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Re: *In re Quest Software Inc. Shareholders Litigation*
Civil Action No. 7357-VCG

Dear Counsel:

This matter involves the Plaintiffs' attempt to enjoin a proposed management buyout of the stockholders' interest in Quest Software Inc. ("Quest"). The Plaintiffs, purportedly on behalf of the class of Quest stockholders, brought this action (the "Litigation") during the "go-shop" period provided for in the proposed buyout agreement. During the go-shop period, Dell, Inc. ("Dell") sought to merge with Quest, offering the stockholders a substantially better price than that

offered by management. Ultimately, the Quest Board of Directors (the "Board" or the "Quest Board") accepted the Dell offer, and merged with Dell. The Plaintiffs now seek attorneys' fees under the corporate benefit doctrine, arguing that the Litigation induced the Quest Board to seek and accept the offer from Dell. Quest denies that the Litigation created any benefit for the stockholders.

In order to develop their corporate benefit claim, the Plaintiffs have filed a Motion to Compel seeking discovery of documents otherwise protected by attorney-client privilege. This Letter Opinion, broadly speaking, considers whether statements made by the Quest Defendants—that their attorneys kept them informed of the status of the Litigation, but that the Litigation did not influence their negotiation of the Dell merger—placed communications between the attorneys and the Quest Board "at issue," thus necessitating disclosure of those communications in order to resolve the Plaintiffs' request for attorneys' fees. I conclude that it did not.

A. Background

In early 2012, the Quest Board received an expression of interest in a merger from Insight Venture Management LLC ("Insight"). Anticipating that Quest's CEO Vinnie Smith ("Smith"), would participate with Insight in the buyout of Quest, the Quest Board formed a special committee of disinterested Quest directors to review, recommend and negotiate any potential merger agreement (the "Special

Committee").[1] The Special Committee negotiated a merger agreement with Insight (the "Insight Agreement") at a price of $23 per share.[2] The Insight Agreement also contained deal terms designed to encourage a third party to make a higher bid, including a 60 day go-shop period and a top-up option allowing a third party to acquire a 19.9% interest in Quest in the event the Board were to reject a superior offer from that third party.[3] During the go-shop period, Dell submitted an all-cash offer to purchase Quest at a price of $28 per share, and on June 30, 2012, Quest entered into an agreement with Dell (the "Dell Agreement").[4] Shortly thereafter, the Quest Board announced that it had terminated the Insight Agreement in favor of the Dell Agreement.[5] On August 3, 2012 the parties stipulated to an order dismissing the Litigation as moot.[6]

In this Motion to Compel, the Plaintiffs seek otherwise-privileged documents, including unredacted versions of the notes, minutes and draft minutes of the special committee meetings; communications with counsel concerning the Litigation that reflect discussions with any of the Defendants; and all litigation updates provided to the special committee.[7] The Plaintiffs assert that the Quest Defendants placed "at issue" privileged and confidential communications and

[1] Dirks Aff. ¶ 7.
[2] Dirks Aff ¶ 16.
[3] Dirks Aff. ¶ 18.
[4] Dirks Aff. ¶ 36.
[5] Dirks Aff. ¶ 37.
[6] Stip & Ord. of Dismissal 1 (Aug. 3, 2012).
[7] Mot. Compel 20.

failed to preserve their attorney-client privilege in opposing the fee application, entitling the Plaintiffs to the requested discovery. The Plaintiffs also seek certain communications which the Defendants have withheld under the attorney-client privilege on the ground that the privilege was waived when the communications were shared with third parties.

In opposition, the Quest Defendants maintain that the "at issue" exception to the attorney-client privilege does not apply to their opposition to the fee request, that the Plaintiffs are not entitled to unredacted special committee meeting minutes and draft minutes, and that otherwise-privileged communications shared with non-special committee Quest directors and their counsel are protected under the common-interest doctrine. For the reasons below, the Motion to Compel is denied.

