

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Submitted: November 23, 2007

Decided: November 30, 2007

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Re: *Ryan, et al. v. Gifford, et al.*
Civil Action No. 2213-CC

Dear Counsel:

I have before me the motions listed below. I have ruled on each of these motions, in brief form, as follows.

- 1. The motion to compel of defendants Frederick Beck, Tunc Doluca, Pirooz Parvarandeh, Richard Hood, Vijaykumar Ullal, Charles Rigg, Michael Byrd, James Bergman, B. Kipling Hagopian, Frank Wazzan, Eric Karros, M.D. Sampels, and Alan Hale (the “individual defendants”)**

By this motion, the individual defendants seek to compel plaintiffs to respond to interrogatories seeking to ascertain the factual basis for plaintiffs’ claims against the individual defendants. Because this motion appears to have been mooted or eclipsed by other circumstances, I deny this motion without prejudice. Should individual defendants determine the need still exists for the discovery sought in this motion, they may refile this motion at that time.

- 2. Plaintiffs’ July 3, 2007 motion to compel production from defendants, including nominal defendant Maxim Integrated Products, Inc.**

Plaintiffs seek an order compelling: (1) nominal defendant Maxim Integrated Products, Inc. (“Maxim” or the “Company”) to respond to plaintiffs’ document requests in native file format, with original metadata, but without a separate production of metadata; (2) all defendants (and Maxim) to produce non-privileged documents involving discussions or negotiations relating to defendant Jasper’s and defendant Gifford’s employment termination from Maxim, including notes or minutes taken at meetings concerning their termination from the Company; and (3) all defendants (and Maxim) to provide copies of communications between any defendant and the Securities and Exchange Commission (the “SEC”) concerning stock option backdating at the Company, including transcripts of testimony provided to the SEC regarding this subject. Maxim insists that these requests are irrelevant, moot or burdensome. The individual defendants contend the requests are burdensome, irrelevant, privileged or not in the possession of the individual defendants.

For the following reasons, I grant plaintiffs’ motion to compel. First, metadata may be especially relevant in a case such as this where the integrity of

dates entered facially on documents authorizing the award of stock options is at the heart of the dispute. This relevance is further illustrated by the fact that Maxim's special committee, as well as Deloitte & Touche, undoubtedly reviewed metadata as part of their investigation into the backdating problems at Maxim. This latter fact also undermines the asserted burdensomeness of producing documents in native file format. Maxim need not produce metadata separately, but the Court does order the production of documents identified in plaintiffs' July 3rd motion to compel in a format that will permit review of metadata, as plaintiffs have clearly shown a particularized need for the native format of electronic documents with original metadata.

Second, discussions or negotiations regarding Jasper's and Gifford's termination may be relevant or likely lead to the discovery of relevant information regarding the scope and nature of the stock option backdating that allegedly occurred under their direction. Maxim's assertion that it has already produced all non-privileged documents responsive to this particular request leaves unanswered and unclear precisely which documents have not been produced based on privilege. Thus, Maxim shall provide an updated and complete privilege log (in substitution for the May 15, 2007 privilege log) identifying each document for which it claims privilege (and that has not been produced under this subject request), as well as the document's date, author, recipients, and a brief description of the precise privilege relied upon as a basis for withholding the document. The privilege log shall be submitted to plaintiffs and to the Court. Maxim shall further provide the Court with each of the withheld documents identified in the privilege log for the Court's *in camera* inspection. In order to be explicitly clear, these documents shall include any minutes or notes of meetings (whether in person or telephonically) of discussions or negotiations regarding the Jasper/Gifford terminations. The individual defendants are under the same burden to produce the requested documents concerning the termination. If documents are withheld on the grounds of privilege, the individual defendants must provide plaintiffs and the Court with a privilege log, as above described, identifying each and every document being withheld, together with copies for the Court's *in camera* review.

