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Re: Grunstein v. Silva
C.A. No. 3932-VCN
Date Submitted: March 18, 2010

Dear Counsel:

This letter opinion addresses Plaintiffs' motion to compel the production of certain financial documents and emails and Defendants' motion for a protective order precluding additional discovery sought by Plaintiffs from third-party Washington State Investment Board ("WSIB").[1] Specifically, Plaintiffs seek post-

[1] For some background on the underlying dispute, see *Grunstein v. Silva*, 2009 WL 4698541, at *1-4 (Del. Ch. Dec. 8, 2009).

closing financial information for Beverly Enterprises, Inc. ("Beverly") and other entities involved in the acquisition, along with compensation information for Defendant Silva and his companies related to the transaction, as well as six emails between and among Silva and his attorneys at Dechert LLP ("Dechert") as to which the Defendants claim the attorney-client privilege. Through their motion for a protective order, Defendants seek mainly to prevent Plaintiffs from obtaining from WSIB the financial information that is at issue in the Plaintiffs' motion to compel, although the motion also asks that Plaintiffs be precluded from pursuing further discovery from WSIB with respect to a wide variety of other matters.

I. THE MOTION TO COMPEL

A. *The Six Dechert Emails*

The principal question in this action is whether Plaintiff Grunstein (and possibly Plaintiff Dwyer) had, by way of an oral agreement, formed a partnership (or other arrangement) with Silva for purposes of acquiring and managing Beverly. In attempting to establish the existence of such a business relationship, Plaintiffs rely, in part, on emails and corresponding deposition testimony by W. Brinkley Dickerson, Jr., Grunstein's law partner at Troutman Sanders LLP ("Troutman

Sanders") during the events at issue, describing a conversation with Silva in which Silva allegedly acknowledged that Grunstein had a "carried interest" in the transaction.[2] Troutman Sanders, as transactional counsel, represented the entities that acquired Beverly; this generally included Silva and his related entities.[3] Plaintiffs have cause to believe that Silva made similar assertions regarding the nature of his business relationship with Grunstein to his attorneys at Dechert, which, Plaintiffs suspect, have been memorialized in some of the six emails that Plaintiffs now seek to have produced.

Plaintiffs assert that the six emails[4] should not be subject to the attorney-client privilege in whole or in part either because the privilege does not encompass

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[2] Aff. of Martin Stein in Support of Pls.' Mot. to Compel ("Stein Aff.") Ex. 3. At the time (well before the Beverly acquisition closed), Silva and Dickerson were discussing Troutman Sanders' fees for its work on behalf of the acquiring entities. It was apparently Dickerson's perception that Silva believed that he (or the acquiring entities) was being over-billed for the time that Grunstein, among others at Troutman Sanders, was spending on the transaction—time that Silva thought Grunstein should have been spending anyway as a participant in the deal.

[3] *See MetCap Securities LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *9 n.71 (Del. Ch. May 16, 2007) (reflecting on the apparent nature of Troutman Sanders' role as "deal counsel").

[4] Of the six emails, four are between Dechert attorneys and either refer to communications with Silva or discuss legal strategies or proposed courses of action. Two of the emails are from a Dechert attorney to Silva either requesting information from Silva or proposing a course of action. Transmittal Certificate of Laina M. Herbert in Support of Defs.' Mem. in Opp'n to Pls.' Mot. to Compel ("Herbert Aff.") Ex. D.

their general subject matter or because any claim to attorney-client privilege with respect to the nature of Grunstein and Silva's relationship vis-à-vis the Beverly acquisition—which, Plaintiffs contend, is among the topics discussed in these emails—was waived as a result of (1) Dickerson's email to Troutman Sanders personnel recounting Silva's assertion as to Grunstein's carried interest (along with Defendants' withdrawal of their privilege objection to the production of this email), or (2) Dickerson's deposition testimony about his conversations with Silva regarding his relationship with Grunstein (as to which the attorney-client privilege was not preserved).[5]

1. Are the Emails Privileged Communications?

The attorney-client privilege may be invoked for communications made in confidence between persons in an attorney-client relationship for the purpose of obtaining or providing legal assistance. The privilege operates "to foster the confidence of the client and enable him to communicate without fear in order to

[5] Plaintiffs argue that, should the emails be discoverable on the ground of waiver, Defendants could satisfy production while preserving privileged communications by providing copies of the emails with all legal advice, attorney impressions, or other privileged language redacted.

seek legal advice."[6] Such a privilege would safely apply in a general sense to the emails in question, as they were communications from Dechert attorneys to a represented client, Silva (or were communications among attorneys at Dechert with respect to that client), and dealt in confidence with matters directly related to the scope of their representation, which included the responsibility for negotiating the legal terms of Troutman Sanders' engagement and for providing advice to Silva and his entities regarding any potential conflicts issues surrounding Troutman Sanders' involvement in the transaction.

