

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WALTER E. RYAN, JR., and)
DONNA CONRAD, in the right of)
and the benefit of MAXIM)
INTEGRATED PRODUCTS, INC.,)

Plaintiffs,)

v.)

Civil Action No. 2213-CC

JOHN F. GIFFORD, FREDRICK)
G. BECK, CARL W. JASPER,)
TUNC DOLUCA, PIROOZ)
PARVARANDEH, RICHARD C.)
HOOD, VIJAYKUMAR ULLAL,)
CHARLES G. RIGG, MICHAEL J.)
BYRD, JAMES R. BERGMAN, B.)
KIPLING HAGOPIAN, A.R. FRANK)
WAZZAN, ERIC P. KARROS,)
M.D. SAMPELS, and ALAN HALE,)

Defendants,)

and)

MAXIM INTEGRATED)
PRODUCTS, INC.,)

Nominal Defendant.)

MEMORANDUM OPINION

Date Submitted: December 20, 2007

Date Decided: January 2, 2008

Norman M. Monhait, of ROSENTHAL MONHAIT & GODDESS, P.A., Wilmington, Delaware; OF COUNSEL: Clinton A. Krislov and Jeffrey M. Salas, of KRISLOV & ASSOCIATES, LTD., Chicago, Illinois; Thomas G. Shapiro, Edward F. Haber, Michelle H. Blauner, and Robert E. Ditzion, of SHAPIRO HABER & URMY LLP, Boston, Massachusetts, Attorneys for Plaintiffs.

“J” Jackson Shrum, of ARCHER & GREINER, P.C., Wilmington, Delaware; OF COUNSEL: Michael J. Ioannou, Lita M. Verrier, and Sue H. Handelman, of ROPERS MAJESKI, KOHN & BENTLEY, San Jose, California, Attorneys for Nominal Defendant Maxim Integrated Products, Inc.

CHANDLER, Chancellor

This case involves what is now admitted stock option backdating that occurred at Maxim Integrated Products, Inc. (“Maxim” or the “Company”). On November 30, 2007, this Court issued a letter decision resolving several discovery disputes and other pre-trial issues in this case.¹ One of the issues resolved in that November 30 decision concerned plaintiffs’ motion to compel Orrick Herrington & Sutcliffe LLP (“Orrick,” counsel to Maxim’s “Special Committee”), and LECG Corporation (retained by Orrick for forensic accounting assistance), and Maxim (including its Special Committee) to produce all communications between Orrick and the Special Committee that occurred during their investigation into the option backdating, including Orrick’s presentation of the investigation’s final report to the Special Committee and to Maxim’s board of directors. Maxim has now moved, pursuant to Supreme Court Rule 42, for certification of an interlocutory appeal of this limited aspect of the November 30 decision. Plaintiffs Ryan and Conrad oppose certification. For the following reasons, I deny Maxim’s application for an order certifying an interlocutory appeal. Finding that there is no basis to stay the November 30 decision under *Kirpat, Inc. v. Delaware Alcohol Beverages Control Commission*,² I further deny Maxim’s motion to stay proceedings pending appeal.

¹ *Ryan v. Gifford*, C.A. No. 2213-CC, 2007 WL 4259557 (Del. Ch. Nov. 30, 2007).

² 741 A.2d 356 (Del. 1998).

I. FACTUAL BACKGROUND

To place the November 30 decision's discovery rulings in context, it is necessary to describe at some length the factual background of this dispute. This derivative action was filed on June 12, 2006, following the publication of Merrill Lynch's report asserting that stock option grants were almost certainly backdated at a number of companies, including Maxim. Two days later, on June 14, 2006, Maxim established a Special Committee, comprised of a single director, Peter De Roeth, which was charged with investigating the Company's stock option grants and practices. As I noted previously, the Special Committee in this case was not an independent Special Litigation Committee under *Zapata Corp. v. Maldonado*.³ In addition, although Maxim's board could have given the Special Committee power to act without consulting the remaining members of the board (all of whom had roles in Maxim's option granting practices and some of whom were recipients of backdated options), it chose not to do so.

