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Case No. 4993-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STEVEN E. KLIG, Plaintiff, v. DELOITTE LLP, DELOITTE TAX LLP and DELOITTE & TOUCHE LLP, each a Delaware Limited Liability Partnership Defendants.	)	C.A. No. 4993-VCL

MEMORANDUM OPINION

Date Submitted: August 16, 2010
Date Decided: September 7, 2010

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LASTER, Vice Chancellor.

In a bench ruling and implementing order dated August 6, 2010, I directed the defendants to produce documents listed on their privilege log (the "Discovery Ruling"). The defendants ask me to certify the Discovery Ruling for interlocutory appeal. Only the Delaware Supreme Court can determine whether to accept an interlocutory appeal. Nevertheless, Supreme Court Rule 42 tasks this Court with initially assessing whether interlocutory review is warranted. Guided by the language of Rule 42 and a consistent line of Supreme Court precedent rejecting interlocutory appeals from discovery rulings, I conclude that certification is not appropriate.

The defendants also ask for a stay of the Discovery Ruling pending the outcome of an appeal. Either this Court or the Delaware Supreme Court can grant a stay. Applying the factors set forth in *Kirpat, Inc. v. Delaware Alcoholic Beverage Control Commission*, 741 A.2d 356, 357-58 (Del. 1998), I conclude that a stay is not warranted.

I previously stayed the effectiveness of the Discovery Ruling pending the issuance of this decision. Recognizing that it is within the discretion of the Delaware Supreme Court to view either the certification or the stay issue differently, the temporary stay shall remain in place for an additional 20 calendar days to facilitate appellate review. During that time, the defendants can pursue a further stay with the Delaware Supreme Court.

I. FACTUAL BACKGROUND

The underlying claims in this case concern efforts by plaintiff Steven E. Klig to return to active practice as a tax advisor with defendants Deloitte LLP, Deloitte Tax LLP, and Deloitte & Touche LLP (collectively, "Deloitte"). In January 2009, the FBI arrested Klig and charged him with multiple felonies. The salacious details of the charges

generated significant media coverage. Deloitte and Klig agreed that he would take a voluntary, paid leave of absence.

In September 2009, with his legal problems still unresolved, Klig sought to return to active employment and resume his counseling practice. Deloitte senior management rejected Klig's proposal and determined that he would remain on leave. Because Klig was still a partner, Deloitte continued to pay him his seven-figure compensation.

Klig responded by filing this action. He primarily contends that the Deloitte executives who placed him on leave lacked the requisite authority under the limited partnership agreements that govern the Deloitte entities. Although he originally sought injunctive relief compelling Deloitte to permit him to return to work, he now seeks damages for wrongful disassociation.

The far narrower matter addressed by the Discovery Ruling concerned the adequacy of Deloitte's privilege log. On February 4, 2010, Klig served his first requests for production of documents. On March 8, Deloitte served its responses. Later that month, Deloitte began a rolling production of documents.

On June 8, 2010, Deloitte produced its privilege log. The 35-page document identified 348 privileged documents. All but 6 documents were withheld on grounds of attorney-client privilege. For 332 of those 342 documents, the log repeated verbatim under the heading "Description" one of five identical phrases:

> "Communication reflecting the legal advice of counsel regarding Klig matter."
>
> "Communication requesting the legal advice of counsel regarding Klig matter."

> "Redacted communication reflecting the legal advice of counsel regarding the Klig matter."
>
> "Redacted communication requesting the legal advice of counsel regarding the Klig matter."
>
> "Document subject of requested legal advice regarding Klig matter."

The descriptions for 97% of the purportedly privilege documents thus did not provide any document-specific description at all. Someone simply used a word processor's copy and paste functions to replicate the five phrases.

The five phrases duplicated information already provided by other columns on the log. The log contained a column entitled "Document Type," which described each document as an "Email," "Redacted email," "Email attachment," or "Redacted Document." The log contained a column entitled "Reason For Withholding," which stated "Attorney-Client Privilege" for each of the 342 documents. Delaware Rule of Evidence 502 defines the attorney-client privilege as extending to "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." By designating the document as protected by the "Attorney-Client Privilege," Deloitte represented that the communication met this standard. So before ever getting to the "Description" column, a reviewer of the log knew that the entry purportedly concerned a communication made for the purpose of rendering legal services. For Deloitte to describe the entry as, for example, a "[c]ommunication reflecting the legal advice of counsel regarding Klig matter" offered no incremental information at all. As important, the description afforded Klig no way to assess the propriety of the assertion of

privilege. And with the same five descriptions replicated 332 times, I am confident that was precisely Deloitte's intent.

