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Re: 3Com Corporation v. Diamond II Holdings, Inc.
C.A. No. 3933-VCN
Date Submitted: July 9, 2009

Dear Counsel:

I. INTRODUCTION

The parties have filed competing motions to compel the production of documents. They have each asserted the attorney-client privilege or the work-product doctrine as a defense to the other party's motion. Resolution of this dispute, as it applies to one set of withheld documents in particular, turns on whether the Court is to apply Delaware or Massachusetts law. The Court concludes that Delaware has a considerable interest in the communications that take place among a

client, its attorneys, and its investment bankers when those parties are discussing the merits of a complex transaction, such as a merger, for which they have selected Delaware law and Delaware as a forum for resolution of any disputes that might arise. For this reason, Delaware has a more significant relationship to the challenged communications than does Massachusetts where the communications took place. Accordingly, Delaware law regarding privilege shall apply. As for the other documents, *in camera* review represents the best means for determining whether those documents are shielded by attorney-client or work-product considerations.

II. BACKGROUND

This action involves an alleged breach of contract and application of the termination provision of a merger agreement. On September 28, 2007, Plaintiff 3Com Corporation ("3Com") entered into a merger agreement (the "Merger Agreement") with Defendant Diamond II Holdings, Inc. ("Newco"),[1] which had been formed by Bain Capital Partners LLC ("Bain") for the purpose of acquiring 3Com. The acquisition was to be joined by Huawei Technologies Co. Ltd. and its

[1] Non-party Diamond II Acquisition Corp. was also a party to the Merger Agreement.

affiliates (collectively, "Huawei"), which are companies based in China.[2] Specifically, Huawei was to acquire a 16.5% minority, non-controlling stake in Newco after consummation of the merger, which was to have been completed on or before April 28, 2008.[3]

In October 2007, 3Com, Bain, and Huawei voluntarily submitted notice of the merger (the "Joint Voluntary Notice") to the Committee on Foreign Investment in the United States ("CFIUS"). By February 2008, CFIUS had informed the parties that it intended to recommend to the President of the United States that he not approve the merger. Because Presidential approval was necessary to consummate the merger, CFIUS's proposed recommendation greatly diminished the likelihood that the transaction could close. The parties withdrew the Joint Voluntary Notice shortly after receiving CFIUS's decision. The Merger Agreement was terminated several months later.

3Com filed this action to recover the $66 million termination fee prescribed by the Merger Agreement. 3Com moved for summary judgment shortly after filing its complaint. Newco resisted summary judgment on the ground that the

[2] Huawei is not a party to this action.
[3] Def.'s Mem. in Opp'n to Pl.'s Mot. to Compel, Ex. 1 at ¶ 4.

termination fee could be ascribed a purpose different from that endorsed by 3Com, and that discovery was necessary under Court of Chancery Rule 56(f) to establish facts in support of an alternative interpretation. It also claimed that several of its affirmative defenses required the support that discovery might yield. The Court reserved decision on 3Com's motion for summary judgment to allow for limited discovery.[4]

As the result of that discovery effort, documents were produced by Newco, Newco's legal advisors, 3Com, and 3Com's legal and financial advisors to the merger. The parties each withheld a number of documents, and each redacted portions of produced documents on privilege grounds. 3Com and Newco held five meet and confer sessions to discuss documents withheld in part or entirely on the basis of privilege. The parties were able to reach agreement on some of the contested documents, but have come to an impasse regarding some others, and have sought the Court's assistance in resolving their stalemate.

[4] At oral argument, the Court discussed three categories of anticipated discovery: 1) the intent behind Section 8.3(c)(iii) of the Merger Agreement; 2) the parties' intentions with respect to withdrawing the proposed merger from review by CFIUS; and 3) Newco's equitable estoppel and waiver defenses, which are based on the CFIUS withdrawal. Oral Arg. on Pl.'s Mot. for Summ. J. Tr. at 61-63.

III. THE COMPETING MOTIONS

A. *Newco's Motion to Compel*

Newco has challenged four categories of documents redacted or withheld by 3Com. It seeks the production of these documents in full; alternatively, it requests that the Court review the documents individually and *in camera* to determine whether the privilege has been properly asserted.

First, Newco challenges 3Com's decision to withhold merger communications between it and its attorneys that also involved its investment banker, Goldman Sachs. This particular challenge raises a choice-of-law dispute over whether Delaware or Massachusetts law should apply. 3Com would apply the law of Delaware, which extends a wider privilege for communications made between a client and its attorney in the presence of an investment banker than that recognized by Massachusetts. Newco, of course, would apply Massachusetts law, although it argues that it should prevail even under Delaware law.

Second, Newco seeks the production of redacted documents involving Neal Goldman, who served as 3Com's Executive Vice President, Chief Administrative

and Legal Officer, and Secretary.[5] Mr. Goldman, both within 3Com and during the transaction, acted in more than one role. On the one hand, Mr. Goldman served as 3Com's general counsel during the merger negotiations; however, he also purportedly acted as 3Com's chief negotiator for the transaction. 3Com has withheld or redacted many of Mr. Goldman's internal communications and notes on privilege grounds. Newco contends that these documents should be produced because Mr. Goldman's activities related to the pending dispute were made primarily in a business capacity, and not within the scope of his duties as 3Com's general counsel.

Third, Newco challenges blanket assertions of attorney work product made by 3Com with respect to a number of the withheld or redacted communications involving Goldman Sachs and Mr. Goldman. These assertions have been made in addition to 3Com's claims of attorney-client privilege. 3Com's counsel has identified the theoretical possibility of shareholder litigation as a basis for asserting attorney work-product protection for these withheld or redacted documents,

[5] Transmittal Aff. of Patrick H. Kim (dated May 15, 2009) ("Kim Aff."), Ex. E.

regardless of their specific subject matter. Newco argues that 3Com has failed to show that the documents were generated "because of" anticipated litigation.

Lastly, Newco contends that 3Com's failure to provide the subject lines of withheld e-mails in its privilege logs violated the terms of the Scheduling Order[6] that governs the parties' limited discovery efforts.

B. *3Com's Motion to Compel*

3Com also seeks the production, or *in camera* review, of three categories of documents withheld by Newco.

The first set of challenged documents relates to communications between Newco and Huawei. Newco maintains that it and Huawei had a "common interest" in the merger and thus certain of its communications with Huawei remain privileged. 3Com responds that Newco and Huawei were in an adversarial position to each other, and therefore their communications, and any internal Newco documents reflecting such communications, must be produced.

Second, 3Com challenges heavy redactions made by Newco to produced copies of handwritten notes taken by several Newco employees or agents who are

[6] D.I. 77.

not attorneys. The redactions may span anywhere from an entire page to several pages. 3Com has not challenged all of the redactions, but only those that it believes may be relevant, based upon their date or log description, to Newco's opposition to summary judgment.

Third, 3Com challenges redactions made to, or the non-production of, a number of electronic communications in which no attorney participated or in which an attorney was merely copied. 3Com similarly challenges several electronic communications sent to a number of business people but just one attorney. As with the challenges to the redacted handwritten notes, 3Com has only challenged a subset of redacted or withheld electronic communications—specifically, those it anticipates may be relevant to the pending summary judgment motion.

IV. ANALYSIS

A. *3Com's Communications with Goldman Sachs*

As stated above, 3Com has withheld a number of communications among it, its attorneys, and Goldman Sachs personnel. These communications took place largely in Massachusetts. The parties, however, selected Delaware law to govern

and interpret the Merger Agreement;[7] they also consented to Delaware as the exclusive jurisdiction for disputes arising out of the Merger Agreement.[8] Massachusetts and Delaware define the attorney-client privilege in similar terms: namely, one's right to refuse to disclose, and prevent others from disclosing, confidential communications made for the purpose of obtaining or receiving legal services.[9] The jurisdictions differ, however, in determining whether the privilege attached to confidential communications is waived through certain third-party disclosure. Although they provide comparable definitions of "confidential communication" and waiver within their respective rules,[10] Massachusetts' courts

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[7] Transmittal Aff. of Leslie A. Polizoti (dated May 15, 2009) ("Polizoti Aff."), Ex. S (the "Merger Agmt.") § 9.8. Section 9.8 of the Merger Agreement reads as follows: "This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, regardless of the laws that might otherwise govern under applicable principles of conflicts of law thereof."

[8] Merger Agmt. § 9.9. Section 9.9 of the Merger Agreement provides in part: "Each of the parties hereto irrevocably consents to the exclusive jurisdiction and venue of any state court located within New Castle County, State of Delaware in connection with any matter based upon or arising out of this Agreement or the transactions contemplated hereby, ...").

