COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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VICE CHANCELLOR

New Castle County Court House
500 N. King Street, Suite 11400
Wilmington, Delaware 19801

Submitted: October 9, 2007
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Revised: August 19, 2008

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RE: In re Chaparral Resources, Inc. Shareholders Litigation
C.A. No. 2001-VCL

Dear Counsel:

The defendants move, pursuant to Court of Chancery Rule 26 and Rule 37, for an order compelling the plaintiffs to produce documents relating to the valuation analysis contemplated by the litigation consulting services agreement executed on July 12, 2006 between the plaintiffs and Gustavson Associates.[1] Because Gustavson is serving in the dual capacity of expert litigation consultant and expert trial witness and has not strictly segregated those functions, the motion to compel will be granted.

[1] Gustavson Associates, LLC, is a Colorado limited liability company, headquartered in Boulder, Colorado, specializing in a wide range of natural resource evaluations.

The plaintiffs hired Gustavson as a litigation consultant to prepare a valuation of Chaparral Resources, Inc. John B. Gustavson, the president of Gustavson Associates,[2] led the consulting services team. The retention agreement states that "an agent of [Gustavson] may in the future be designated as a testifying expert and asked to provide an expert report and expert testimony."[3] In fact, at the suggestion of Mr. Gustavson, the plaintiffs later retained Edwin C. Moritz, a Gustavson employee, as their testifying expert. Working with a second team, Moritz created a formal appraisal report, which purports to be entirely distinct from the comparable valuation analyses prepared by Gustavson in its role as litigation consultant.[4]

In their motion to compel, the defendants argue that Moritz and his team were not properly walled-off from Gustavson's consulting team. They point to Moritz's own involvement in the rendition of consulting services, as well as to the

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[2] The plaintiffs state that John Gustavson is now the retired president of Gustavson Associates. John Gustavson appears to have been president of Gustavson Associates during the time period relevant to this motion to compel. As recently as March 2, 2007, John Gustavson sent an email identifying himself as the president of Gustavson Associates. Regardless of when he stepped down as president, it is still reasonable to conclude that he retained a certain degree of superiority in the company. Plfs.' Opp. to Defs.' Motion to Compel ("PO") Ex. C.

[3] PO Ex. B.

[4] This report estimated the fair value of Chaparral as a whole on four different effective dates, in accordance with the plaintiffs' requests, and was signed on August 20, 2007.

involvement of persons on the consulting team—including Gustavson himself—in the work of the Moritz team. In these circumstances, the defendants contend, the entire firm should be viewed as the testifying expert and all documents relating to work on Chaparral should be produced.

The plaintiffs respond that they have fulfilled their discovery obligations by producing all of the documents and correspondence related to the work performed by the Moritz team. The plaintiffs contend that the Moritz team operated as an independent unit that never discussed or relied on the valuation analysis prepared by the Gustavson consulting team. Given what they claim is the sufficient isolation of the Moritz team from the firm's consulting services, the plaintiffs maintain that the defendants' motion fails to meet Rule 26(b)(4)(B)'s onerous "exceptional circumstances" test.[5]

Pursuant to Rule 26(b)(4)(B), a party is not required to produce to an opposing party documents relating to the work of a non-testifying litigation consultant unless the opposing party can show "exceptional circumstances"

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[5] Rule 26(b)(4)(B) states:

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only . . . upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

justifying such an obligation. Conversely, Rule 26(b)(4)(A)(i) requires a party to produce all materials relied on by a testifying expert to form his opinion.[6] Because the defendants do not attempt to meet subpart (B)'s difficult standard, the court must examine the connection between the Moritz team and the Gustavson team to determine if those teams were adequately distinct or if, instead, the documents should be produced.

The decision of the Delaware Superior Court in *Sea Colony East v. Carl M. Freeman Associates Inc.* provides a useful structure for this analysis.[7] *Sea Colony* states that discovery will only be compelled where a party employs testifying experts and consultants from the same firm, if "the testifying expert has seen, commissioned, or relied upon the desired materials in preparing opinions and conclusions."[8] Before beginning this analysis, the court notes that the plaintiffs invited this inquiry by choosing, at their peril, to employ Gustavson for both expert

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[6] Rule 26(b)(4)(A)(i) states:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

[7] 1989 WL 25839 (Del. Super. Mar. 8, 1989).

[8] *Id.* at *3.

testimony and consulting services.[9] That action created an inherent conflict within Gustavson that required strict segregation to avoid unwanted discovery.

