of informed consent, LRPC 1.0(e) provides guidance. It requires the Attorney to discuss with the client the risks and any available alternatives to the proposed course of conduct. Once this takes place, and the client chooses to continue this course, informed consent has been given. Under the facts of this particular Attorney's situation, the Client sent a

written request in the form of an email to the Attorney. Such a written request appears to be sufficient to satisfy the concerns addressed by the rule, if the client holds the same position after the Attorney discusses the risks and available alternatives to the proposed course of conduct. However, the Attorney should not disclose matters protected by the attorney-client privilege or work product doctrine unless the Attorney obtains the client's consent after full discussion and advice concerning the risk and effects of waiver of those protections, and possibly methods, such as a joint interest agreement, to avoid waiver.

This same method of informed consent appears to satisfy any concerns raised by LRPC Rule 1.8 (b). This rule prohibits an Attorney from using information relating to the representation of a client to the disadvantage of the client, unless informed consent is given. As stated previously, informed consent is given after the Attorney fully discusses the issue with his client. Although an Attorney may not believe an arrangement under these circumstances are in the best interest of the client, it does not appear that a lawyer providing information to the company at the request of the client is using the information to the disadvantage of the client. The Attorney would be providing the information at the client's request. The person using the information under these circumstances appears to be the client. Furthermore, it is questionable whether the information, in fact, is being used to the client's disadvantage. Obviously, the client believes that there is an advantage in providing the information. The client is in dire financial straits and is seeking financial assistance from the Company. Therefore, there is an advantage to the client's request, but whether it outweighs the potential disadvantage is a value call.

LRPC Rule 1.8(e) presents another issue raised by these circumstances. This rule forbids an Attorney from providing financial assistance to a client in most situations. This committee has previously "suggest[ed] that under Rule 1.8(e), a lawyer is not prohibited from providing financial assistance to a client while representing the client in connection with pending or contemplated litigation, unless the financial assistance is connected in some way to the litigation."[1] Here, any

financial assistance that would be given to the client as a result of providing the information would be connected in some way to the litigation. This is because payment to the client and repayment to the company is contingent upon the existence and successful completion of the litigation. However, this committee has never addressed whether the Attorney's cooperation in providing the information to a third party constitutes the Attorney providing financial assistance to the client in conflict with the rule.[2]

Other State Ethics Committees, however, have come closer to addressing this issue. "The majority of states have concluded that providing information to a funding company at the client's request is permissible, with the informed consent of the client."[3] There does not appear to be any opinion written by various bar associations or ethics committees, indicating that an Attorney merely providing information to a Company with the client's informed consent, and at the client's request, is equal to the Attorney him/herself providing financial assistance to a client. However, there are opinions suggesting that it would be unethical for an Attorney to co-sign or guarantee the loan, or act as a trustee for the lender in reference to repayment and distribution of funds, or have an ownership interest in the lending institution. See also LRPC 1.7(a)(2), which would prohibit the attorney having an interest in the lending institution. Other state bar opinions also conclude that the attorney should not provide the lending institution an opinion on the value or merits of the case, or receive compensation for the loan.[4] This committee believes members of the Delaware Bar should be guided by these same principles. As such, it is the committee's opinion that it would violate LRPC 1.7(a)(2) and 1.8, for an Attorney to co-sign or guarantee the loan, act as a trustee for the lender in reference to the repayment under these circumstances, to have an ownership interest in the lending institution, or receive compensation from the lending company. Further, if the attorney believes the disclosures of such "evaluation" would "materially or adversely" affect the client, then LRPC 2.3 would appear to allow an attorney to provide an "evaluation" of the personal injury claim to a third party only upon receipt of the client's informed consent . Full disclosure and informed

consent would require that the client be "adequately informed concerning the important possible effects on the client's interest." See Comment 5. Such effects would appear to include disclosure of possible waiver and may require consideration of a joint interest agreement or other mechanism to attempt to avoid waiver. LRPC 2.3 provides that a lawyer may give an evaluation only "…if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client." This determination would depend upon the facts of each case.