De Roeth retained Orrick as the Special Committee's counsel, and it was Orrick that conducted the investigation with forensic accounting assistance from LECG Corporation. Together, Orrick and LECG conducted extensive interviews and collected and analyzed huge volumes of electronic and paper material.

³ 430 A.2d 779 (Del. 1981).

As Maxim noted in an 8-K filing with the SEC, in the course of the investigation, the Special Committee's legal and accounting advisors identified, preserved and collected approximately thirteen terabytes of electronic data. After running the agreed-upon search terms and eliminating software applications and duplicates, 120 gigabytes of electronic information were reviewed. The Special Committee's legal and accounting advisors reviewed a total of 270,000 electronic documents (not including metadata documents) and a total of 50,000 hard copy documents. They also conducted thirty-two interviews of current and former employees, members of Maxim's board of directors and auditing partners of both firms that audited Maxim's financial statements during the relevant time period. Some individuals were interviewed on more than one occasion.

Plaintiffs' burden in this litigation also has been made even more difficult by the frequent invocation of the Fifth Amendment privilege not to testify. Defendant Carl Jasper (Maxim's former CFO), as well as other individuals who played central roles in the administration of Maxim's stock option plan (including Maxim's former treasurer, Timothy Ruehle, and stock administrator, Sheila Raymond) have asserted their Fifth Amendment privilege not to testify.⁴

⁴ Defendant John Gifford, Maxim's former CEO, has recently advised the Court by letter that he would no longer be asserting his Fifth Amendment privilege not to testify.

On January 18 and 19, 2007, Orrick and the Special Committee presented its final report, *purportedly only orally*, to Maxim's board of directors. In attendance at the board meeting were De Roeth, other members of Maxim's board of directors (including director defendants Frank Wazzan, Kipling Hagopian, and James Bergman), attorneys from Orrick, **as well as attorneys from Quinn Emanuel, who represent the director defendants in this derivative action.**⁵ Following this presentation, the board met on several occasions to deliberate and discuss actions in response to the Special Committee's findings and conclusions.

Notwithstanding the significant cost of the investigation, the importance of its results, and the need for transparency, no written report of the Special Committee's findings and recommendations was ever prepared, submitted or published. No board members were permitted to leave the room with any documents or notes from the meetings discussing the investigation. The presentation evidently was completed in a manner that left little, or no, paper trail. Maxim has instructed the directors in this litigation not to answer questions regarding the board meetings or their decision making.

⁵ Quinn Emanuel represents the director defendants, and other present and former Maxim officers or directors (defendants Doluca, Byrd, Karros, and Sampels) (collectively, the "Individual Defendants") in this litigation. Throughout this litigation, and at the time of the January 2007 board meetings, Maxim has been represented by separate counsel, Ropers, Majeski, Kohn & Bentley ("Ropers"). The choice to have separate counsel presumably reflects an awareness that the Individual Defendants in this case have interests different from those of Maxim.

On February 1, 2007, Maxim publicly announced the results of the Special Committee's review. Maxim noted that there were "deficiencies related to the process for granting stock options to employees and directors," and that, in certain instances, the recorded exercise price of option grants to employees and directors "differed" from the fair market value on the "actual measurement date," but otherwise publicly exonerated the directors from any wrongdoing or malfeasance. The public report did not assign responsibility to any individuals for the option anomalies, but noted that defendants Gifford and Jasper had resigned in connection with the investigation.