The facts presented in the parties' papers and discussed in the teleconference held on October 9 lead to the conclusion that the work product of the consulting team significantly influenced Moritz's opinion regarding the valuation of Chaparral. Before Moritz's designation as the trial expert, John Gustavson asked him to attend the deposition of Bryan Emslie on February 26, 2007.[10] Moritz stated in his deposition that before the Emslie deposition he and John Gustavson discussed general background information regarding Chaparral. Moritz also stated that following the deposition, he reviewed Emslie's testimony and studied some of the Chaparral reports held by Gustavson. An email sent by John Gustavson four days after the deposition informally designating Moritz as a testifying expert, notifies the plaintiffs' counsel that Moritz "would be isolated from all discussions and data and opinions in our offices" regarding Chaparral.[11] This email also

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[9] *See Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 280 (E.D. Va. 2001). In *Trigon*, the court noted that the non-moving party was "playing with fire," in terms of protecting documents from discovery, by employing the same firm to provide a testifying expert and perform litigation consulting services.

[10] This fact is undisputed, but John Gustavson's March 2, 2007 email also states that Moritz attended the "McDaniels" deposition. It is unclear whether this is the same as the Emslie deposition. PO Ex. C.

[11] *Id.*

suggests that Gustavson and Moritz had more extensive communications regarding Chaparral than either admits. The email lists ten documents that Moritz reviewed relating to Chaparral and makes clear that Moritz discussed the valuation of Chaparral with Gustafson at some length. The informative part of that email is as follows:

> [Moritz] has no opinion of value at this point. He thinks that the primary method of value estimate must be based on DCF approach, because this is a producing field with much production data, many well penetrations and many pilot tests. He also thinks that prior sales of KKM equity must be studied and possibly considered (although he knows that many changes have taken place since those transactions).[12]

This email certainly suggests that Moritz relied on materials prepared by the consulting arm of Gustavson to form an initial understanding of the proper analysis for valuing Chaparral, which was necessary to form his opinion.

The later involvement of John Gustavson in Moritz's work further supports the conclusion that the consulting and testifying arms of Gustavson were not strictly kept separate. The plaintiffs do not dispute that John Gustavson attended a Moritz team meeting on July 31, 2007 where the valuation of Chaparral was

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[12] *Id.*

discussed.[13] It is also conceded that Moritz gave Gustavson a draft of his report to review, Gustavson made comments on the draft, and Moritz incorporated at least some of those comments in his report.[14]

In addition to John Gustavson's involvement, two Gustavson firm employees who worked on the consulting team also contributed to Moritz's appraisal report.[15] These persons may have significantly affected the formulation of Moritz's opinion. While their individual contributions did not include physically transferring work product from the consulting team to the Moritz team, they both extensively participated in the consulting services prior to their work on the Moritz team and this pre-existing knowledge necessarily influenced their work

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[13] The plaintiffs contend that John Gustavson said nothing at this meeting and only listened. While this may be true, Gustavson held a certain degree of authority at the meeting and clearly was not the passive observer portrayed by the plaintiffs.

[14] The plaintiffs argue that John Gustavson was merely reviewing the report to check spelling and the like, but this is also difficult to believe given Gustavson's knowledge of Chaparral and his status in the company. While Moritz may not have been explicit in his intentions, he undoubtedly wanted John Gustavson to review the substance of the report.

[15] The Vice President and Chief Reservoir Engineer at Gustavson, Letha C. Lencioni, admits to being "peripherally" involved with the consulting team beginning in late 2006 or early 2007. Specifically, she worked on an economic model created by a former employee used in the consultants' valuation model. After she transferred to the Moritz team shortly after it was created, she worked on the economic model used in Moritz's valuation report. She maintains that she did not incorporate any of the knowledge gained in her experience on the consulting team into the work she performed for the Moritz team, but she was preparing an economic model on the same subject matter. PO Ex. E. The plaintiffs admit that another member of the consulting team, Victoria Egorova, checked calculations for Moritz. PO 4.

for Moritz.[16] Thus, it is reasonable to conclude that the opinion Moritz eventually formed was based, at least indirectly, on the work product of the consultants.[17] In light of this conclusion, it is appropriate for this court to consider the consulting team as testifying experts for purposes of discovery, making the production of the documents sought by the defendants appropriate.

For the foregoing reasons, the motion to compel is GRANTED. IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor

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[16] *Cf. In re Pennzoil Co. S'holders Cons. Litig.*, 1997 WL 770663, at *3 (Del. Ch. Oct. 27, 1997) (finding that the personnel of an advisory firm could not be expected to segregate mentally the non-moving parties' confidential and highly confidential information depending on whether they were performing financial advisory work or litigation consulting services).

[17] *See Trigon*, 204 F.R.D. at 284 (when a non-testifying expert influences the opinion rendered by a testifying expert, the resources relied upon by the non-testifying expert may be discoverable).