By focusing on the 332 entries that mindlessly repeated one of the five phrases, I do not mean to imply that the other descriptions were any better. Two entries were described as "[d]raft communication prepared at the request of the Office of General Counsel." Two others were described as "[d]raft communication reflecting the legal advice of counsel regarding the Klig matter." Two more were described as "[d]raft communication reflecting the legal advice of counsel regarding Klig matter." One was "[d]ocument reflecting legal advice of counsel regarding Klig matter." Another was "[d]ocument prepared for Office of General Counsel." Another was "[d]ocument reflecting the legal advice of counsel regarding partner matters." The last was "[e]mail forwarding communication reflecting the legal advice of counsel regarding Klig matter." Although not technically identical to the rote five phrases, the remaining ten offered equally insubstantial fluff.

Deloitte's log did not even identify which of the people named on the log were attorneys. There was no "Esq.," asterisk, different type, or other marking that might signify attorney status. Deloitte did not bother to provide anyone's title or professional affiliation. Solely because the log was so deficient, the minor alternation in Deloitte's descriptions between the verbal phrase "reflecting the legal advice" and "requesting the legal advice" actually acquired some marginal informational content: it suggested whether or not the author of the communication was a lawyer. That is not a redeeming feature. It shows how little information the log provided.

By letter dated June 21, 2010, Klig's counsel pointed out deficiencies in Deloitte's log and asked Deloitte's counsel to address them. By letter dated June 24, 2010, Deloitte's counsel refused.

Klig then moved to compel. He advanced a number of arguments, including that the log did not adequately describe the purportedly privileged documents.

Deloitte responded with a cross-motion. In its July 15, 2010, opposition to Klig's motion and opening brief in support of its own motion, Deloitte finally provided a list of the attorneys who appeared on its log. Deloitte claimed the list was provided "in response to Klig's request for a legend that identifies the persons listed on the log who are attorneys . . . ." Defendants' Answering Brief in Opposition to Plaintiff's Motion to Compel and Opening Brief in Support of Defendants' Cross-Motion to Compel ("DAB") at 4. Deloitte did not explain why it decided to accede to Klig's request in its opposition, since just three weeks earlier Deloitte saw no need to supplement its log in any way.

During a hearing on August 6, 2010, I issued the Discovery Ruling. With respect to Deloitte's log, I ruled as follows:

> Now, the Deloitte log is also inadequate, although for different reasons. They at least listed documents on a document-by-document basis. But you don't just get to send over a list of documents and not say who people are. I know you guys then gave this list as Exhibit C, but that came too late. You also had these descriptions on here that are conclusory in the extreme. The vast majority of the documents on the log say communication reflecting the legal advice of counsel regarding Klig matter. Some of them say ["]communication requesting the legal advice of counsel regarding the Klig matter.["] So from that, someone looking at this log can discern that one is a [question], the other is an answer. That's it. You can't tell whether this relates to Mr. Klig's resignation, Mr. -- the partnership vote, you know, what his compensation would be, what the settlement would be. A description has to be sufficiently detailed so that someone can

actually assess whether it makes sense to challenge the document. This is cutting and pasting the same description for every single entry.

Now, I exaggerate a bit. There are a couple entries on here later on where there are some slight variations, such as ["]draft communication reflecting the legal advice of counsel regarding the Klig matter.["]

What this does is, it simply cuts and pastes one aspect of the attorney-client privilege standard – *i.e.*, ["]reflecting legal advice["] again and again and again. It would not constitute anything remotely approaching waiver to say, for example, communication regarding potential partnership vote expelling Mr. Klig. Then at least someone reviewing this log would have some clue as to what this was talking about and what these entries were.

. . .

Now, I know that in the past this Court has shown remarkable willingness to allow practitioners who provide an inadequate log to get a do-over and do it right. I think that's a terrible idea. I think that the privilege [law] out there is clear. A summer associate can find it in approximately an hour. There is no reward for doing a good privilege log. It's painful. It results in these huge documents. No one has any incentive to be responsible [on] a privilege log as opposed to [being] overinclusive. Junior associates or paralegals get tasked with it. They screw up if they don't log a document, not if they come to the partner and say, "Really, this one shouldn't be logged."

Because of those incentives, people have ample reason to be, again, overinclusive, not to describe documents meaningfully and hope that the other side won't challenge them. It's particularly a win-upside-no-downside scenario, if the only thing that happens when you then get challenged on it is you actually have to go back and do what you . . . should have done in the first place. So I'm not going to play that game. An improperly asserted claim of privilege is no claim at all. It's waived. So as to those documents on the log, they're being ordered to be produced. So both sides, both logs, you blew it . . . .

