COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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JACK B. JACOBS
VICE-CHANCELLOR

COURT HOUSE
WILMINGTON, DELAWARE 19801

February 23,200 1

Thomas J. Allingham, II, Esquire
Skadden, Arps, Slate, Meagher & Flom
One Rodney Square
P.O. Box 636
Wilmington, DE 19899

Thomas A. Beck, Esquire
Richards, Layton & Finger
One Rodney Square
P.O. Box 55 1
Wilmington, DE 19899

RE: Greenlight Capital Qualified, L.P., et al. v. Emerging Communications, Inc.
Civil Action No. 16943
Date Submitted: February 20, 2001

Dear Counsel:

Respondent Emerging Communications, Inc. ("Emerging") has moved for an order compelling David Einhorn, the Rule 30(b)(6) witness for petitioners, Greenlight Capital Qualified, L.P., et al. ("Greenlight"), to provide deposition testimony regarding Greenlight's valuation of Emerging prepared in August and September, 1998 (the "August-September valuation"). That valuation is the only

pre-litigation valuation prepared by Greenlight in which it calculated, on a preliminary basis, a specific range of values for Emerging.

In December of last year that valuation was submitted to the Court for an in camera determination of whether it was protected by the work product immunity. In a letter opinion to counsel dated December 14, 2000, the Court determined that the August-September valuation constituted protected work product. Emerging contends that even though the valuation document is protected from discovery, the valuation itself is not, and may be discovered through Mr.. Einhorn's (and, if necessary, Mr.. Sethi's)' deposition testimony. Emerging rests this argument on this Court's August 2 1, 2000 letter Opinion, in which the Court ruled that although Mr.. Einhorn could not be compelled to give opinion testimony regarding the fair value of Emerging's shares:

> . ..If in fact [Mr.. Einhorn] arrived at a valuation of [Emerging] and communicated that value determination to anyone within outside of his organization for purposes other than settlement discussion, Mr.. Einhorn may be questioned about his valuation and the basis therefor.. .

[1]The August-September valuation, which is the only pre-litigation valuation by Greenlight currently in dispute, was prepared by Mr.. Einhorn and Vinit Sethi, another Greenlight employee.

Emerging contends that that ruling justifies compelling Mr.. Einhom's (and Mr.. Sethi's) deposition testimony, because those gentlemen in fact "arrived at a valuation" of Emerging in the August-September valuation and communicated that valuation to persons within the Greenlight organization. Greenlight resists, on the ground that because the Court has already found the valuation document to be protected work product, it must necessarily have also found that the valuation contained within that document was nondiscoverable "opinion work product." Greenlight argues that although the issue was not specifically addressed in this Court's two prior letter opinions, the August-September valuation constitutes "opinion work product," and therefore is nondiscoverable.

Mr. Einhorn (and Mr.. Sethi) did in fact arrive at a valuation of Emerging in August and September, 1998, and they communicated that valuation to others within their organization. Therefore, that valuation and the bases therefor appear, at least facially, to fall within the scope of this Court's August 2 1, 2000 ruling. The only issue is whether despite that ruling, that valuation constitutes nondiscoverable "opinion work product." Contrary to Greenlight's position, the Court has not previously decided that question.

"Opinion work product" consists of "material containing a lawyer's mental impressions, conclusions, opinions or other legal theories."[2] Although my recollection of the August-September valuation is imperfect, as a logical matter it would seem that the "bottom line" valuation range, and any intermediate data and calculations leading thereto, would not contain such protected information. Accordingly, I perceive no reason why Emerging's counsel would be unable to frame deposition questions that will elicit the discoverable information described in the August 21, 2000 letter opinion, without eliciting, directly or indirectly, "disclosure of an attorney's mental impressions or theories of the case."[3] The deposition will be held, provided that it is conducted in that manner.

* * *

'Donald J. Wolfe, Jr. and Michael A. Pittenger, Cornorate and Commercial Practice in the Delaware Court of Chancery, Procedures in Equity §7-1 (2000).

[3]Protective Nat'1 Ins. Co. Of Omaha v. Commonwealth Ins. Co., 130 F.R.D. 267, 280 (D. Neb. 1989); see also, Eoppolo v. National R.R. Passenger Corp., 108 F.R.D. 292, 293 (E.D. Pa. 1985).

For the above reasons, Emerging's Motion to Compel Discovery is granted, subject to its adhering to the guidelines set forth above. IT IS SO ORDERED.[4]

Very truly yours,

Jack B. Jacobs

cc: Register in Chancery

[4]The impression persists that the discovery Ernerging seeks will have only marginal probative value. Presumably, Emerging anticipates (or hopes) that the August-September valuation will be less than (and therefore will tend to discredit) the "fair value" that Greenlight intends to advocate at the trial. Should there be any discrepancy, Greenlight will be afforded an opportunity to explain it at the hearing.