In Maxim's non-public report to NASDAQ, the Company was far more forthcoming regarding the Special Committee's findings than it was in its public disclosures. The Company explained:

- The Special Committee's review of Maxim's stock option grants to directors and rank-and-file employees between 1996 and the third quarter of fiscal year 2006 revealed a number of misdated option grants. Among the director grants reviewed, such misdated options included (1) grant dates that appeared to have been selected after the grant date; (2) occasions on which a grant date was selected and later changed to a date with a lower price; (3) grants at relatively low market prices which lacked contemporaneous evidence of grant selection and (4) utilization of the "one day lookback" provision in the 1996 Plan, which allowed the Interim Options Committee to select as the grant date either the day on which the grant was made or the prior day.

- The Special Committee’s review of the thirty-eight quarterly grants to existing rank-and-file employees made between the first fiscal quarter of 1996 through the third fiscal quarter of 2006 revealed that grant dates fell at market prices that were uniquely low. The evidence also revealed the existence of general process issues, including (1) grant lists that were not entirely finalized until after the selection of the grant date; and (2) post-grant-date changes by Mr. Gifford to the number of shares recommended to particular employees.
- The Special Committee was unable to locate contemporaneous documentation of a number of the grant-date selections. Some grant dates appeared to have been selected after the grant date and on some occasions a grant date appeared to have been selected and later changed to a date with a lower price.

The Special Committee found that the employees most involved in the selection of grant dates for directors were John F. Gifford, Maxim’s former Chief Executive Officer, and Carl Jasper, who served as Maxim’s Chief Financial Officer from April 1999 until January 2007. The Special Committee concluded that based on the evidence developed in the investigation, that Mr. Gifford and Mr. Jasper had knowledge of and participated in the selection of grant dates for director, rank and file and new hire employee option grants from 1999 through 2005 either with hindsight or prior to completion of the formal grant-approval process.

As a result of the Special Committee’s investigation, Gifford’s employment as a part-time strategic advisor to the Company was terminated and Jasper’s employment with the Company was terminated. In addition, based upon the findings of the Special Committee, the Company decided to change the

responsibilities of Ruehle and Raymond. Other than minor corporate governance changes, no other remedial actions have been taken. Despite these findings of the Special Committee, Maxim's board of directors, which itself was conflicted (since the Special Committee found that some board members received backdated options), did not take any action to recover the damages Maxim sustained from the backdating of its options and the unjust enrichment of its officers and directors from their receipt of the backdated options.⁶

Although Maxim now asserts far-reaching privileges for the Special Committee's work, it has, as discussed above, provided details of this work to third-parties, including NASDAQ and publicly to investors (through the SEC Form 8-K). Moreover, the Special Committee itself provided a number of documents to the SEC, the United States Attorney's Office, and Maxim's current and former auditors.

Additionally, as I have previously concluded, the director defendants in this case have specifically made use of the Special Committee's findings and conclusions for their personal benefit and have argued to this Court that the Special Committee's exoneration of them should be accorded deference. The director

⁶ See *Conrad v. Blank*, 2007 WL 2593540, at *7 (Del. Ch.), where Vice Chancellor Lamb found "troubling" the fact that directors, after concluding that the corporation's stock options were erroneously issued with "incorrect measurement dates," "... did nothing to remedy those past 'errors.'"

defendants have made these arguments in a brief, opposing plaintiffs' motion to amend the complaint, in which coincidentally Maxim has expressly joined.⁷ Further, the director defendants have extensively relied upon the Special Committee's findings both in opposing plaintiffs' motion for summary judgment and in support of their own motion for summary judgment. At the time of the November 30 decision, in their unamended summary judgment brief, the director defendants explicitly rely upon the unwritten "findings" of the Special Committee that purport to absolve the director defendants of liability. In further support of their motion, the director defendants laud "the Special Committee's comprehensive investigation," which included "32 individual interviews." Interestingly, however, these same director defendants, who clearly control Maxim's litigation position,⁸ have refused to produce to plaintiffs (who prosecute this action on behalf of Maxim) materials related to the Special Committee's investigation. Even more interestingly, since the November 30 decision, the director defendants have submitted an amended brief in support of their motion for summary judgment that

⁷ Maxim's assertion that "the Special Committee's findings have not been used by Maxim as grounds for a motion to dismiss," (Maxim Application, at p.10) is deceptive at best, in light of the fact that Maxim expressly joined the individual director defendants' brief that made this precise argument.