Plaintiffs claim that these emails are not privileged because they were originally designated in Defendants' privilege logs as involving either attorneys' fees or the Troutman Sanders engagement letter. They point to case law that "in the absence of special circumstances . . . information related to billing and payment of attorneys' fees does not fall within the scope of the attorney-client privilege."[7] Communications regarding fee arrangements are typically discoverable because fee arrangements are considered incidental to the attorney-client relationship and

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[6] *Valente v. Pepsico, Inc.*, 68 F.R.D. 361, 367 (D. Del. 1975).
[7] *Oliver B. Cannon and Son, Inc. v. Fidelity and Cas. Co. of New York*, 519 F. Supp. 668, 680 (D. Del. 1981).

do not usually involve the disclosure of confidential communications arising in the context of the professional relationship. However, this exception only applies to communications between an attorney and client with respect to their particular professional arrangement. Here, however, Plaintiffs seek to access legal advice sought by Silva and provided by Dechert with respect to an emerging fee dispute between Silva and Troutman Sanders. The privilege exception for fee arrangements does not extend to legal advice procured or provided to a client with respect to a fee dispute with an unrelated law firm.[8] The fact that the initial abbreviated descriptions in the privilege logs as to the subject matter of the emails

[8] *See, e.g., Sokol Holdings, Inc. v. Dorsey & Whitney, LLP*, 2009 WL 2501542, at *8 (Del. Ch. Aug. 5, 2009) (holding that, in bringing a suit against a law firm for legal malpractice in a fee dispute, plaintiff waived the attorney-client privilege with respect to communications between the non-party co-counsel and plaintiff during the period of the co-counsel's joint representation with the defendant firm, but noting there may have been an argument that "communications [between plaintiff and co-counsel] not related to the underlying suit—i.e., communications regarding [plaintiff's] strategy in the current fee dispute—may be covered by attorney-client privilege"). *Cf. Montgomery County v. MicroVote Corp.*, 175 F.3d 296, 304 (3rd Cir. 1999) (holding that attorney billing records were privileged "because they reveal the nature of the services [the attorney] rendered"); *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999) (finding that, where billing records "would divulge confidential information regarding legal advice, they constitute privileged communications and, as such, should not be disclosed"); *Clarke v. American Commerce Nat. Bank*, 974 F.2d 127, 129 (9th Cir. 1992) (recognizing that "correspondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the [attorney-client] privilege").

in question could be read as involving communications that are exceptions to the privilege rule does not operate as an admission or waiver of any privilege by Defendants where such characterization is consistent with the scope of the attorney-client relationship at issue, a conclusion supported by the more granular descriptions of the contents of these emails later provided by Defendants to Plaintiffs.

As the emails in question are subject to the attorney-client privilege, they are not subject to discovery unless the privilege has been waived.

2. Was the Privilege Waived?

Plaintiffs claim that any privilege with respect to the subject of Silva and Grunstein's business relationship has been waived by the alleged discussions of this relationship between Dickerson and Silva that have since been disclosed to third-parties. Before there can be a privilege to be waived, however, there must first be an attorney-client relationship within which the communications at issue occurred. This is because the privilege protects communications regarding legal

advice, as opposed to business or personal advice.[9] Here, Troutman Sanders (and Dickerson) represented Silva only through their representation of the acquiring entities in the acquisition of Beverly.[10] The representation did not include the underlying legal foundation and structure governing the acquiring entities—the alleged relationship between Grunstein and Silva that is at the core of this case.[11] According to Dickerson, he "explicitly agreed with both Mr. Silva and Mr. Grunstein that neither [he] nor Troutman Sanders would represent either of them insofar as it related to their co-investing relationship."[12] Dickerson also asserted that the conversation with Silva referenced in his emails did not "involve the

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[9] *Securities and Exch. Comm. v. Gulf & Western Indus., Inc.*, 518 F. Supp. 675, 681 (D.D.C. 1981).

[10] *See, e.g.*, Transmittal Aff. of Arthur L. Dent, Esquire in Support of Pls.' Reply Br. in Support of their Mot. to Compel Ex. 25 ("FCP, on behalf of the Partnership has engaged the Dechert LLP and Troutman Sanders LLP legal council [sic] in order to create an implement the optimal tax structure for the benefit of PSP and, the Partnership.").

[11] When asked during his deposition whether Troutman Sanders had represented Silva or Grunstein with respect to their business relationship, Dickerson replied, "We had a partner prepare documents very early in the transaction to document the equity investment. Those documents did not move forward. I assume we prepared those documents on behalf of our client, North American Senior Care. I don't know the details of it because I wasn't directly involved." Herbert Aff. Ex. K at 32-33. Although there is a dispute between Plaintiffs and Defendants over the timing of when Troutman Sanders began representing the acquiring entities, and, thereby, Silva, the question of timing is irrelevant here given that the firm's representation never extended to the underlying structure of Silva and Grunstein's alleged business relationship.

[12] Herbert Aff. Ex. K at 50-51.

solicitation by Mr. Silva or the rendering by [Dickerson] of any legal advice,"[13] nor did subsequent conversations with Silva on the topic of Silva and Grunstein's business relationship.[14] Not surprisingly, there was never any suggestion by Dickerson that he viewed the information provided by Silva with respect to his business relationship with Grunstein as critical, essential, or even relevant to his work as "deal counsel."

Furthermore, the attorney-client privilege adheres only where the client has a reasonable expectation of confidentiality in the matters discussed with counsel. In this context, Silva had no reasonable expectation that Dickerson would keep their conversations with respect to the nature of his alleged business relationship with Grunstein confidential. Dickerson expressly informed Silva that he was not representing him as to that topic. Indeed, as Dickerson testified, when approached by Silva about his specific concerns with respect to Grunstein, Dickerson replied, "Ron, I'm not going to get in the middle of this one. If you want me to go tell Len [Grunstein] that he and you need to have discussions and finalize your business

[13] Herbert Aff. Ex. K at 33-34.
[14] Herbert Aff. Ex. K at 47.

relationship, I can carry that message. But I'm not going to get into the specifics or try to negotiate because we're not going to be involved in that."[15] Dickerson testified that Silva "acquiesced to that,"[16] and that Silva did not ask Dickerson to keep their conversation confidential,[17] but instead "expected [Dickerson] to discuss those conversations with Mr. Grunstein."[18] Our courts have held that communications with counsel are not privileged where "the client *intends* the information to be disclosed to non-confidential persons."[19] Moreover, the fact that Dickerson was Grunstein's law partner underscores the conclusion that Silva had no expectation of confidentiality in these communications with Dickerson.

Because the communications between Silva and Dickerson concerned matters outside of the scope of their attorney-client relationship, they were not privileged communications. As such, their subsequent disclosure did not constitute a waiver of the attorney-client privilege with respect to the subject matter of those

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[15] Herbert Aff. Ex. K at 63.
[16] *Id.*
[17] Herbert Aff. Ex. K at 57.
[18] Herbert Aff. Ex. K at 58.
[19] *Baxter Int'l, Inc. v. Rhone-Poulenc Rorer, Inc.*, 2004 WL 2158051, at *4 (Del. Ch. Sept. 17, 2004).

communications, such that Plaintiffs may now access otherwise privileged communications between Silva and his attorneys at Dechert regarding this same subject matter.[20]

Thus, Plaintiffs' motion to compel production of the six emails is denied.

B. *Financial Information Related to Beverly and Compensation to Silva*

Plaintiffs additionally seek to compel the production of financial information currently in the possession of Defendants for the purpose of quantifying the damages they claim to have suffered. Specifically, Plaintiffs seek (1) quarterly and annual financial statements for each of the Defendants; (2) quarterly and annual financial statements for certain other related entities; (3) the compensation received by Silva or any of his companies (including Fillmore Strategic Investors, of which he is a minority owner) in connection with Beverly since the time it was acquired; (4) any internal or external valuation of Beverly; (5) any valuation of Silva's equity, financial, or carried interest in the transaction to acquire Beverly; and

[20] Consequently, any *in camera* review of the emails is unnecessary and the Court need not determine whether California or Delaware law governs the privilege issue here.

(6) any communications between WSIB and Defendants with respect to these topics.

Defendants initially objected to the production of such documents on a host of grounds, including: (1) that their production would be unduly burdensome; (2) that certain of these documents were subject to the attorney-client privilege; (3) that the documents were already in the possession of Grunstein and/or Troutman Sanders; (4) that the documents were not in Defendants' custody or control; (5) that the request called for the disclosure of confidential information to a direct competitor of Beverly; (6) that the documents were irrelevant to any claim, defense, or applicable measure of damages; and (7) that the request was duplicative of a previous request made in the Southern District of New York that was ultimately denied without prejudice.