Attorney inquired as to the relevance of Rule 1.8(f)(2). This rule restricts an Attorney's ability to accept compensation from someone other than the client who is being represented. This rule could be applicable if it is determined that the Company is either directly or indirectly paying for the Attorney to provide legal services to the client. If Attorney has a contingency arrangement with the client, it is the opinion of this committee that Rule 1.8(f)(2) would not apply under these circumstances. This is because the Company would not be directly or indirectly paying the Attorney through advancing funds to the client. Furthermore, as long as the Attorney does not allow the Company to control the course of litigation, this rule would appear to be satisfied.[5]

It has been suggested by an Ethics Committee of another jurisdiction that the attorney should not agree to protect the interests of the loan company.[6] This Committee believes, however, that it is not uncommon for an attorney to agree to protect the interests of a third party out of settlement proceeds. For example, this is frequently done for medical providers. This Committee believes that the attorney may not allow the loan company to control the course of the litigation, and nothing in any agreement to protect the lender's interest should allow such interference. Subject to those restrictions, the attorney, after full disclosure of the impact, may agree to protect the interest of the lender.

Lastly, Rule 1.2(d) must be considered. The Rule states:

> "(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning of application of the law."

If the loan transaction were criminal or fraudulent, Rule 1.2(d) would appear to prevent the attorney from counseling the client to engage or to assist the client in such a loan transaction. It is not the function of this Committee or of this Opinion to issue an opinion on whether or not this type of loan transaction is champerty or maintenance. In Hall v. State,[7] agreements determined to be champerty or maintenance were found unenforceable. However, this does not mean that these agreements are criminal or fraudulent. If the subject loan agreement is determined not to be champerty or maintenance, there would not appear to be any ethical violations. If, however, it is determined this type of arrangement is champerty or maintenance, the question then becomes to what extent the Attorney's involvement violates LRPC Rule 1.2(d). Again, this Committee will not decide or opine upon the issue of whether the proposed arrangement is champerty or maintenance; but, the Committee does conclude that, even if it is champerty or maintenance, it is not necessarily criminal or fraudulent; and, even though potentially voidable or unenforceable, the Attorney's involvement does not violate Rule 1.2(d). As concluded above, there is no other specific ethical rule that appears to be violated by this type of transaction. The mere fact the agreement may be voidable or unenforceable does not make the lawyer's advice violative of the LRPC. Consistent with Rule 1.2(d), the Attorney should not counsel the client to take the loan, if the client has an expectation that the loan is unenforceable. Furthermore, the Attorney should not counsel the client to fraudulently take the loan if it is known that it will not be repaid after successfully litigating the suit. It would appear that type of advice could indeed be considered counseling or assisting a client with respect to a fraudulent transaction, and violative of Rule 1.2(d).

[1] Opinion 1994-3 at 6.
[2] Although the Rule states two exceptions to an attorney providing such assistance, those exceptions are not relevant here.
[3] Professional Ethics of the Florida Bar Opinion 00-3.
[4] Board of Professional Responsibility of the Supreme Court of Tennessee, Ethic Opinion 99-A-666; Virginia State Bar Legal Ethics Opinion No. 1379 and No. 1471; Florida State Bar Opinion 92-6 and 00-3; Nebraska Ethics Advisory Opinion No. 00-2; New York State Bar Association Committee on Professional Ethics Opinion 666 (73-94)..
[5] South Carolina State Bar Ethics Advisory Opinion 94-04; Florida State Bar Opinion 00-3.
[6] Florida State Bar Opinion 00-3.
[7] 655 A.2d. 827 (Del. Super., 1994).

Charge Injection Technologies, Inc., Plaintiff, v. E.I. DuPont de Nemours and Company, Defendant.