B. Analysis

1. The "At-Issue" Exception

In *Pfizer Inc. v. Warner-Lambert Co.*, then-Vice Chancellor Chandler explained the broad scope of discovery:

> The scope of discovery pursuant to Court of Chancery Rule 26(b) is broad and far-reaching. Rule 26(b) . . . renders discoverable any information that appears reasonably calculated to lead to the discovery of admissible evidence.[8]

Discovery exists to "advance issue formulation, to assist in fact revelation, and to

[8] *Pfizer Inc. v. Warner-Lambert Co.*, 1999 WL 33236240, at *1 (Del. Ch. Dec. 8, 1999) (citing Ch. Ct. R. 26(b)(1)).

reduce the element of surprise at trial,"[9] and is based on the policy that the trial decision should result from "a disinterested search for truth."[10] This broad scope of discovery is limited by a number of privileges, including the attorney-client privilege, codified in Rule 502 of the Delaware Rules of Evidence, which protects from discovery certain communications between attorney and client.[11]

In contrast to Rule 26, the attorney-client privilege is not intended to facilitate the search for truth in a particular matter, but rather exists to "encourage full and frank communication between clients and their attorneys,"[12] communication necessary to the effective functioning of the legal system as a whole. However, the attorney-client privilege is not absolute. The "at issue" exception to the attorney-client privilege exists where either "(1) a party injects the privileged communications themselves into the litigation, or (2) a party injects an

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[9] *IQ Hldgs., Inc. v. Am. Commercial Lines Inc.*, 2012 WL 3877790, at *1 (Del. Ch. Aug. 30, 2012) (quoting *Levy v. Stem*, 1996 WL 742818, at *2 (Del. 1996)).

[10] *Id.* (quoting *Hoey v. Hawkins*, 332 A.2d 403, 405 (Del. 1975)).

[11] Rule 502 provides that:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

D.R.E. 502(b).

[12] *Zirn v. VLI Corp.*, 621 A.2d 773, 781 (Del. 1993).

issue into the litigation, the truthful resolution of which requires an examination of confidential communications."[13] The exception "rests upon a fairness rationale"[14] and recognizes that a party cannot use the attorney-client privilege as both a "shield" from discovery and a "sword" in litigation.[15] A defendant may not refuse to produce privileged attorney-client communications only to rely subsequently on the substance of those communications to prove its case.[16]

In a case such as the one before me here, where a defendant opposes a plaintiff's request for attorneys' fees on the grounds that the litigation did not produce a corporate benefit, the defendant does not place attorney-client privileged communication "at issue" simply by indicating that its counsel has provided updates on the status of litigation. For example, in *In re William Lyon Homes Shareholder Litigation*, the Court did not require defendant William Lyon to produce copies of emails exchanged with his attorneys, even after he had expressly stated that plaintiff Alaska's then-pending lawsuit did not in any way contribute to

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[13] *In re William Lyon Homes S'holder Litig.*, 2008 WL 3522437, at *3 (Del. Ch. Aug. 8, 2008) (quoting Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice In The Delaware Court of Chancery* § 7.02[c][2], at 7-28 (2008)).
[14] *Tackett v. State Farm Fire and Cas. Ins. Co.*, 653 A.2d 254, 259 (Del. 1995).
[15] *See Ashmore v. Metrica Corp.*, 2007 WL 1464541, at *1 (Del. Ch. May 11, 2007) ("Principles of waiver and fairness . . . [prevent] a party from using the privilege as both a sword and a shield[.]"); *see also Sealy Mattress Co. NJ, Inc. v. Sealy, Inc.*, 1987 WL 12500, at *6 (Del. Ch. June 19, 1987) ("As a general matter, a party cannot take a position in litigation and then erect the attorney-client privilege in order to *shield* itself from discovery by an adverse party who challenges that position." (emphasis added)).
[16] *William Lyon Homes*, 2008 WL 3522437, at *4.

the decision to increase an underlying tender offer from $100 to $109 per share.[17] Though Lyon mentioned that he discussed the Alaska litigation with his attorney, the Court found that that fact alone was insufficient to place the emails "at issue" and to require their disclosure.[18] The Court held that so long as the defendants did not rely on privileged communication to rebut the presumption that the plaintiffs' litigation caused a benefit to the stockholders, the defendants were free to withhold those documents.[19]

Again, in *In re Comverge, Inc. Shareholders Litigation*, this Court held that a party may reference obtaining legal advice without placing the substantive content of that advice "at issue."[20] In *Comverge*, the plaintiffs sought certain documents from the defendants relating to a non-disclosure agreement which would typically be protected under the attorney-client privilege.[21] The plaintiffs argued that the defendants had placed these communications "at issue" by testifying that they had conferred with attorneys regarding an alleged breach of the NDA.[22] The Court rejected the plaintiffs' argument, writing:

> Moreover, the examination of privileged communications is not required for the truthful resolution of this litigation because the Comverge Defendants *merely seek to rely on the fact that they sought and obtained legal advice rather than that they relied on the*

[17] *Id.* at *1.
[18] *Id.*
[19] *Id.*
[20] *In re Comverge, Inc. S'holders Litig.*, 2013 WL 1455827, at *3 (Del. Ch. Apr. 10, 2013).
[21] *Id.* at *1.
[22] *Id.*

> *substance of privileged communications* to prove that the Board was fully informed. Thus, the Comverge Defendants did not 'inequitably us[e] attorney-client privilege as a sword' or inject a privilege-laden issue into the litigation.[23]

A party's admission that it sought legal counsel does not imply that the party necessarily acted in reliance upon the legal advice received, thereby placing the communications with counsel "at issue."[24]

Here, the Defendants concede that the Special Committee received briefings on the status of the Litigation, but the Defendants represent, via affidavit of H. John Dirks, the chairman of the Special Committee, that "[t]he status updates did not influence our negotiation strategy or tactics."[25] The Plaintiffs assert that this statement constitutes "reli[ance] on communication with counsel to rebut the presumption of a causal connection" between the Litigation they brought and the Dell Merger.[26] As a consequence, they argue, the substance of counsel's communications is "at issue." I disagree. Dirks's statement is nearly indistinguishable from the statements at issue in *William Lyon Homes* and *In re Comverge*. The Defendants here have simply admitted that they received updates

[23] *Id.* at *3 (emphasis added).
[24] Plaintiffs suggest *Comverge* is inapplicable because there the plaintiffs, not the defendants, "injected" the issue regarding privileged communications into the Litigation. However, the *Comverge* opinion, while recognizing this distinction, still addresses the nature of the defendants' statements—that speaking to the existence of privileged communications, rather than relying on their substantive content, is not the same as placing those communications "at issue"—which is the portion of the opinion relevant to the matter here.
[25] Dirks Aff. ¶ 40.
[26] Pls.' Mot. Compel ¶ 10.

about the status of pending litigation, while denying that that information influenced their negotiations with Dell. The Plaintiffs were free to explore this assertion through their own examination of the Quest directors.

What the Defendants have not done is assert, for instance, that counsel indicated that the Board should ignore the Litigation because it was without merit. Relying on, but refusing to produce, such communication would be an impermissible use of the attorney-client privilege as both sword and shield. Here, on the other hand, the Defendants' representation is that *no communication* from counsel affected their actions with respect to the Dell merger. That simple negation is not the equivalent of a reliance on advice of counsel that put the substance of the communication at issue in this litigation. Moreover, the Individual Defendants themselves were amenable to discovery, including depositions and requests for admissions; disclosure of privileged communications is not required for the truthful resolution of the issues at hand. Accordingly, I conclude that the Plaintiffs have failed to meet their burden to show that the at-issue exception applies.

I also note that the Defendants here have made a tactical choice like the one made in *William Lyon Homes*. There, the Court indicated that the defendants would be unable to rely on the substance of any privileged communications to support their case. The same is true here.

2. Waiver of Attorney-Client Privilege and the Common Interest Doctrine

The Plaintiffs also argue that the Quest Defendants waived the attorney-client privilege by disclosing legal advice to third parties. The Defendants argue that all third-party communications which have not been produced to the Plaintiffs in this action are protected by the common-interest doctrine.

In most instances, a party waives the attorney-client privilege by communicating privileged information to a third party.[27] An exception to this waiver exists under the common-interest doctrine. As codified in Rule 502 of the Delaware Rules of Evidence, this exception provides that communications "by the client . . . or the client's lawyer . . . to a lawyer . . . representing another in a matter of common interest" may be exempt from discovery if the communication "was made for the purpose of facilitating the rendition of professional legal services."[28] The common interest must involve primarily legal issues, rather than relate to a common interest in a commercial venture.[29] The party attempting to withhold discovery bears the burden of showing that the communications fall within the