Discovery Ruling at 5-8. Later on August 6, I entered an order requiring that the inadequately described documents be produced.

II. LEGAL ANALYSIS

Supreme Court Rule 42 governs the certification of interlocutory appeals. Rule 42(b) provides: "No interlocutory appeal will be certified by the trial court or accepted by [the Supreme Court of Delaware] unless the order of the trial court determines a substantial issue, establishes a legal right and meets 1 or more of the following criteria . . . ." The identified criteria include "[a]ny of the criteria applicable to certification of questions of law set forth in Rule 41." Supr. Ct. R. 42(b)(i). Under Rule 41(b), reasons to certify a question of law include:

> (i) *Original question of law*. The question of law is of first instance in this State;
>
> (ii) *Conflicting decisions*. The decisions of the trial courts are conflicting upon the question of law;
>
> (iii) *Unsettled question*. The question of law relates to the constitutionality, construction, or application of a statute of this State which has not been, but should be, settled by the Court.

Supr. Ct. R. 41(b).

A. Deloitte Mischaracterizes The Discovery Ruling.

Deloitte contends that certification is warranted because the Discovery Ruling conflicts with other trial court decisions. In making this argument, Deloitte emulates populist pundits from the extremes of the political spectrum who score points with their base by misleadingly reducing meaningful issues to simplistic sound bites. Deloitte thus re-casts the Discovery Order as follows:

> In its August 6, 2010 bench ruling, the Court created a new one-strike-and-you're-out rule for parties asserting privileges in the Court of Chancery: the party waives its attorney-client privilege if the Court

> perceives any aspect of a privilege log to be "inadequate." The Court also made clear in its Ruling that it will apply this harsh rule in all cases going forward – it will not provide counsel with a "do-over" on a privilege log. In all cases going forward, "[a]n improperly asserted claim of privilege is no claim at all. It's waived."

Defendant's Memorandum of Law in Support of Their Application for Certification of Interlocutory Appeal of the August 6, 2010 Ruling and Request for Stay Pending Appeal ("Application" or "App.") at 1. This is not a fair characterization of the Discovery Ruling.

Nothing about the Discovery Ruling was "new." Admittedly I did not dilate at length on the law governing privilege logs. In small part this was because the law in this area is so readily established and easily available. In larger part it was because (at least prior to the current Application) both sides agreed on the operative legal principles. Deloitte's answering brief in opposition to Klig's motion to compel stated: "Deloitte agrees that a party must include information on its privilege log identifying 'the subject [matter] of the communication sufficient to show why the privilege applies.'" DAB at 14 (quoting *Unisuper Ltd. v. News Corp.*, C.A. No. 1699-N, slip op. at 1-2 (Del. Ch. Mar. 9, 2006)). Deloitte also recognized that waiver was an appropriate remedy for an inadequate description; in pressing its own motion to compel against Klig, Deloitte stated: "As Klig's log fails to meet several of the basic requirements for establishing a privilege, the documents listed on the log should be produced." DAB at 19 (citing *Sokol Holdings, Inc. v. Dorsey & Whitney, LLP*, 2009 WL 2501542, at *31-32 (Del. Ch. Aug. 5, 2009)).

Nor did I announce a blanket rule that would apply "if the Court perceives *any aspect* of a privilege log to be 'inadequate.'" DAB at 1 (emphasis added). Contrary to Deloitte's alarmist framing, I do not believe that ordering production of inadequately described documents is the appropriate remedy for every case. A party that has attempted in good faith to provide meaningful descriptions should not be penalized for falling short. An order requiring supplementation for the inadequate entries could well be appropriate. If the number of documents is limited, *in camera* review by the Court or a Special Master may be the most efficient solution.

This case, however, did not involve a party's good faith attempt to comply with Delaware law. Deloitte served a privilege log which contained virtually identical and content-less descriptions for 342 documents and which recited one of five rote descriptions for 332 of those entries (97% of its log). Deloitte made no effort to describe individual documents. Deloitte did not even bother to identify who on the log was an attorney. It takes conscious effort to render a log so devoid of content.