⁸ There can be no doubt that the individual director defendants making these arguments control Maxim's litigation position as these defendants comprise a majority of Maxim's current board members (Wazzan, Bergman, Doluca, and Hagopian) and Maxim's current Chief Executive Officer (Doluca).

purports to disavow reliance on the Special Committee's findings, despite their explicit reliance thereon in the first brief in support of their motion.

In light of the above facts and the convenient and selective invocation of the attorney-client privilege, this Court on November 30, 2007, granted plaintiffs' motion to compel. Specifically, the Court ruled that Maxim, its Special Committee, and Orrick must produce all material related to the Special Committee's investigation that were withheld on grounds of attorney-client privilege.⁹ Maxim now seeks certification for an interlocutory appeal of one portion of this ruling.

II. ANALYSIS

Supreme Court Rule 42 sets forth the standards for certification of interlocutory appeals by a trial court. Under this Rule, no interlocutory appeal may be certified unless the order from which appeal is to be taken (1) determines a substantial issue, (2) establishes a legal right,¹⁰ and (3) meets at least one of the criteria enumerated in Supreme Court Rule 42(b)(i)–(v). Those criteria include the

⁹ The Court also directed Orrick to turn over its work-product, including its interview notes, for *in camera* review. Orrick does not seek to appeal any aspect of this Court's ruling, including the ruling that plaintiffs have made a showing of good cause to obtain its non-opinion work product.

¹⁰ A court resolves a substantial issue where it resolves at least one substantive legal issue; a court establishes a legal right when it determines an essential issue regarding the merits of a case. *In re Kent County Adequate Public Facilities Ordinances Litig.*, 2007 WL 2875204, at *2 (Del. Ch. Sept. 26, 2007).

reasons listed in Rule 41 for certification of questions of law,¹¹ questions of the trial court's jurisdiction, instances where the trial court has set aside precedent, or instances where the trial court has ruled on a dispositive issue. Usually, the Supreme Court accepts interlocutory appeals only where the circumstances are "extraordinary" or "exceptional."¹² Maxim's application seeks immediate appellate review of what it purports is a significant question of law that is of first impression in this state. Because this Court's November 30 letter decision applied only established precedent, Maxim is incorrect, and because I conclude Maxim has failed to establish any other permissible justification for its application, I decline to certify its interlocutory appeal.

A. *Maxim's interlocutory appeal would be futile: the November 30 Order provided two alternative bases for granting plaintiffs' motion to compel and Maxim has challenged only one*

Maxim seeks an interlocutory appeal solely of this Court's conclusion that the Company's Special Committee's communications with the director defendants and their individual counsel constituted a waiver of attorney-client privilege. In the November 30 decision, however, I expressly determined that any claim to privilege was vitiated by plaintiffs' showing of good cause under the longstanding

¹¹ See SUP. CT. R. 41(b) (listing reasons for accepting certification, including whether the question is one of first instance in the state, focuses on conflicting trial court decisions, or relates to construction or application of a statute that has not been settled by the Court).

¹² DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY §14-4 (supp. 2006).

principle of *Garner v. Wolfinbarger*¹³ as adopted and applied by this Court numerous times over the past three decades.¹⁴ As then-Vice Chancellor Jacobs noted in 1987, *Garner* is technically not an exception to attorney-client privilege.¹⁵ Instead, where a plaintiff shareholder demonstrates good cause under the *Garner* framework, Delaware courts refuse to apply the privilege and permit discovery of otherwise protected materials.¹⁶ Such is the case here, where plaintiffs have established good cause under *Garner* and thereby rendered inapplicable any privilege that would protect the materials they seek.