In response to Plaintiffs' motion to compel, Defendants have additionally argued that the Court should wait to decide this issue until after it has had a chance to consider Defendants' now-recently filed motion for summary judgment. Defendants express confidence that they will prevail on summary judgment on all of those claims for which Plaintiffs now assert a need for the documents in

question, and argue that, given that the documents are highly confidential and are needed by Plaintiffs only for the purpose of calculating damages, the burden of production on Defendants outweighs the potential benefit of the documents to Plaintiffs at this stage. In the meantime, Defendants contend that Plaintiffs can extrapolate approximate damages by using the somewhat-outdated financial information that Defendants were ordered to provide during the action in the Southern District of New York.

However, Plaintiffs have adequately shown that these documents are reasonably likely to lead to admissible evidence supporting the damages that Plaintiffs claim to have suffered under their theories of the case. Even though Defendants suggest that this matter will shortly be put to rest on summary judgment, the Court need not halt discovery pending the outcome of such a motion.[21]

Although these documents are relevant only as to damages, Plaintiffs deserve adequate time to allow their experts to properly analyze and extrapolate

[21] *See Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1061 (Del. 1986); *Orman v. General Cigar Holdings, Inc.*, 2002 WL 31678689, at *1-2 (Del. Ch. Nov. 13, 2002); *Kier Constr., Ltd. v. Raytheon Co.*, 2002 WL 31583266, at *2 (Del. Ch. Nov. 4, 2002).

the relevant damages due under each of the theories that they have put forward. The valuation data previously provided by Defendants—apparently specially prepared for the purpose of complying with the New York discovery order—are nearly two years old and are arguably outdated for Plaintiffs' purposes. Defendants' concern as to the sensitive nature of the documents that Plaintiffs seek can be adequately mitigated by the designation of these documents as "highly confidential," an "attorneys' eyes only" designation that has already been extensively employed in this case. In addition, the volume of relevant documents is not likely to be great; thus, the burden of production on Defendants is presumably immaterial.

Accordingly, Plaintiffs' motion to compel production of the relevant financial information is granted.

II. THE MOTION FOR A PROTECTIVE ORDER

In a related motion, Defendants seek a protective order to preclude Plaintiffs from directing additional discovery to WSIB relating to the matters identified in subpoenas issued in May 2009. Ostensibly, the protective order seeks to prevent Plaintiffs from seeking post-acquisition financial documents from WSIB that,

Defendants contend, are duplicative of those being sought from Defendants, duplicative of those already provided by WSIB under a 2008 subpoena, and beyond the scope of discovery. In light of the Court's conclusion, above, as to the propriety of current production of the post-acquisition financial documents, Defendants' motion for a protective order is denied.[22]

Defendants assert that Plaintiffs are merely seeking to harass third-party WSIB and harm the relationship between Defendants and WSIB, and that production of these documents will be burdensome to WSIB; however, Defendants concede that WSIB has already provided most, if not all, of the subpoenaed documents to Defendants' counsel. Thus, compliance should impose relatively little (if any) burden on WSIB at this point. While WSIB need not produce any documents among those previously produced under the 2008 subpoena, the fact

[22] To the extent to which the matters identified in the May 2009 subpoenas may be viewed as encompassing the entirety of WSIB's involvement in, and knowledge of, the matters at issue in this case, such that a broad protective order would operate as a general bar to any additional discovery efforts aimed at WSIB, the protective order is likewise denied. While not a party to the litigation, WSIB was directly involved in the events central to this action and, conceivably, may be in a position to provide some illumination to the parties' divergent accounts regarding the relationship between Grunstein and Silva. Furthermore, without knowing *ex ante* the specific discovery requests that might be barred by a protective order, the Court is of the view that the more prudent course is to assess the propriety of additional discovery in the context of specific discovery requests.

that certain of the WSIB documents will overlap documents to be produced at the same time by Defendants because of Plaintiffs' motion to compel is of no consequence. Finally, as with those financial documents in Defendants' possession, any confidentiality concerns with respect to these documents may also be mitigated by employing the "highly confidential" designation.

Therefore, Defendants' motion for a protective order is denied.[23]

III. CONCLUSION

For the foregoing reasons, Plaintiffs' motion to compel production is denied with respect to the six Dechert emails and granted with respect to the post-acquisition financial documents. Defendants' motion for a protective order is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[23] Plaintiffs question whether Defendants have the authority to represent the interests of WSIB with respect to the discovery at issue. In light of the merits-based denial of Defendants' motion, the Court need not address this question.