Deloitte's counsel knew how to prepare an adequate log. They are frequent and experienced practitioners before this Court. As discussed below, the requirements for a valid assertion of privilege have been stated repeatedly and consistently. In the *Unisuper* case, on which Deloitte itself relied, Deloitte's current counsel prepared the log that Chancellor Chandler deemed inadequate. The Chancellor wrote:

> The party asserting the protection of the attorney-client privilege has the burden of establishing its application. To meet this burden, defendants must include greater detail in their privilege log. Specifically, defendants must identify: (a) the date of the communication, (b) the parties to the communication (including their names and corporate positions), (c) the

> names of the attorneys who were parties to the communication, and (d) the subject [matter] of the communication sufficient to show why the privilege applies, as well as whether it pertains to the decision to reincorporate, the decision to adopt the board policy, or the decision to extend the board policy. With regard to this last requirement, the privilege log must show sufficient facts as to bring the identified and described document within the narrow confines of the privilege.

Id. at 1-2 (internal quotations and footnotes omitted).

Measured by Deloitte's own authority, Deloitte's log fell woefully short. Deloitte did not provide anyone's corporate position, did not identify the parties who were attorneys, and did not provide "sufficient facts" in its rote and redundant descriptions. When Klig asked Deloitte to supplement its log, Deloitte refused. Deloitte's conduct indicates that its counsel intentionally produced chaff.

As I noted in my bench ruling, a practice of granting counsel a do-over even for this type of extreme behavior reinforces problematic incentives that already pervade the preparation of privilege logs. Lawyers know they rarely will be second-guessed by their clients for taking an expansive view of privilege and withholding borderline documents (I need not consider the potential for conscious concealment of evidence). Too frequently counsel default to a rule of invoking privilege whenever an attorney appears on a document. For there to be downside from this strategy, an adversary first must challenge the privilege calls. With all that needs doing in litigation, the opposing party may never do so. Or they may raise the issue but never follow up. Or they might follow up but not move to compel. And if the opposing party actually decides to file, the motion may be poorly pressed, and a cross-motion can muddy the waters and prompt a busy judge to

declare a pox on both houses and deny all relief. If nothing else, every step takes time. With many a slip 'twixt cup and lip, the aggressive privilege call becomes second nature.

The privilege log serves as the fulcrum on which the adversary's decisions turn. The log is supposed to provide sufficient information to enable the adversary to assess the privilege claim and decide whether to mount a challenge. Vapid and vacuous descriptions interfere with the adversary's decision-making process. Just as you can't hit what you can't see, you can't challenge what the other side hasn't described. Presented with pages of inscrutable descriptions, the adversary must first undertake the burden of fighting for a usable log. This builds another round of multi-stage decisions, increasing the payoff for the party that broadly and vaguely asserts privilege.

These incentives and the resulting practices undermine Delaware's "well established policy of pretrial disclosure which is based on a rationale that a trial decision should result from a disinterested search for truth from all the available evidence rather than tactical maneuvers based on the calculated manipulation of evidence and its production." *Hoey v. Hawkins*, 332 A.2d 403, 405 (Del. 1975) (quoting *Olszewski v. Howell*, 253 A.2d 77, 78 (Del. Super. 1969)). "Candor and fair-dealing are, or should be, the hallmark of litigation and required attributes of those who resort to the judicial process. The rules of discovery demand no less." *E.I. DuPont de Nemours & Co. v. Florida Evergreen Foliage*, 744 A.2d 457, 461 (Del. 1999).

The remedies imposed by the Court play a significant role in the producing party's calculus. If the only consequence of losing a motion to compel is an order requiring the party to prepare the log it should have prepared in the first place, then a Deloitte-style log

offers considerable upside without meaningful downside. If parties know that a motion to compel can result in the immediate production of inadequately described documents, then the upfront incentives change. *Cf. Willemijn Houdstermaatschaapij BV v. Apollo Computer Inc.*, 707 F. Supp. 1429, 1443 (D. Del. 1989) (refusing to allow a party to supplement its log entries in responding to a motion to compel; "Before compiling its withheld document list, plaintiff could easily have ascertained the standard of particularity expected by this Court and could have met that standard. Allowing it to do so now would encourage dilatory discovery practices.").

Court of Chancery Rule 1 mandates that the rules be "construed and administered to secure the just, speedy and inexpensive determination of every proceeding." Discovery is called that for a reason. It is not called "hide the ball." By describing all of its documents with virtually identical and meaningless phrases, Deloitte deliberately deployed a strategy of obfuscation and delay. As I stated in the Discovery Ruling, it is a "terrible idea" to reward that type of conduct with a do-over. Every discovery dispute must be judged on its own facts and circumstances. The Discovery Ruling did not establish a rule of law for every case, but it should make clear the types of consequences that can flow from failing to comply with well-established obligations.

B. The Decisions Of The Trial Courts Do Not Conflict.

Deloitte's application turns on portraying the Discovery Ruling as conflicting with other decisions of the trial courts. *See* Supr. Ct. R. 41(b)(ii) & 42(b)(i). Deloitte takes issue with my statement that "[a]n improperly asserted claim of privilege is no claim at

all." App. at 1. Deloitte also disputes the principle that an inadequate description gives rise to waiver, which in turn depends on who has the burden to establish privilege. *Id.*

Although I did not provide a citation from the bench for my statement about the effect of an improperly asserted claim of privilege, the comment was not original. Chief Judge Latchum coined the phrase. *Int'l Paper v. Fibreboard Corp.*, 63 F.R.D. 88, 94 (D. Del. 1974) ("An improperly asserted claim of privilege is no claim of privilege at all."). Then Vice Chancellor, later Justice Hartnett adopted it in *Reese v. Klair*, 1985 WL 21127, at *5 (Del. Ch. Feb. 20, 1985) ("An improperly asserted claim of privilege is no claim of privilege at all."). A number of subsequent cases have embraced it.[1]

Nor can I claim credit for placing the burden of proving that a privilege exists "on the party asserting the privilege." *Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992).[2] In meeting that burden,

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[1] *E.g.*, *M & G Polymers USA, LLC v. Carestream Health, Inc.*, 2010 WL 1611042, at *51 n.262 (Del. Super. Apr. 21, 2010); *Williams Natural Gas Co. v. Amoco Prod. Co.*, 1991 WL 236919, at *2 (Del. Super. Nov. 8, 1991); *Council of Unit Owners of Sea Colony East v. Carl M. Freeman Assocs., Inc.*, 1990 WL 161169, at *2 (Del. Super. Sept. 26, 1990); *Playtex, Inc. v. Columbia Cas. Co.*, 1989 WL 5197, at *2 (Del. Super. Jan. 5, 1989).

[2] *Accord Sokol Holdings*, 2009 WL 2501542, at *6 n.28; *PharmAthen, Inc. v. SIGA Techs., Inc.*, 2009 WL 2031793, at *4 n.13 (Del. Ch. July 10, 2009); *Rembrandt Techs., L.P. v. Harris Corp.*, 2009 WL 402332, at *5 n.43 (Del. Super. Feb. 12, 2009); *SICPA Holdings, S.A. v. Optical Coating Lab., Inc.*, 1996 WL 636161, at *7 (Del. Ch. Oct. 10, 1996); *Emerald Partners v. Berlin*, 1994 WL 125047, at *1 (Del. Ch. Mar. 30, 1994); *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co.*, 623 A.2d 1118, 1122 (Del. Super. 1992); *In re Fuqua Indus., Inc. S'holders Litig.*, 1992 WL 296448, at *3 (Del. Ch. Oct. 8, 1992); *Deutsch v. Cogan*, 580 A.2d 100, 107 (Del. Ch. 1990); *see generally* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 7.04 (2010).

> a bare allegation that information and documents are protected from discovery by the attorney-client privilege is insufficient without making more information available. . . . It is incumbent on one asserting the privilege to make a proper showing that each of the criteria [underlying the attorney-client privilege] exist[s]. . . . A proper claim of privilege requires a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality.[3]

This standard requires that a party provide "sufficient *facts* as to bring the identified and described document within the narrow confines of the privilege." *Int'l Paper*, 63 F.R.D. at 94 (emphasis in original); *accord Unisuper*, C.A. No. 1699-N, at 2 (quoted *supra* at 9-10); *Reese*, 1985 WL 21127, at *5 ("The documents must be precisely enough described to bring them within the rule . . . .").

I also did not invent the remedy of waiver as a consequence for an inadequate assertion of privilege. The leading treatise on practice in the Court of Chancery explains that waiver may result from an inadequate privilege log:

> The importance of providing an adequately descriptive and timely privilege log cannot be overlooked. *Although the Delaware courts have sometimes allowed a party the opportunity to supplement an insufficient privilege log, at least where that party appears to have endeavored in good faith to provide an adequate description of the privileged information in the first instance, the failure to properly claim a privilege or immunity or failure to raise a privilege or immunity in a timely manner can, in appropriate circumstances, result in a waiver of the privilege.*

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[3] *Int'l Paper Co. v. Fibreboard Corp.*, 63 F.R.D. 88, 93-94 (D. Del. 1974); *accord Sokol Holdings*, 2009 WL 2501542, at *8; *Deutsch*, 580 A.2d at 107; *Reese v. Klair*, 1985 WL 21127, at *5 (Del. Ch. Feb. 20, 1985).