Maxim's application for certification of interlocutory appeal does not discuss or challenge this Court's conclusion that plaintiffs demonstrated good cause under *Garner*; it only seeks review of the waiver analysis in the November 30 decision. Because the *Garner* determination provides an independent basis for the November 30 decision, however, even a successful appeal on the waiver issue would prove futile. The Committee's comment to Supreme Court Rule 42 clarifies

¹³ 430 F.2d 1093 (5th Cir. 1970).

¹⁴ See, e.g., *In re Freeport-McMoran Sulphur, Inc.*, C.A. No. 16729, 2005 WL 225040, at *3–5 (Del. Ch. Jan. 26, 2005); *In re Fuqua Indus., Inc.*, C.A. No. 11974, 2002 WL 991666, at *3–6 (Del. Ch. May 2, 2002); *Sealy Mattress Co. of N.J. v. Sealy, Inc.*, C.A. No. 8853, 1987 WL 12500 (Del. Ch. June 19, 1987); *Tabas v. Bowden*, C.A. No. 6619, 1982 WL 17820, at *2–3 (Del. Ch. Feb. 16, 1982); *Cascella v. GDV, Inc.*, C.A. No. 5899, 1979 WL 175245, at *2 (Del. Ch. Sept. 13, 1979).

¹⁵ *Sealy Mattress*, 1987 WL 12500, at *3.

¹⁶ See *Grimes v. DSC Commc'ns Corp.*, 724 A.2d 561, 569 (Del. Ch. 1998) (concluding that plaintiff had satisfied his burden of showing good cause under *Garner*).

that the rule’s purpose is to “sav[e] time” and “advance the litigation.”¹⁷ Certifying a purely academic appeal such as this one would undermine the rule’s purpose.

B. The Court’s November 30 Order neither determined a “substantial issue” nor established a “legal right”

Supreme Court Rule 42(b) prohibits certification of an interlocutory appeal unless the application, as a threshold matter, both determines a substantial issue and establishes a legal right.¹⁸ Maxim has failed to demonstrate that the Court’s November 30 decision did either. Contrary to Maxim’s assertion, this Court’s decision did not establish a “new legal right of access to internal corporate information.”¹⁹ Instead, the Court reiterates that, as in *Fleischman*, where this Court was also asked to certify under Rule 42 an order requiring production of material relating to an independent investigation of backdating, the decision “simply grants a *limited procedural right* to plaintiff—access to documents that

¹⁷ SUP. CT. R. 42 cmt.; *see also E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 686 A.2d 1015, 1016 (Del. 1997) (“[I]nterlocutory appeals interrupt[] the progress of litigation and are counter-productive if they delay the final resolution of the case. The decision to grant interlocutory review is discretionary and highly case-specific. The goal, in all events, is to facilitate the orderly disposition of claims without inadvertently promoting a piecemeal approach to litigation.”) (citation omitted).

¹⁸ “A court resolves a substantial issue where it resolves at least one substantive legal issue; a court establishes a legal right when it determines an essential issue regarding the merits of a case.” *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, C.A. No. 2742-VCN, 2007 WL 4357667, at *2, n.8 (Del. Ch. Dec. 6, 2007) (citing *In re Kent County Adequate Public Facilities Ordinances Litig.*, 2007 WL 2875204, at *2 (Del. Ch. Sept. 26, 2007)).

¹⁹ Maxim Application at 5.

defendants have expressly relied upon in support of their motion to dismiss.”²⁰ Here, the November 30 decision merely gave a similar limited procedural right to plaintiffs. As noted above, since the issuance of this Court’s November 30 decision, the director defendants have—in a seeming coincidence of timing—filed an amended brief in support of their motion for summary judgment in which they superficially state that they do not rely on the findings of the Special Committee for the purposes of their motion. At the time of the November 30 decision, however, the director defendants explicitly asserted that the findings of the Special Committee were entitled to deference from this Court. Moreover, even if this Court ignores the suspicious timing of the director defendants’ purported disavowal of reliance on the investigation, Maxim seeks to further avail itself of the Special Committee’s report, which will redound to the benefit of the director defendants.

