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

COURT OF CHANCERY COURTHOUSE
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GEORGETOWN, DELAWARE 19947

Submitted: January 15, 2008
Decided: January 17, 2008

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Re: *Amirsaleh v. Bd. of Trade of the City of New York, Inc., et al.*
Civil Action No. 2822-CC

Dear Counsel:

Discovery disputes invariably arise when parties stop talking to one another, and this case is no different. Although the process of discovery described in the Court of Chancery Rules should involve the judge as little as possible, the Rules provide for judicial intervention when communication breaks down. That is precisely what happened here. Before me is plaintiff Mahyar Amirsaleh's ("Amirsaleh") motion for sanctions and to compel. For the reasons stated below, I grant this motion in part and deny in part.

On January 12, 2007, the Board of Trade of the City of New York, Inc. ("NYBOT") merged with IntercontinentalExchange, Inc. ("ICE" and, together, "defendants"). The merger agreement provided the members of NYBOT with a

choice of converting their shares to newly issued ICE common stock, cash consideration, or a combination of both. In this action, Amirsaleh, a former member of NYBOT, alleges breaches of the merger agreement and fiduciary duties by the defendants. Specifically, Amirsaleh contends that defendants failed to mail him a merger consideration election form ("election form") with proper time and sufficient notice to make a proper election. Plaintiff alleges that he did not receive his election form in time to make his election "timely," and he received, therefore, only cash for his membership interest. Plaintiff further alleges, however, that defendants accepted many other late election forms and defendants, in fact, operated with an undisclosed second cutoff date for processing election forms.

On June 11, 2007, defendants moved for judgment on the pleadings or, alternatively, for summary judgment. Plaintiff sought to complete discovery in order to contest this motion and, on June 12, 2007, defendants moved for a protective order to block such discovery. After the parties completed briefing, I issued a letter decision denying defendants' motion.[1] I concluded that a protective order was unnecessary so long as discovery was limited to the five items specifically requested by plaintiff in a letter from counsel sent on July 3, 2007, in an effort to compromise on the discovery issue. I noted that some discovery was necessary to "permit fair consideration of the pending motion for summary judgment" but that such "limited discovery will not be burdensome to the defendants."[2]

In the motion before me, plaintiff essentially seeks three things: (1) an order forcing defendants to respond to perceived deficiencies in their compliance with my September 17 decision; (2) an order compelling defendants to turn over certain materials defendants say are privileged; and (3) sanctions and fees under Rule 37(b). I will address and rule on each of these requests in turn.

A. Defendants must fully comply with the September 17 letter opinion

Plaintiff argues that defendants have not responded to the second requested item in the July 3 letter, which asks for a "Summary of NYBOT member election responses, including: (i) what they elected (*i.e.*, all cash, shares, or combination); (ii) those treated as no election; (iii) when elections were made or dates deemed no election; and (iv) which members returned a merger proxy." Plaintiff characterizes

[1] *Amirsaleh v. Bd. of Trade of the City of N.Y., Inc.*, C.A. No. 2822-CC, 2007 WL 2745388 (Del. Ch. Sept. 17, 2007).
[2] *Id.* at *1.

this as "an interrogatory-styled request." Defendants strongly dispute this characterization, arguing that the September 17 decision called for limited discovery and contending that they therefore should not be expected to create a summary. Further, defendants claim that they have responded to this request by providing all of the documents plaintiff needs to glean the answers himself.[3] Amirsaleh responds that defendants have not, in fact, produced documents that answer all of the components of the second requested item in the July 3 letter. In particular, Amirsaleh emphasizes that defendants have not produced documents explaining the dates on which the NYBOT members made their elections; defendants have only produced a range of dates on which elections were made. Moreover, plaintiff contends that some of the documents produced by defendants are wholly unreliable and facially inaccurate.

In my September 17 decision, I ordered the parties to engage in discovery on the five items listed in the July 3 letter; I did not limit discovery to document production. To the extent it is necessary to produce a summary or to do a little extra work in order to satisfy the second request of the July 3 letter, defendants must comply. Defendants had an opportunity to convince this Court that answering plaintiff's requests would prove egregiously burdensome, but I denied their motion for a protective order. The second requested item in the July 3 letter clearly asks for a summary, and that is what defendants should provide.