[27] *See The Cove on Herring Creek Homeowners' Ass'n, Inc. v. Riggs*, 2001 WL 1720194, at *3 (Del. Ch. Dec. 28, 2001) (citing Donald J. Wolfe and Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 7-2[c][1], at 7-23 (2000)).
[28] D.R.E. 502(b).
[29] *See Glassman v. Crossfit, Inc.*, 2012 WL 4859125, at *3 (Del. Ch. Ct. Oct. 12, 2012) ("The common-interest doctrine does not protect communications between parties, or even between their attorneys, when those communications primarily concern 'a common commercial objective.'") (quoting *Titan Inv. Fund II, L.P. v. Freedom Mortg. Corp.*, 2011 WL 532011, at *4 (Del. Super. 2011)).

scope of the common-interest doctrine.[30]

Here, the Plaintiffs point to several instances where the Quest Defendants allegedly waived the attorney-client privilege by communicating privileged information to a third party. First, the Plaintiffs allege that communication between Latham & Watkins and Potter Anderson & Corroon constitutes a waiver of privilege because Latham & Watkins (according to the Plaintiffs) was not counsel to the Special Committee and some communications occurred outside formal Board meetings. They buttress this argument with Dirks's testimony that he did not consider Latham & Watkins counsel. The Quest Defendants point out that, despite Dirks's confusion, Latham & Watkins was in fact counsel of record to the Special Committee. Accordingly, because these communications were not actually disclosed to third parties, the communications between Latham & Watkins and Potter Anderson & Corroon remain privileged and are not subject to discovery.

Second, the Plaintiffs contend that the unredacted copies of the May 23 and 24, 2012 Special Committee's meeting minutes and notes are subject to discovery because non-Special Committee Quest Board members and counsel to Morgan Stanley, financial advisors for the Special Committee, attended these meetings, and therefore privilege was waived. The Quest Defendants counter that these discussions only concerned legal perspectives regarding the 19.9% Option and the

[30] *Glassman*, 2012 WL 4859125, at *2.

Dell offer and were therefore made in furtherance of the common legal interest of all directors, not just those directors on the Special Committee.

I agree with the Defendants, and I find that the redacted portions of these minutes are protected under the common-interest doctrine. The May 23, 2012 meeting was attended by Mr. Chandler from Wilson Sonsini Goodrich & Rosati (counsel to Quest's financial advisor Morgan Stanley), Mr. Morton from Potter Anderson (representing the Quest Board) and Mr. Sallaberry (a Quest director who was not part of the Special Committee). The parties all shared a *legal* interest in the potential legal risk from issuing the 19.9% Option or accepting the Dell deal, because the entire Board would have to approve the Option before its implementation or agree to the Dell deal before its acceptance. Thus, under the common interest doctrine—which allows "separately represented clients sharing a common legal interest" to "communicate directly with one another regarding that shared interest"[31]— the May 23, 2012 discussions did not waive attorney-client privilege. Under similar reasoning, unredacted minutes from the May 24, 2012 meeting attended by a Board member who was not a member of the Special Committee are not subject to discovery.

3. Draft Minutes

Finally, the Plaintiffs assert that they are entitled to copies of draft minutes

[31] *Titan Inv.*, 2011 WL 532011, at *4.

from the Special Committee meetings because the produced minutes were unsigned, not final, and prepared in large tranches. However, the record shows that the minutes provided *were* approved by written consent of the board.[32] The Plaintiffs do not explain the significance of the minutes having been prepared in tranches or address *Lee v. Engle*, in which this Court found that preliminary drafts of board meeting documents are protected by the attorney-client privilege and work-product doctrine.[33] The draft minutes, therefore, are not discoverable.

C. Conclusion

The Plaintiffs have failed to demonstrate that the Quest Defendants placed "at issue" communications that would entitle the Plaintiffs to documents otherwise protected by the attorney-client privilege. Additionally, the Quest Defendants have successfully shown that several conversations including the counsel of Morgan Stanley and non-Special Committee Quest Board members are protected from discovery under the common interest doctrine. Accordingly, the Plaintiffs' Motion to Compel is DENIED.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III

[32] *See, e.g.*, Mot. Compel, Ex. H at QSFT-FP-0003006-3008.
[33] *Lee v. Engle*, 1995 WL 761222, at *5 (Del. Ch. Dec. 15, 1995) (citing *Jedwab v. MGM Grand Hotels, Inc.*, 1986 WL 3426 (Del. Ch. Mar. 20, 1986)).