Maxim also appears to argue that the November 30 decision decided a “substantial issue” because it will affect Delaware corporate customs and long-standing principles of good corporate governance. Not only are such dire consequences exaggerated, but fears thereof are also misplaced. The decision was the result only of the application of well-settled precedent to a set of particular and specific facts. Though detailed more fully above, it is worthwhile to repeat that the

²⁰ 2007 WL 2410386, at *4 (emphasis added).

relevant factual circumstances here include the receipt of purportedly privileged information by the director defendants in their individual capacities from the Special Committee. The decision would not apply to a situation (unlike that presented in this case) in which board members are found to be acting in their fiduciary capacity, where their personal lawyers are not present, and where the board members do not use the privileged information to exculpate themselves. Similarly, the decision would not affect the privileges of a Special Litigation Committee formed under *Zapata*, or any other kind of committee that (unlike the Special Committee here) has the power to take actions without approval of other board members.²¹

Maxim also erroneously argues that the decision results in a waiver of privilege as a consequence of the director defendants' exercise of their duty of due care and that the decision therefore imposes conflicting duties on directors. The decision neither imposes duties on directors nor prevents directors from complying with their duty to act with due care, loyalty and in good faith.²² Maxim appears to fail to appreciate the difference between compliance with fiduciary duties and doing so while maintaining a privilege. In any event, the only thing that directors

²¹ As plaintiffs correctly observe, any special committee always has, always had (and will continue to have) to deal with the possibility that its communications will not be privileged if good cause is shown under *Garner*.

²² See *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

cannot do under the decision is receive purportedly privileged material while acting in their personal (as compared to fiduciary) capacity and still maintain the privilege.

C. Maxim has failed to establish any of the specific criteria in Supreme Court Rule 42(b)

Even if this appeal were not futile, and even if the November 30 decision did determine a substantial issue or establish a legal right, certification remains improper because Maxim has failed to prove applicable any of the criteria listed in Supreme Court Rule 42(b).

1. The November 30 decision did not decide an issue of first impression under Delaware law

Maxim's application appears to rest on the contention that the decision presents a question of first impression in Delaware because "Counsel could find no Delaware case that held that a committee of the board waived privilege over its entire investigation by reporting its findings to the full board."²³ The Court notes that one need not consult even a single case to find the well established principle on which the November 30 decision is based. Rule 510 of the Delaware Rules of Evidence explains that privilege is destroyed whenever the holder of the privilege "voluntarily discloses or consents to disclosure of any significant part of the

²³ Maxim Application at 9.

privileged matter.”²⁴ This clear codification of the principle notwithstanding, plenty of cases also rely on this bedrock principle of waiver.²⁵

Maxim appears to argue that its application presents a novel question of law simply because no case has previously applied Rule 510 in the unique factual context of this case. Such an argument must fail. The mere application of long-held precedent to new facts does not make an order worthy of appeal.²⁶ Moreover, Maxim’s logic is self defeating. Just as Maxim’s counsel “could find no Delaware case that held that a committee of the board waived privilege over its entire investigation by reporting its findings to the full board,” this Court could find no case, in which certification of an interlocutory appeal was granted, where the movant sought review of only one of two independent bases for a decision or where the movant seeks review of a decision that applies well established law to new facts. More importantly, the Court could find no case where a board’s Special Committee disclosed its findings on the misconduct of director defendants to those defendants themselves *and* to their individual, outside counsel and later

²⁴ DEL. R. EVID. 510.