B. Defendants must produce communications related to the undisclosed January 18, 2007 cutoff date but need not produce other privileged documents

Plaintiff seeks an order compelling production of nearly all the materials defendants have identified as privileged.[4] Plaintiff gives three reasons to try to justify this request. First, defendants have disclosed some of these documents, admitting that the communications between in-house counsel and their clients are about business, rather than legal matters. Plaintiff suggests that other communications on the same topics, therefore, are similarly not privileged. Second, plaintiff says that defendants have put "at issue" any communications that relate to the setting of the second, previously undisclosed cutoff date for accepting

[3] *See* Ct. Ch. R. 33(d) (allowing a party to respond to an interrogatory by providing business records from which the answer to the interrogatory may be derived).

[4] *See* Del. R. Evid. 502(b) ("A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or the client's representative and the client's lawyer or the lawyer's representative . . . .").

late election forms.[5] Plaintiff alleges that he was treated unfairly by defendants because the election materials stated that the cutoff date for electing ICE shares was January 5, 2007, and because defendants, admittedly, did accept some election forms after that date (albeit not plaintiff's). Defendants have responded to this allegation by suggesting that the actual cutoff date was January 18, 2007. Without access to the purportedly privileged information regarding the January 18 cutoff, plaintiff has no way of dealing with this defense. Third, plaintiff argues that defendants have partially disclosed some of these communications and, therefore, must disclose them all.

Defendants attempt to counter on all three points. First, defendants have disclosed only the business advice communications—not those containing legal advice. Just because communications occurred on the same subjects between the same people does NOT mean that all such communications were business related. Some constitute legal advice and those communications are the ones for which defendants claim privilege. Second, defendants say that plaintiff misunderstands the "at issue" exception to privilege. The subject of the communications is at issue, but defendants say it was plaintiff who raised that subject. Third, defendants argue they have not disclosed *any* privileged information and thus there has been no partial waiver.

Defendants are correct with respect to plaintiff's first and third points. It would be terrible for this Court to discourage litigants from producing non-privileged communications involving counsel by instilling the fear that such production will result in a waiver as to all counsel communications that are privileged. Defendants have taken the time to carefully review communications with counsel to identify those that do not relate to legal advice. Those communications are, indeed, not privileged.[6] It is nonsensical to assume, as plaintiff does, however, that the existence of non-privileged communications with in-house counsel necessarily means *all* communications with in-house counsel are

[5] Plaintiff and defendants clearly disagree about what date, if any, was communicated to the NYBOT members regarding when elections needed to be received. They also disagree about what date was the record date for mailing the election forms.

[6] *See Texaco, Inc. v. Phoenix Steel Corp.*, 264 A.2d 523, 526 (Del. Ch. 1970) ("[I]t certainly does not follow that every document handled by [in-house] counsel is privileged . . . . '[I]t seems well settled that the requisite professional relationship is not established when the client seeks business or personal advice, as opposed to legal assistance.'" (quoting *Radiant Burners, Inc. v. Am. Gas Ass'n*, 320 F.2d 314, 324 (7th Cir. 1963)).

non-privileged.[7] This Court will not countenance such a silly rule. Companies hire in-house counsel to give legal advice, and surely some—if not most—official communications with such counsel will be legal in nature. To conclude otherwise defies common sense.

Plaintiff fares better, however, with his "at-issue" argument. The at-issue exception to the attorney-client privilege is a specific form of waiver. Under this exception, a party is "deemed to have waived the privilege if '(1) the party injects the communications themselves into the litigation, or (2) the party injects an issue into the litigation, the truthful resolution of which requires an examination of the confidential communications.'"[8] In other words, the at-issue exception prevents a party from using the attorney-client privilege "both offensively and defensively."[9] Here, plaintiff has alleged that he was treated unfairly by defendants because his election form—admittedly submitted after the published deadline of January 5—was not accepted while other late election forms were. Defendants have responded to this by thrusting with the argument that there was actually a second cutoff—January 18—and only forms submitted by that date were valid. Now that plaintiff has asked for communications related to that second, previously undisclosed cutoff,[10] defendants parry and claim that such communication is privileged. Such maneuvering, however, is impermissible. The attorney-client privilege cannot be "both a sword and a shield."[11] Defendants have put this second cutoff date at issue, and they must, therefore, produce the documents that reflect this second deadline.[12]

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[7] *See, e.g.*, *Oliver v. Boston Univ.*, C.A. No. 16570-NC, 2004 WL 944319, at *2 (Del. Ch. Apr. 26, 2004) (refusing to grant motion to compel where movant provided "no basis for any conclusion that any of the documents contain business advice" rather than legal advice).