Wolfe & Pittenger, § 7.04, at 7-51 to -52 (emphasis added). The Delaware state and federal courts have applied this principle.[4] So have other courts.[5]

In an effort to manufacture conflict, Deloitte points to *Cephalon, Inc. v. Johns Hopkins University*, 2009 WL 2714064 (Del. Ch. Aug. 18, 2009). Deloitte mistakenly contends that *Cephalon* endorsed Deloitte's anemic and unchanging descriptions. To the contrary, Vice Chancellor Parsons deemed inadequate a privilege log that "fail[ed] to provide any explanation for the claim of privilege, other than a conclusory notation, such as 'Attorney-Client privilege.'" *Id.* at *3. The absence of any description whatsoever caused him to question the propriety of the privilege assertions. He therefore ordered the producing parties to "revise their privilege logs to provide additional information," *and* to "state as to each document that it contains confidential information made 'for the purpose

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[4] *E.g.*, *Willemijn Houdstermaatschaapi*, 707 F. Supp. at 1443 (ordering production of inadequately described documents); *Sokol Holdings*, 2009 WL 2501542, at *8 ("Sokol has waived the right to [assert privilege] by failing to update its privilege log to contain detailed enough descriptions . . . .").

[5] *E.g.*, *Lee v. State Farm Mut. Auto. Ins. Co.*, 249 F.R.D. 662, 683 (D. Colo. 2008) ("The failure to [adequately describe any information withheld as privileged] results in a waiver of the claims of privilege."); *Aurora Loan Servs., Inc. v. Posner, Posner & Assocs., P.C.*, 499 F. Supp. 2d 475, 479 (S.D.N.Y. 2007) ("Failure to furnish an adequate privilege log is grounds for rejecting a claim of attorney client privilege."); *Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 274 (E.D. Va. 2004) ("The finding of inadequacy [of descriptions in Rambus' privilege log], particularly in light of Rambus' earlier discovery and litigation misconduct, conceptually is sufficient to warrant a finding that the privileges have been waived."); *Bowne of New York City v. AmBase Corp.*, 150 F.R.D. 465, 474 (S.D.N.Y. 1993) ("[I]f the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of all the legal requirements for application of the privilege, his claim will be rejected."), *quoted with approval in United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) (affirming order requiring disclosure of allegedly privileged documents because of an inadequate privilege log).

of facilitating the rendition of professional legal services to the client,' or provide a similar basis for the claimed privilege." *Id.* at *3 (quoting D.R.E. 502(b)(3)). He further required that "the supplemental privilege logs must be signed by an attorney in accordance with Rule 11." *Id.* Vice Chancellor Parsons made clear that "[t]o the extent Defendants are unable to comply with these directions, the documents involved must be produced." *Id.* In a footnote, he observed that "[n]o argument was made . . . to the effect that Defendants had waived their claims of privilege and work product failing to supply a privilege log complying with applicable law." *Id.* at *3 n.10.

Cephalon did not suggest that a claim of privilege can be adequately supported by a description reciting, *verbatim*, "[the document] contains confidential information made 'for the purpose of facilitating the rendition of professional legal services to the client.'" *Id.* at *3. Only a party searching for support for that unreasonable position could construe the decision in that fashion. What Vice Chancellor Parsons demanded was an explicit certification by counsel that each document met the requirements for privilege, including a representation that "it contain[ed] confidential information made 'for the purpose of facilitating the rendition of professional legal services to the client,' or [that there was] a similar basis for the claimed privilege." *Id.* at *3. Vice Chancellor Parsons gave no indication in *Cephalon* that he intended to depart from the pre-existing requirement that a party describe each document with sufficient facts to support the claim of privilege. He specifically noted that he did not consider the question of waiver because no party raised it. *Id.* at *3 n.10. Rather than suggesting a hands-off

endorsement of a canned phrase, *Cephalon* demonstrates this Court's meaningful oversight of the privilege log process.

Deloitte also argues that the Discovery Ruling was a "marked departure from the Superior Court's approach." App. at 12 (citing *Cont'l Cas. Co. v. Gen. Battery Corp.*, 1994 WL 682320 (Del. Super. Nov. 16, 1994)). In making this argument, Deloitte misrepresents *Continental*. Although the Superior Court ordered the defendant to supplement its inadequate privilege log, the court noted that it was "unaware of, and the parties ha[d] not provided, any authority in which a court in this jurisdiction has ordered documents disclosed for which a claim of privilege has been made merely because a document description is insufficient." *Id.* at *2. The Court specifically stated that "[t]his ruling . . . should not be construed as a reluctance to enforce such an order or a belief that it is beyond the Court's inherent powers in managing this litigation to make such a ruling." *Id.* at *2. The *Continental* court exercised its discretion to give the litigants another chance. The court did not hold that it *could not* order waiver.

Deloitte further contends that the Discovery Ruling conflicts with federal law, citing decisions that have required supplementation in lieu of waiver. As discussed, *supra*, waiver is an acceptable remedy. As the various decisions show, "[d]iscovery is subject to the exercise of this Court's sound discretion." *Emerald Partners v. Berlin*, 1994 WL 125047, at *2 (Del. Ch. Mar. 30, 1994) (citing *Dann v. Chrysler Corp.*, 166 A.2d 431 (Del. Ch. 1960)). How members of this Court or other courts previously have exercised their discretion under other circumstances does not establish a rule of law against waiver.

Contrary to Deloitte's sound bite, I did not announce a "one-strike-and-you're-out" rule that will apply in all future cases. Deloitte stood firm on a privilege log that, on its face, made no good faith attempt to provide document-by-document descriptions to support the privilege claims. Ordering that the inadequately described documents be produced fell within the scope of this Court's discretion. This was not a "sharp departure" from precedent or a "harsh new rule." The Discovery Ruling applied settled principles of law that needed no citation. Indeed, Deloitte and its counsel relied on those very same principles when briefing the cross-motions. It was only after they lost that the principles became frighteningly novel and unfamiliar. There is no conflict among the trial court decisions that merits interlocutory review.

C. The Discovery Ruling Did Not Determine A Substantial Issue Or Establish A Legal Right.

Interlocutory review is not available unless an order determines a substantial issue and establishes a legal right. Supr. Ct. R. 42(b); *Gardinier, Inc. v. Cities Serv. Co.*, 349 A.2d 744, 745 (Del. 1975). From these requirements springs the general rule that "a trial court's discovery rulings are not appealable under Rule 42, absent extraordinary circumstances."[6] Discovery is entrusted to the trial court's discretion, and the Supreme

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[6] *Crowhorn v. Nationwide Mut. Ins. Co.*, 804 A.2d 1065, 2002 WL 1924787, at *1 (Del. Aug. 14, 2002) (TABLE) (citing *Pepsico, Inc. v. Pepsi-Cola Bottling Co.*, 261 A.2d 520, 520-21 (Del. 1969)); *accord McCann v. Emgee, Inc.*, 637 A.2d 827, 1993 WL 541922, at *1 (Del. Dec. 22, 1993) (TABLE); *American Centennial Ins. Co. v. Monsanto Co.*, 582 A.2d 934, 1990 WL 168260, at *1 (Del. Aug. 10, 1990) (TABLE); *Huang v. Rochen*, 550 A.2d 35, 1988 WL 117518, at *1 (Del. Oct. 27, 1988) (TABLE); *Levinson v. Conlon*, 385 A.2d 717, 720 (Del. 1978); *Castaldo v. Pittsburgh-Des Moines Steel Co.,*

Court "will not disturb a trial court's decision regarding sanctions imposed for discovery violations absent an abuse of that discretion." *In re Rinehardt*, 575 A.2d 1079, 1082 (Del. 1990); *accord Cebenka v. Upjohn Co.*, 559 A.2d 1219, 1226 (Del. 1989). "Th[e] proscription against interlocutory review of discovery rulings 'does not change merely because the discovery/disclosure order implicates the attorney-client privilege.'"[7]

Deloitte acknowledges these general rules, but argues that this case is different because of my supposed "announced intent to apply a one-strike-and-you're-out rule in all future privilege disputes." App. at 9. As discussed above, this mischaracterizes my ruling. I did not announce a "broadly applicable" rule. My ruling rested on the facts of this case: Deloitte made no good faith attempt to describe documents sufficiently to allow an examination of the basis for the claim of privilege, and therefore they must disclose those documents. Like other discretionary discovery decisions, the Discovery Ruling did not determine a substantial issue or establish a legal right.

In an effort to suggest that the Discovery Ruling concerns a substantial issue, Deloitte cries wolf: "No longer can parties in the Delaware courts – or in-house counsel in Delaware corporations around the world – feel secure that their discussions with

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Inc., 301 A.2d 87, 87 (Del. 1973); *Lummus Co. v. Air Prods. & Chems., Inc.*, 243 A.2d 718, 719 (Del. 1968).