C.A. No. N07C-12-134 JRJ

SUPERIOR COURT OF DELAWARE, NEW CASTLE

2014 Del. Super. LEXIS 103

February 7, 2014, Submitted
February 27, 2014, Decided

NOTICE:

THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

SUBSEQUENT HISTORY: Appeal denied by *Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co., 89 A.3d 476, 2014 Del. LEXIS 167 (Del., Apr. 7, 2014)*

PRIOR HISTORY: [*1]
Upon Plaintiffs' Motion for Protective Order and for Dissolution of the Stay of Proceedings.
Charge Injection Techs., Inc. v. E. I. DuPont de Nemours & Co., 2009 Del. Super. LEXIS 340 (Del. Super. Ct., Sept. 25, 2009)

DISPOSITION: DENIED IN PART, DEFERRED IN PART.

COUNSEL: Ryan P. Newell, Esquire, Connolly Gallagher LLP, Wilmington, DE; Amir H. Alavi, Esquire, (pro hac vice) (argued), Ahmad, Zavitsanos, Anaipakos, Alvi, Mensing, Dallas, Texas, Attorneys for Plaintiff.

Kathleen F. McDonough, Esquire (argued), John A. Sensing, Esquire, Michael B. Rush, Esquire, Potter, Anderson & Corroon LLP, Wilmington, Delaware, Attorneys for Defendant.

JUDGES: Jan R. Jurden, Judge.

OPINION BY: Jan R. Jurden

OPINION

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 [*2] 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.**

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.

II. BACKGROUND

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

2 *See* Trans. ID 40151517.
3 *See* Trans. ID 40632788.
4 *See* Declaration of [*3] 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.

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 [*4] 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.

6 Trans. ID 53689757.
7 Op. Br. 1.
8 Aug. 15, 2013 Hr'g Tr., Trans. ID 53997996, at 47:15-16, 48:10-11.

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."

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

Although CIT is withholding documents on privilege grounds, it has refused to produce a privilege log as required by Delaware law.[10] [*5] 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 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.

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.

12 Op. Br. 2.
13 *See* Trans. ID 54394124.

Briefing on the motion for protective order is complete and the Court heard oral argument on February 17, 2014. Following oral argument, the Court [*6] 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.

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 [*7] 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.

15 *Super. Ct. Civ. R. 26(c).*

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 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 [*8] 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.

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)* (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 [*9] 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 Del. Ch. LEXIS 184, 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 Del. Ch. LEXIS 70, 2004 WL 1305745, at *29 (Del. Ch. June 4, 2004)* (Holding that assignments at issue were not champertous) (citing, *inter alia, Compaq*); *Kingsland Holdings, Inc. v. Bracco, 1996 Del. Ch. LEXIS 28, 1996 WL 104257, at * 5, n.2 (Del. Ch. Mar. 5, 1996)* (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); [*10] *Street Search Partners, L.P. v. Ricon Int'l, LLC, 2006 Del. Super. LEXIS 200, 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]

20 Ans. Br. 14.

21 *See id.*

Under Delaware law, maintenance "is an officious [*11] 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 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]

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

23 *Id.* (quoting *Hamilton v. Gray, 67 Vt. 233, 31 A. 315 (Vt. 1895))*.

24 *Emerging Communs. Inc. S'holders Litig., 2004 Del. Ch. LEXIS 70, 2004 WL 1305745, at *29*.

25 *Street Search Partners, 2006 Del. Super. LEXIS 200, 2006 WL 1313859, at * 3* (citation omitted).

CIT argues that Aloe is not an "officious meddler" because CIT sought out Aloe (not the other way around), [*12] 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.

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.

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 [*13] not prove that Aloe

is not exercising control over CIT or the 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.

28 Op. Br. 15.
29 Ans. Br. 16.
30 *Id.*

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 [*14] 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.

IT IS SO ORDERED.

Jan R. Jurden, Judge