Third, and finally, the most equitable solution to plaintiffs' request for communications between all defendants (including Maxim) and the SEC, is for Maxim to scan and produce on CD or DVD a complete and unaltered set of all documents (including cover letters and "MXIM-SEC" Bates numbers) actually produced to the SEC, which Maxim has in its possession and which reflect

delineations between separate documents easily recognized by electronic discovery software. This will obviate any purported burden from such production because Maxim must have those documents organized in MXIM-SEC Bates number order in its files. Thus, production in the manner described above should not be difficult; it also should eliminate most, if not all, of the problems concerning missing Bates-numbered pages and any question of missing witness binders or transcripts of SEC testimony that plaintiffs contend have been produced to the SEC but withheld from them. Very little of the information should be privileged, as only one defendant has mentioned any form of confidentiality order entered into in connection with the SEC investigation.¹ To the extent any document is purportedly privileged, the claiming party shall provide a privilege log for plaintiffs, and a privilege log and the privileged documents for the Court's *in camera* review. To the extent testimony or other information with the SEC is not in the physical possession of defendants, the appropriate defendant shall make a request of the SEC for the transcript or document.

Accordingly, consistent with the above-described parameters, I grant plaintiffs' July 3, 2007 motion to compel production from defendants, including nominal defendant Maxim.

3. Plaintiffs' July 3, 2007 motion to compel production from Maxim Integrated Products, Inc. (including its Special Committee), Orrick Herrington & Sutcliffe, LLP and LECG Corporation

Plaintiffs seek to compel Orrick Herrington & Sutcliffe LLP (counsel to Maxim's special committee) and LECG (who was retained by Orrick for forensic accounting assistance) (together "Orrick") and Maxim (including its special committee) (the "Special Committee") to produce all communications between Orrick and the Special Committee and Orrick and Maxim. Specifically, plaintiffs seek, first, discovery concerning the communications between Orrick and the Special Committee that occurred throughout the course of the Special Committee's

¹ Defendant Gifford asserts that documents were provided to the SEC on his behalf only under an express oral confidentiality agreement. Gifford contends that he therefore may properly withhold any documents produced to the SEC or communications between his attorney and the SEC about those documents on privilege grounds. To the extent these documents are purportedly privileged, and such privilege has not been waived because of the oral confidentiality agreement, Gifford shall provide a privilege log for plaintiffs and the Court.

investigation and, second, Orrick's presentation of the final report to the Special Committee and Maxim's board of directors. Orrick and Maxim assert that the attorney-client privilege applies to the communications sought by plaintiffs and that this privilege has neither been waived nor vitiated by a showing of good cause by plaintiffs. Plaintiffs also seek documents withheld by Orrick on the grounds that they are protected by the work product doctrine, including notes from its interviews with thirty-two individuals conducted in the course of the investigation and Orrick's forensic analysis of Maxim's computer systems, including metadata. For the reasons that follow, I grant plaintiffs' motion to compel in part.

There appears to be no dispute that, absent waiver or good cause, the attorney-client privilege protects communications between Orrick and its client, the Special Committee. Maxim, however, also asserts attorney-client privilege for its communications with Orrick relating to the Special Committee's findings, reports, presentations, and other communications, contending that, because the Special Committee was formed at its direction in direct response to the litigation challenging Maxim's grants of stock options, Maxim and its Special Committee share a joint privilege. As a result of this purported joint privilege, communications between not only the Special Committee and Orrick, but also Maxim and Orrick would be protected. Maxim further contends that it has not waived this privilege. Even assuming that Maxim can assert the privilege between the Special Committee and Orrick to protect communications between Maxim and Orrick about the investigation and report,² I conclude that the privilege does not

² It is worthwhile to note that the Special Committee formed here to investigate the stock option backdating appears to lack power to assert claims on behalf of Maxim and so is not one formed under the framework of *Zapata v. Maldonado*, 430 A.2d 779 (Del. 1981). Such a committee would certainly possess its own independent privilege. See, e.g., *Moore Business Forms, Inc. v. Cordant Holdings Corp.*, Nos. 13911, 14595, 1996 WL 307444, at *6 (Del. Ch. June 4, 1996) (stating that a special committee formed pursuant to 8 *Del. C.* § 141(c) would be free to retain separate counsel and its communications with counsel would be properly protected from disclosure to members of the company's board). Here, it is clear that an attorney-client relationship exists between Orrick and the Special Committee. But, given the nature of the Special Committee as to Maxim, it is at least arguable that the Special Committee is not wholly separate from and independent of Maxim such they may share a joint privilege. Though, as discussed below, I am skeptical that the individual defendants, as directors of Maxim's board, do in fact share a joint privilege, I analyze this issue assuming, but without deciding, that Maxim could properly assert the privilege between the Special Committee and Orrick as to Maxim's communications with Orrick.

apply here because plaintiffs' showing of good cause vitiates it. Applying the factors set forth in *Garner v. Wolfinbarger*,³ and particularly the three identified in *Sealy Mattress Co. of New Jersey, Inc. v. Sealy, Inc.*,⁴ I conclude that no privilege has attached to the communications between Maxim and Orrick regarding the investigation and report. Plaintiffs have demonstrated: (1) a colorable claim; (2) the unavailability of information from other sources, including the lack of written final report, the inability to depose witnesses regarding the report or investigation because of assertions of privilege, and the unavailability of witnesses due to invocation of the Fifth Amendment privilege not to testify; and (3) the specificity with which the information is identified. Of particular importance is the unavailability of this information from other sources when information regarding the investigation and report of the Special Committee is of paramount importance to the ability of plaintiffs to assess and, ultimately prove, that certain fiduciaries of the Company breached their duties. Consequently, I conclude that no attorney-client privilege attached to the communications between Maxim and Orrick regarding the investigation and, therefore, these communications must be produced.

Even if, however, Maxim and its Special Committee do share a joint privilege, as to certain communications between Orrick and the Special Committee, I conclude that plaintiffs have demonstrated that the privilege has been waived. Plaintiffs appear to seek discovery of all communications between Orrick and the Special Committee related to the investigation and report, in addition to discovery of the presentation of the Special Committee's investigation and final report to the Special Committee and Maxim's board of directors. Though plaintiffs have demonstrated waiver of the privilege only as to the presentation of the report, this partial waiver operates as a complete waiver for all communications regarding

³ 430 F.2d 1093, 1103-04 (5th Cir. 1970), *cert denied*, 401 U.S. 974 (1971). *See also Deutsch v. Cogan*, 580 A.2d 100, 105 (Del. Ch. 1990); *Zirn v. VLI Corp.*, 621 A.2d 773, 782-83 (Del. 1993).

⁴ No. 8853, 1987 WL 12500, at *4 (Del. Ch. June 19, 1987) (identifying three factors as of "particular significance": (i) whether the claim is colorable; (ii) the necessity or desirability of information and its availability from other sources; and (iii) the extent to which the information sought is identified as opposed to blind fishing expedition)).

this subject matter.⁵ Therefore, I conclude that plaintiffs are entitled to all communications between Orrick and the Special Committee related to the investigation and final report. Communications made in the presence of third persons not for the purpose of seeking legal advice operates as a waiver of the attorney-client privilege.⁶ On January 18 and 19, 2007, the Special Committee presented its final oral report to Maxim’s board of directors. This report appears to be more than a mere acknowledgement of the existence of the report and instead disclosed such details that, for example, attendees were directed to turn in any notes taken during the presentation at the end of the meeting. In addition to the Special Committee and Orrick, other members of the board of directors and attorneys from Quinn Emmanuel were also in attendance. The presentation of the report constitutes a waiver of privilege because the client,⁷ the Special Committee, disclosed its communications concerning the investigation and final report to third parties—the individual director defendants and Quinn Emmanuel—whose interests are not common with the client, precluding application of the common interest exception to protect the disclosed communications.⁸ The individual defendants, though directors on the board of Maxim, cannot be said to have interests that are so parallel and non-adverse to those of the Special Committee that they could reasonably be characterized “joint venturers.” The Special Committee was formed to investigate wrongdoing and in response to litigation in which certain directors were named as individual defendants. This describes a relationship more akin to one adversarial in nature. Though the presence of counsel that seemingly acts in a

⁵ See *Citadel Holding Corp v. Roven*, 603 A.2d 818, 825 (Del. 1992) (citing Del. R. Evid. 510; *Texaco, Inc. v. Phoenix Steel Corp.*, 264 A.2d 523 (Del. Ch. 1970); *Int’l Bus. Machs. Corp. v. Sperry Rand Corp.*, 44 F.R.D. 10 (D. Del. 1968)).

