



Hexion Specialty Chemicals Inc., et al. v. Huntsman Corp., Del. Ch., C.A. No. 3841-VCL, Lamb, V.C., letter op.

August 12, 2008

In a suit brought by Hexion seeking a declaratory judgment relating to a proposed merger between Hexion and Huntsman, plaintiff Hexion moved to compel the production of an e-mail, inadvertently produced by Huntsman and subject to a claim of attorney-client privilege. The e-mail in question was sent by Huntsman's outside counsel to other outside counsel and Huntsman's general counsel, and included as a recipient an individual from Merrill Lynch, who was then advising the Huntsman board on financial matters in connection with the merger. The individual from Merrill Lynch thereafter forwarded the email to other individuals within Merrill Lynch. Hexion argued that the disclosure of the email to Merrill Lynch constituted a waiver of the attorney-client privilege. The Court found that the underlying e-mail was subject to the attorney-client privilege, and that the presence of the Merrill Lynch representatives on the e-mail did not destroy that privilege. Citing *Jedwab*, the Court held that the privilege was maintained because the Merrill Lynch executive was also working for Huntsman on the same transaction that was the subject of the e-mail and their advice was being solicited in connection with the legal issues arising out of the merger.

The full opinion is available [here](#).

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***RE: Hexion Specialty Chemicals, Inc., et al. v. Huntsman Corp.
C.A. No. 3841-VCL***

Dear Counsel:

I have reviewed and considered the papers submitted in connection with the motion to compel filed by plaintiff Hexion Specialty Chemicals, Inc. on July 31, 2008, directed at an email that defendant Huntsman Corp. inadvertently produced. Hexion seeks an order that the email be made available to it for use in discovery. Huntsman argues that the email is protected from disclosure by the attorney-client privilege.¹ For the following reasons, the motion to compel is denied.

The email at issue was sent on July 8, 2007, by a partner at Vinson & Elkins, Huntsman's outside counsel, to a partner at Shearman & Sterling, another of Huntsman's outside counsel, and to the General Counsel of Huntsman. Several other persons were added as recipients, including a Managing Director at Merrill Lynch & Co. Both law firms and Merrill Lynch were, at the time, actively involved in advising the Huntsman board of directors in connection with the then ongoing merger negotiations between Hexion and Huntsman. The email is entitled

¹ Paragraph 16 of the confidentiality order governing the production of documents in this case contains a standard "non-waiver" and "clawback" provision that permits Huntsman to demand the return of the document that it says was mistakenly produced. The order further provides that the receiving party, here Hexion, may submit the document to the court for a determination of the claim of privilege.

“Thoughts” and its content relates to strategies for making the financing covenants in the merger agreement more favorable to Huntsman. The email was distributed to two other Shearman & Sterling lawyers by the author. The Merrill Lynch executive forwarded the email to several other members of his team.

The email is plainly subject to a valid claim of attorney-client privilege. It is a communication from a lawyer to the client and another lawyer representing the same client, made for the purpose of facilitating professional legal services. *See* Rule 502(b) of the Delaware Uniform Rules of Evidence.

The disclosure of the email to the Merrill Lynch executive and members of his team did not destroy or constitute a waiver of the claim of privilege.² As explained in the affidavit of the author of the email submitted in opposition to the motion, the Merrill Lynch executive was also working for Huntsman on the same transaction and “had been an active participant in the review and drafting of the Merger Agreement particularly as it related to the financing covenants and working to create greater certainty that the Merger would close.”³ As he goes on to say, “I was hoping to elicit any thoughts Merrill Lynch might have regarding the drafting of the Merger Agreement and I wanted to make sure that Merrill Lynch was up to speed on the legal issues we were considering particularly in light of the fact that certainty of closing was one of the key issues Huntsman’s lawyers and bankers had been instructed by the Huntsman board to focus on.”⁴ As Chancellor Allen noted in *Jedwab*, “[k]nowledgeable participants in [corporate] transactions would themselves regard disclosures” to investment bankers in such circumstances “as confidential and the law would, in my judgment, tend to validate that judgment.”⁵

Finally, the record does not support Hexion’s strained argument that the content of the email shows that Huntsman is taking knowingly false positions in this litigation. I will not elaborate on this point because it is not appropriate to make any further disclosure of the content of the email. It suffices to say that there is nothing in the email that is necessarily inconsistent with the positions taken by Huntsman in the litigation.

² *Jedwab v. M.G.M. Grand Hotels, Inc.*, 1986 Del.Ch.LEXIS 383 (Del. Ch. Mar. 20, 1986); *Cede Co. v. Joulé Inc.*, 2005 WL 736689 (Del. Ch. 2005).

³ Aff. of Jeffrey B. Floyd, Esquire, sworn August 5, 2008, at para. 7.

⁴ *Id.*

⁵ *Jedwab*, at *5.

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For all of these reasons, Hexion's motion to compel dated July 31, 2008 is DENIED. IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor