COURT OF CHANCERY
OF THE
STATE OF DELAWARE

STEPHEN P. LAMB
VICE-CHANCELLOR

COURT HOUSE
WILMINGTON, DELAWARE 19801

Submitted: November 8, 2000
Decided: December 19, 2000

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RE: Christopher Kosachuk v. Henry E. Harper, Violy McCausland and Contrasena, S.A. and Latinadvisor.com, Inc.
C.A. No. 17928

Dear Counsel:

I understand from Mr. Walsh's letter of November 8, 2000, that the parties have been unable to agree upon a discontinuance of this litigation. In light of this development, I have reviewed the parties' submissions and the transcript of the October 23, 2000 hearing, and am prepared to rule on the pending motion to compel. For the following reasons, that motion will be denied.

Plaintiff, Christopher Kosachuk, moved to compel the production of all documents identified on defendants' privilege log. Before argument, the defendants produced all documents identified on that log that were dated on or before March 14, 2000, the date on which Kosachuk was discharged as an employee and removed as a director of the defendant corporation, LatinAdvisor.com, Inc. At oral argument, defendants also agreed to produce all documents identified on that log for which the only claim of privilege is "business strategy." Kosachuk continues to press for the production of all of the documents identified on the log as attorney/client privileged or work product privileged, dated after March 14, 2000. These documents all contain communications between LatinAdvisor.com and its present counsel, the firm of Wachtell, Lipton, Rosen & Katz ("WLR&K").

Delaware courts recognize that a stockholder litigating against his or her corporation may be entitled to discover attorney-client privileged or attorney-work product privileged documents in the possession of the corporation or its counsel where "good cause" is shown.[1] For present purposes, "good cause" is judged under the standard established in ***Garner v.*** *Wolfinbarger*.[2] Three factors are particularly salient: (i) the colorability of the claim, (ii) the availability of the information from some other source, and (iii) the specificity with which the communications are identified. [3]

In the context of this motion as limited by the defendants' supplemental production, I am persuaded that Kosachuk has not shown "good cause" to justify the wholesale invasion of the remaining areas of privilege between LatinAdvisor.com and WLR&K. I reach this conclusion for two reasons. First, there is no showing that, by pursuing other avenues of discovery, Kosachuk will be unable to obtain substantially the same information he argues he will discover in these privileged documents. In particular, his claims about the dilutive conversion by noteholders in June and July 2000, and the related failure on the part of LatinAdvisor.com to have raised $2.0 million in equity should first be discovered through other, non-privileged means. Second, I agree with LatinAdvisor.com that Kosachuk's demand does not adequately identify the

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

[2] (5th Cir.) 430 F.2d 1093 (1970).

[3] *Sealy* ***Mattress Co. of New Jersey, Inc. v. Sealy, Inc.,*** Del. Ch., C.A. No. 8853, Jacobs, V.C. (June 19, 1987), mem. op. at ***9;*** *In* ***re*** *Fuqua Indus.* ***Inc. Shareholders*** *Litig.*, Del. Ch., C.A. No. 11974, Chandler, C. (Sept. 17, 1999).

specific communication at issue; rather, his demand is broad and all-encompassing, covering a multitude of topics and communications. It seems likely that, after exhausting other avenues of discovery, Kosachuk will be able to limit any renewed application to a small subset of those documents he now seeks. This result is fully consistent with the decision of Chancellor Chandler in *In re Fuqua Indus., Inc. Shareholders Litig*.[4]

Kosachuk also argues; that LatinAdvisor.com has waived its claim of privilege. On the record before me, I am satisfied that the company has not waived any claim of privilege.

In resolving this aspect of the dispute, I first conclude that WLR&K was not acting as attorney to the company until shortly after March 14, 2000. WLR&K rendered services to LatinAdvisor.com in the fall of 1999, but the company then employed other counsel until WLR&K was retained. In February and early March 2000, WLR&K rendered legal services to defendant Henry Harper and others, but not to the company.' It follows from this that the defendants' decision to produce communications dated up until March 14, 2000 did not operate as a waiver of LatinAdvisor.com's privilege with respect to later-dated communications .[6]

As to those later-dated communications, I am satisfied that the privilege log adequately identifies their subject matter. Moreover, the Harper and Emmerich affidavits provide an adequate basis for me to conclude that the communications are entitled to the protection of the attorney-client or work product privileges. There also is no reason to conclude that any of the privileged communications were disserninated so broadly as to destroy the privilege. Kosachuk complains that copies of documents were sent to persons who were neither WLR&K attorneys nor directors of the company. But this is not the appropriate test. In this context, the privilege can extend to the confidential

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[4] See n.4, *supra*.

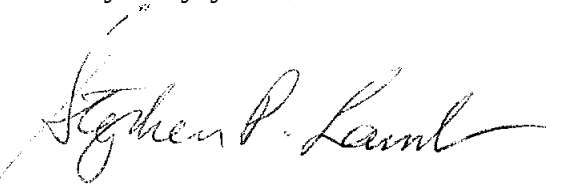
[5] A review of the subject matters covered by the communications identified on the privilege log confirms that the nature and scope of WLR&K's duties changed significantly after March 14, 2000.

[6] It may, of course, have operated as a waiver of privilege by Harper or others represented by WLR&K before March 15, 2000, as to the subject matter of the Shareholders Agreement and related issues.

communication of information or advice between attorneys representing the corporation and corporate employees, agents and representatives .[7]

For all these reasons, the motion to compel will be denied. An order to that effect has been entered and is enclosed herein.

Very truly yours,



SPL/caj
Enclosure
Original to the Register in Chancery

[7] *Deutsch v. Cogan*, Del. Ch., 580 A.2d 100, 106 (1990); *Tabas* v. *Bowden*, Del. Ch., C.A. No. 6619, Hartnett, V.C. (Feb. 16, 1982).