⁶ See e.g., *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1424 (3d Cir. 1991) (“[V]oluntary disclosure to a third party of purportedly privileged communications has long been considered inconsistent with an assertion of the privilege”).

⁷ The privilege, which is based in Rule 502(b) of the Delaware Rules of Evidence, belongs to the client and may be waived either expressly or implicitly. See *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 259 (Del. 1995).

⁸ The common interest doctrine extends the protections of the attorney-client privilege to disclosures of communications among parties who share a common interest. Under this exception, however, for the communication to remain privileged even after its disclosure to others, the “others [must] have interests that are ‘so parallel and non-adverse that, at least with respect to the transaction involved, they may be regarded as acting as joint venturers.’” *Saito v. McKesson HBOC, Inc.*, No. 18553, 2002 WL 31657622, at *4 (Del. Ch. Nov. 13, 2002) (citing *Jedwab v. MGM Grand Hotels, Inc.*, No. 8077, 1986 WL 3426, at *2 (Del. Ch. Mar. 20, 1986)).

dual capacity as counsel for both Maxim (before the SEC) and the individual defendants in this litigation⁹ may confuse the issue of whether the director defendants attended the January meetings in a fiduciary—not individual—capacity, any apparent confusion may now be dismissed because the individual director defendants specifically rely on the findings of the report for exculpation as individuals defendants. Thus, there can be no doubt that the common interest exception is inapplicable to extend the protection of the attorney-client privilege to the communications disclosed at the January board meetings. Therefore, those communications relating to the final report, including any materials distributed or collected at meetings between the Board members and the Special Committee, must be produced.¹⁰

As to the documents for which Orrick claims protection under the work product doctrine,¹¹ this Court rules as follows: first, because Orrick states that its notes are not transcripts of interviews and do not provide a verbatim account of witness testimony and, instead, characterizes its notes as containing attorney thoughts, impressions, opinions, and conclusions regarding witness credibility and testimony, Orrick’s interview notes are protected by the work product doctrine. Plaintiffs contend that the notes are in fact work product, not opinion work product, and so plaintiffs’ burden—which plaintiffs assert they have satisfied—is to show both substantial need and undue hardship.¹² Because work product containing attorney thoughts, impressions, opinions, and conclusions is the paradigmatic type of work product that Rule 26(b)(3) operates to protect, this

⁹ If, in fact, as plaintiffs allege, the same law firm acts in a dual capacity as counsel for both Maxim before the SEC and the individual defendants in this litigation, this is a representational conflict about which the Court anxiously awaits to be enlightened.

¹⁰ Of course, all documents and communications related to the underlying factual information upon which Orrick based any legal advice is not within the ambit of attorney-client privilege protections and should have already been produced

¹¹ See Ct. Ch. R. 26(b)(3). See also *Saito*, 2002 WL 31657622, at *3 (discussing protection for opinion work product).

¹² See *Saito*, 2002 WL 31657622, at *11 (“A party may receive non-opinion work when the party has a *substantial need* for the materials and the party cannot acquire a substantial equivalent of the materials by other means without *undue hardship*.”) (citing Ct. Ch. R. 26(b)(3) (emphasis in original)). Plaintiffs must satisfy a higher burden for opinion work product, which the courts will protect in all but the most compelling circumstances. *Id.* (“A party may receive opinion work product when it is *directed to the pivotal issue* in the current litigation and the need for the information is *compelling* (citing *Tackett*, 653 A.2d at 262 (emphasis in original)).