²⁵ See, e.g., *Weeden v. State*, 647 A.2d 1078, 1081–82 (Del. 1994) (concluding that defendant waived his privilege); *Khanna v. McMinn*, C.A. No. 20545-NC, 2006 WL 1388744, at *39 (Del. Ch. May 9, 2006) (concluding defendant corporation waived privilege by disclosure); *Texaco, Inc. v. Phoenix Steel Corp.*, 264 A.2d 523, 525 (Del. Ch. 1970) (holding that privilege is waived once there is disclosure to an outsider by the client or by the attorney with the client’s authority).

²⁶ See *Achtermann v. Bussard*, C.A. No. 05C-04-198 RRC, 2007 WL 1152720, at *1 (Del. Super. Ct. Apr. 10, 2007) (denying certification because the decision merely “required the application of a unique set of facts to established principles of negligence law.”), *aff’d*, 922 A.2d 414 (Del. 2007).

successfully claimed that such disclosure did not constitute a waiver. Indeed, had the Court found such a case, the November 30 decision may have read differently.

It is not clear that the privilege between Orrick and the Special Committee extends to the Company itself but, even if it does, that privilege was waived by disclosure to the director defendants, who attended the January meeting in their individual—not fiduciary—capacities along with their individual, outside counsel.²⁷ Disclosure to outsiders has never failed to waive privilege under Delaware law. Maxim’s “Chicken Little” argument that the Court’s November 30 decision changes the law of privilege, therefore, is vastly overstated. The sky is not falling. Maxim has merely been struck by an acorn that it brought upon itself through its careless and suspicious practices.

2. Maxim has not established (or even attempted to establish) any of the other criteria of Rule 42(b)

Maxim does not make any other serious arguments that another of the criteria under Supreme Court Rule 42(b) applies in this case. The other reasons an interlocutory appeal may be permitted include resolution of conflicting trial court decisions, construction or application of a previously unconsidered statute, consideration of controverted jurisdiction, or consideration of an order that

²⁷ *Ryan v. Gifford*, C.A. No. 2213-CC, 2007 WL 4259557, at *3 (Del. Ch. Nov. 30, 2007). Furthermore, the director defendants cannot be said to have shared the Special Committee’s goals of objectively investigating Maxim’s options practices when these same director defendants were acting at every step with an eye to their own defense in the present litigation.

reverses or sets aside a prior decision of the court, a jury, or an administrative agency. None of those situations is present here.²⁸ Consequently, the application for certification of interlocutory appeal is improper.

III. CONCLUSION

Maxim has failed to satisfy the requirements of Supreme Court Rule 42. First, an appeal of the waiver analysis in this Court's November 30 decision would be futile because the Court decided the privilege issue on two independent grounds and Maxim has not appealed the other basis for the decision. Second, Maxim has not proved that the decision determined a "substantial issue" or established a "legal right." Third, the November 30 decision did not address a question of first impression and none of the other specific criteria of Rule 42(b) are present in this case. Maxim's rhetorically charged application stated more cogently its position than did its brief opposing plaintiffs' motion to compel, but rhetoric alone cannot justify Maxim's attempt to keep from plaintiffs the materials I ordered the company to produce on November 30. Because Maxim has not satisfied Supreme Court Rule 42, I deny its application for certification of interlocutory appeal. I

²⁸ Maxim blithely suggests that an interlocutory appeal is appropriate under Supreme Court Rule 42(b)(iii) because it would "serve considerations of justice." In so suggesting, Maxim apparently has failed to read all of the Rule. By its very language, Rule 42(b)(iii) does not apply here. This Court simply did not "reverse or set aside a prior decision of the court, a jury, or an administrative agency." See *Smith v. Lawson*, C.A. No. 01C-12-105 RRC, 2006 WL 496137, at *3 (Del. Super. Ct. Feb. 15, 2006) ("Thus, under the plain language of Rule 42(b)(iii), no interlocutory appeal may be certified from an order of this Court that did not set aside or reverse the jury's verdict.").

further deny Maxim's motion to stay the November 30 decision, finding the application meritless and finding no basis under *Kirpat, Inc.* to justify granting the motion.

IT IS SO ORDERED.