[7] *Certain Underwriters at Lloyd's London v. Monsanto Co.*, 599 A.2d 412, 1991 WL 134471, at *1 (Del. June 7, 1991) (TABLE) (quoting *Rinehardt*, 575 A.2d at 1081); *accord Cordant Holdings Corp. v. Moore Bus. Forms, Inc.*, 682 A.2d 625, 1996 WL 415923, at *1 (Del. July 18, 1996) (TABLE); *Pepsico, Inc. v. Pepsi-Cola Bottling Co.*, 261 A.2d 520, 520-21 (Del. 1969); *E.I. DuPont de Nemours & Co. v. Admiral Ins. Co.*, 1993 WL 19587, at *1-2 (Del. Super. Jan. 25, 1993).

counsel will remain confidential." App. at 10. The Discovery Ruling does not alter in any way the requirements for the attorney-client privilege, which is governed by Delaware Rule of Evidence 502. It has always been the case that any claim of privilege, no matter how well-founded, must be adequately described. Here, Deloitte's counsel produced a privilege log that facially failed the standards set out in the very authorities on which they relied. It was this tactical decision that led to the Discovery Ruling. Applying settled law on waiver does not alter the underlying scope of the attorney-client privilege, or create any uncertainty for future litigants.

The Discovery Ruling therefore does not establish a legal right. It did not determine a substantial issue. Separate and independent of the lack of any conflict among discretionary trial court determinations, these failings provide alternative bases for denying interlocutory review.

D. The Defendants' Motion For A Stay Pending Appeal

In addition to seeking interlocutory review, Deloitte for a stay of the Discovery Ruling pending appeal. Under Court of Chancery Rule 62(d), stays pending appeal are governed by Delaware Supreme Court Rule 32(a) and Article IV, Section 24 of the Constitution of the State of Delaware. Ct. Ch. R. 62(d). Under Supreme Court Rule 32(a), "[a] stay . . . pending appeal may be granted or denied in the discretion of the trial court." In deciding whether to exercise its discretion to grant a stay, the Court is required:

> (1) to make a preliminary assessment of likelihood of success on the merits of the appeal; (2) to assess whether the petitioner will suffer irreparable injury if the stay is not granted; (3) to assess whether any other interested

> party will suffer substantial harm if the stay is granted; and (4) to determine whether the public interest will be harmed if the stay is granted.

Kirpat, 741 A.2d at 357. The *Kirpat* factors are not a checklist; they are balanced with "all of the equities involved in the case together." *Id.* at 358.

Kirpat's "likelihood of success" factor requires only that the appellant have "presented a serious legal question that raises a fair ground for litigation and thus for more deliberative investigation." *Id.* (internal quotation omitted). Because my discretionary ruling cohered with prior precedent and the principles Deloitte itself embraced at the time, there is no fair ground for further litigation. This factor weighs against a stay.

The threat of irreparable harm to Deloitte points in a different direction. Once privileged documents are produced and reviewed, the opposing party cannot later erase all memory of their contents. Where, as here, the consequences of a ruling "cannot be undone," a stay is more likely to be warranted. *Wynnefield Partners Small Cap Value L.P. v. Niagara Corp.*, 2006 WL 2521434, at *2 (Del. Ch. Aug. 9, 2006).

There is some threat of harm to Klig. As long as a stay remains in place, Klig will not be able to review the documents or use them in discovery as the case moves forward. Granting a stay therefore risks furthering Deloitte's strategy of defense-by-attrition. At the same time, the case is not expedited, the parties have not pressed forward rapidly, and no trial date has been set. The harm to Klig appears limited.

The public interest is neither harmed nor helped by a stay. There is a substantial public interest in the protection of the attorney-client privilege, but that interest is

balanced by equally substantial interests in the expeditious resolution of disputes and the deterrence of discovery misconduct. The public interest stands in equipoise.

Weighing these factors, I believe that the appropriate course is to grant a limited stay sufficient to enable Deloitte to pursue its application for certification of an interlocutory appeal with the Delaware Supreme Court. If the senior tribunal sees merit in the application, then it will be in a position to grant a stay. If the justices believe a shorter stay is warranted to allow them to consider the application, they can take that step. This Court's stay will therefore remain in effect for another 20 calendar days to facilitate appellate review.

III. CONCLUSION

For these reasons, I decline to certify the Discovery Ruling for interlocutory appeal. The temporary stay I ordered on August 17, 2010, shall remain in place for an additional 20 calendar days. **IT IS SO ORDERED.**