Court will not order their production and risk erosion of the work product doctrine, particularly if the notes are indeed opinion work product. Instead, Orrick must produce its interview notes to the Court for *in camera* inspection. If, after this Court's review of the notes, this Court determines that the notes may be properly produced either in their entirety or in some redacted form, then the notes shall be produced at that time. I, therefore, defer ruling on this aspect of plaintiffs' motion until I have reviewed the notes, which Orrick is directed to promptly produce to the Court. Second, plaintiffs contend that, aside from the interview notes and metadata, they are unable to identify the precise nature and scope of documents withheld by Orrick on the grounds of the work product doctrine. Orrick must, therefore, provide plaintiffs with a privilege log identifying each document it is withholding on this basis. Orrick also must provide the Court with the privilege log, in addition to the documents for which the privilege is claimed, for *in camera* review. Third, this Court compels Maxim to produce metadata, within the parameters described in the Court's reasoning in relation to plaintiffs' other July 3rd motion to compel.

4. Plaintiffs' July 5, 2007 motion to compel production from nominal defendant Maxim Integrated Products, Inc. and third party Deloitte & Touche LLP

Plaintiffs seek all documents and communications concerning any determinations as to the correct measurement dates for Maxim stock options. Defendants, however, have not yet reached any conclusions regarding the correct measurement dates, and argue that interrupting the ongoing restatement process to produce these inchoate materials will present an undue burden. Plaintiffs need the correct grant dates only to calculate damages for any backdated options that have been exercised. Because this need is relatively slight compared to the burden that would be placed on the defendants, I deny this motion to compel.¹³ Plaintiffs will be able to calculate damages based on the correct measurement date after defendants have completed their restatement.

5. Plaintiffs' motion for order regarding defendants' and witnesses' invocation of their Fifth Amendment privilege

¹³ See Ct. Ch. R. 26(b)(1)(iii); *Cal. Pub. Employees' Ret. Sys. v. Coulter*, No. 19191-NC, 2004 WL 1238443, at *1 (Del. Ch. May 26, 2004) (denying motion to compel where "the currently pending requests are far too broad and far too burdensome").

Plaintiffs seek protections (in the form of advance notice and opportunity to depose) against unfair surprise if either defendant Jasper or other non-party witnesses waive their Fifth Amendment rights before trial.¹⁴ Specifically, plaintiffs' proposed order would require Jasper and any other defendant who invoke his Fifth Amendment privilege and then waives that right before trial to: (1) at least eight weeks before trial, notify all parties of this waiver and respond to interrogatories and document requests previously served upon him by plaintiffs; and (2) at least five weeks before the start of trial, submit to a deposition in which he does not invoke his Fifth Amendment privilege. Plaintiffs' proposed order would require the similar requirements for non-party witnesses (specifically, no party may call a non-party witness who invokes his or her Fifth Amendment right to testify at trial without providing notice to all other parties at least eight weeks before trial and this witness must submit to a deposition at least five weeks before trial).

Though I am not convinced that there is necessarily a cognizable prejudice to defendants from an order limiting non-party witnesses from testifying unless they have submitted to depositions at least five weeks before trial, I also see no reason why plaintiffs cannot rely on the pre-trial stipulation's identification of all witnesses. This stipulation would provide the basis for moving to depose and seek documents from particular witnesses who have not already had discovery taken as to their testimony. Plaintiffs will have sufficient time to review responses and take any necessary depositions on an expedited basis between the time the pre-trial stipulations must be filed and the beginning of the trial. I, therefore, deny this motion.

6. Plaintiffs' motion for partial summary judgment

Given the resolution of the above motions, I will defer consideration of plaintiffs' motion for partial summary judgment until the close of discovery, at which time the parties are invited to make any final submissions in connection with plaintiffs' motion. As of February 27, 2008, all defendants shall have two weeks to file any final submissions in connection with plaintiffs' motion for partial summary judgment. Plaintiffs shall have one week thereafter to reply. The Court will rule promptly once all submissions have been filed.

¹⁴ This motion is moot as to defendant Gifford, who has informed the parties and the Court that he will not assert his Fifth Amendment rights in this case.

7. Individual defendant's motion for summary judgment

The parties have not submitted a briefing schedule for this motion and are directed to confer to develop one.

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 above the printed name.

William B. Chandler III

WBCIII:mpd