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CHANCELLOR

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: December 14, 2004
Decided: February 7, 2005

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Re: *Cede & Co. v. Joulé Inc.*
Civil Action No. 696-N

Dear Counsel:

Before the Court is the Objection and Motion of Updata Capital, Inc. ("Updata") to Quash Subpoena (the "Motion") pursuant to Court of Chancery Rule 45(c)(3)(A). For the reasons discussed below, the Motion will be denied.

The Motion was not brought on behalf of Updata. It was brought by Joulé Inc. ("Joulé"). It is clear under federal law, upon which the Court of Chancery Rules are based, that when a subpoena is issued to a non-party, a

party does not have standing to object to the subpoena unless production of documents pursuant to the subpoena would violate a privilege held by the objecting party.[1] The only privilege raised in the Motion is Joulé's attorney-client privilege. *Joulé's* objection is not well taken because its attorney-client privilege, at best, is related tangentially to the request for documents in the subpoena. To the extent that *Updata's* files contain advice given by Joulé's counsel to Joulé, and Updata became privy to that advice during the course of Updata advising Joulé, those portions of documents may be redacted, as the attorney-client privilege is not waived by the presence of the investment banker.[2] Updata may also redact or withhold documents (with a corresponding privilege log) that contain communications from Updata's counsel to Updata. Otherwise, Joulé has no standing to object, and the Motion must be denied.

In the alternative, even if Updata itself properly brought the Motion, it has no merit except to the extent that Updata's files contain communications between Joulé and its counsel or Updata and its counsel. Clearly, there would be no privilege between communications between Updata and Joulé's counsel or Joulé and Updata's counsel. Furthermore, the subpoena is not

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[1] *See, e.g.*, Wright & Miller, FEDERAL PRACTICE & PROCEDURE 2D, § 2459, nn.15-16.
[2] *See Jedwab v. MGM Grand Hotels, Inc.*, 1986 WL 3426, at *2 (Del. Ch.).

overbroad or unduly burdensome, but is narrowly tailored to obtain the records that plaintiff will need to complete and present its case.

Joulé also argues that the subpoena should be quashed because it purports to require disclosures of opinions resulting from Updata's advising Joulé in connection with a tender offer in 2003 and the merger in 2004, citing to Court of Chancery Rule 45(c)(3)(B)(ii). In support, Joulé cites a non-appraisal case from the Eastern District of Pennsylvania.[3] Not only is that case not controlling, but it also is not persuasive in the context of an appraisal action where the data and opinions of the company's financial advisor go to the core issue of the case—the value of the company. Furthermore, the federal courts have interpreted Federal Rule of Civil Procedure 45(c)(3)(B)(ii), which was only created in 1999, as applying only to experts whose opinions were not solicited at the behest of one of the parties to the litigation, and when that opinion does not relate to events or occurrences in dispute in the litigation.[4] Here, Joulé solicited Updata's opinion with respect to the fair value of Joulé. The fair value of Joulé is the key concern in this litigation, and Joulé is a party. The prohibition on

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[3] *Thompson v. Glenmeade Trust Co.*, 1995 WL 752422 (E.D. Pa.).
[4] *Statutory Comm. Of Unsecured Creditors v. Motorola, Inc.*, 218 F.R.D. 325, 326-27 (D.D.C. 2003).

production of an unretained expert's opinion contained in Court of Chancery Rule 45(c)(3)(B)(ii), therefore, is not applicable in this case.

For the foregoing reasons, and subject to the instructions given herein regarding the attorney-client privilege, the Motion is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ William B. Chandler III

William B. Chandler III

WBCIII:amf