[8] *Tenneco Auto. Inc. v. El Paso Corp*., C.A. No. 18810-NC, 2001 WL 1456487, at *3 (Del. Ch. Nov. 7, 2001) (quoting *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co*., 623 A.2d 1118, 1125 (Del. Super. Ct. 1992)).

[9] *Princeton Ins. Co. v. Vergano*, 883 A.2d 44, 59 (Del. Ch. 2005).

[10] Plaintiff has represented to this Court that defendants had not disclosed the second cutoff date until briefing on this motion. *See* Pl.'s Reply Br. at ¶ 29.

[11] *E.g.*, *Ashmore v. Metrica Corp.*, C.A. No. 2811-CC, 2007 WL 1464541, at *1 (Del. Ch. May 11, 2007).

[12] *See Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 259 (Del. 1995) ("The courts of this State have refused to allow a party to make bare, factual allegations, the veracity of which are central to resolution of the parties' dispute, and then assert the attorney-client privilege as a barrier to prevent a full understanding of the facts disclosed.").

C. The Court will issue no sanctions and award no fees

The Rules of this Court are primarily based on the Federal Rules of Civil Procedure,[13] which were originally crafted in their modern form in 1938.[14] The framers of the federal rules intended the discovery process to be managed with little judicial oversight by the parties, and intended that the process be cooperative and self-regulating.[15] Today, with far more complex cases and discovery processes that are extraordinarily voluminous and complicated, cooperation and communication among the parties and their counsel are even more important.[16]

Such communication and cooperation were clearly absent in this case. Defendants protest at length in their answering brief about plaintiff's New York counsel's failure to discuss this discovery dispute.[17] Such behavior is inappropriate. This Court does not relish the opportunity to resolve discovery spats that likely could have been resolved by the parties on their own. If defendants did not understand my September 17 decision, they should have asked for clarification. If plaintiff took issue with defendants' response to discovery request, he should have reached out to defense counsel to express his concerns. Plaintiff's counsel should certainly not refuse to articulate such concerns when explicitly asked to do so by the other side. Both sides are reminded to treat one another with respect and civility throughout the discovery process.[18]

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[13] *See Cede & Co. v. Joule Inc.*, C.A. No. 696-N, 2005 WL 736689, at *1 (Del. Ch. Feb. 7, 2005).

[14] Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 910 (1987).

[15] John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 513 (2000) ("At the dawning of the age of litigation enlightenment in the federal courts in 1938, with the advent of the newly crafted Federal Rules of Civil Procedure, discovery in civil litigation was intended to be an essentially cooperative, self-regulating process for which the parties would take responsibility, with little judicial intervention required."); *see also* William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 706 (1989) ("The process is not intended to serve as a sublimated form of trial by battle or ordeal—although at times, that is how it appears.").

[16] George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?* 13 RICH. J.L. & TECH. 10, at ¶ 3 (2007) ("Litigators must collaborate far more than they have in the past . . . .").

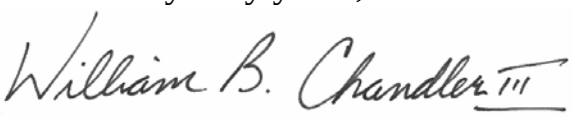
[17] *See, e.g.*, Defs.' Ans. Br. at 10–11 ("Plaintiff's counsel steadfastly refused not only to discuss any other grounds for the anticipated motion, but even to name or identify 'another issue' that would be a basis for the motion.").

[18] *Cf. Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 52 (Del. 1994) ("The issue of discovery abuse, including lack of civility and professional misconduct during depositions, is a matter of considerable concern to Delaware courts and courts around the nation.").

Plaintiff requested sections and fees under Rule 37(b) for Defendants' failure to comply fully with this Court's September 17 decision. Because, however, plaintiff did not adequately work with defendants to try to resolve this issue before coming to the Court, he shares some of the blame. I therefore decline to award sanctions or fees.[19]

IT IS SO ORDERED.

Very truly yours,



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[19] *See In re Tyson Foods, Inc.*, C.A. No. 1106, 2007 WL 2685011, at *1 (Del. Ch. Sept. 11, 2007) (noting that discovery process is administered under this Court's discretion).