[9] *Compare* D.R.E. 502(b) *with* Mass. G. Evid. § 502(b). Massachusetts has not adopted formal rules of evidence, but instead has issued a guide which summarizes the law of evidence as applied in its courts. Mass. G. Evid. § 102.

[10] Under the Delaware Rules of Evidence, "a communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." D.R.E. 502(a)(2). Massachusetts provides a similar definition, and considers a communication to be confidential if it is not intended to be disclosed to third persons other than those to whom disclosure is made to obtain or provide professional legal

have adopted a more limited approach than have Delaware's courts when assessing the privilege to communications made to, or in the presence of, third-parties, particularly investment bankers.

Massachusetts' highest court, in *Commissioner of Revenue v. Comcast*, recently considered application of the attorney-client privilege to communications between a client and its attorney made in the presence of a third-party.[11] The Court held that such communications are privileged only when the third-party's "presence is 'necessary' for the 'effective consultation' between client and attorney."[12] The Court in *Comcast* explained that, under Massachusetts law, the "necessity element" means "more than 'just useful and convenient,'" the third-party's role must be to "clarify or facilitate" communications between the attorney and client.[13]

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services to the client, and those reasonably necessary for the transmission of the communication. Mass. G. Evid. § 502(a)(5).

Similarly, in both Delaware and Massachusetts, a party may waive the privilege if it voluntarily discloses or consents to disclosure any significant part of the privileged matter. *See* D.R.E. 510; Mass. G. Evid. § 523.

[11] 901 N.E.2d 1185 (Mass. 2009).

[12] *Id.* at 1197 (citing *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961)). The Court in *Comcast* refers to the application of the attorney-client privilege to communications made in the presence of third-parties under the circumstances described above as the "derivative attorney-client privilege" or the *Kovel* doctrine. *Id.* at 1196-97.

[13] *Id.* at 1197-98 (quoting *Cavallaro v. United States*, 284 F.3d 236, 249 (1st Cir. 2002)).

To illustrate this point, the Court in *Comcast* cited opinions which "rejected claims that the derivative privilege applies where an attorney's ability to represent a client is improved, even substantially," by the assistance of a third-party, unless that third-party was acting as an interpreter or translator.[14] And, though *Comcast* specifically dealt with disclosures made to an accountant, the language used and cases cited strongly suggest that *Comcast*'s holding would be applied to disclosures made to other third-party, non-lawyer professionals, including investment bankers. Indeed, the Court in *Comcast* cited to *United States v. Ackert* in which the United States Court of Appeals for the Second Circuit held that communications between a taxpayer's counsel and an investment banker were not privileged, even though the Court assumed "that those conversations significantly assisted the attorney in giving his client legal advice about its tax situation."[15]

Delaware, on the other hand, employs a broader rule when determining whether a communication was, or has remained, confidential for privilege purposes. This Court has framed the confidentiality issue as follows:

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[14] *Id.* at 1197 (citations omitted).
[15] 169 F.3d 136, 139 (2d Cir. 1999) ("[A] a communication between an attorney and a third party does not become shielded by the attorney-client privilege solely because the communication proves important to the attorney's ability to represent the client.").

> Whether disclosure of a communication beyond the client and lawyer destroys the basis for the claim of privilege or not inevitably involves a judgment as to whether in the circumstances the person making the disclosure in fact regarded that disclosure as confidential and, if there was an expectation of confidentiality, whether the law will sanction that expectation.[16]

Delaware law sanctions the privilege's application to attorney-client communications including an investment banker, especially within the context of a pending transaction. Indeed, the Court in *Jedwab* explained that "where a client seeks legal advice as to the proper structuring of a corporate transaction and it is also prudent to seek professional guidance from an investment banker, it would hardly waive the lawyer-client privilege for a client to disclose facts at a meeting concerning such transaction at which both his lawyer and his investment banker were present."[17] Following *Jedwab*, Delaware courts have applied the attorney-

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[16] *Jedwab v. MGM Grand Hotels, Inc.*, 1986 WL 3426, at *2 (Del. Ch. Mar. 20, 1986).

[17] *Id.* Newco cites *Baxter International, Inc. v. Rhone-Poulenc Rorer, Inc.* to argue that the Delaware standard is actually much closer to the Massachusetts standard than *Jedwab* and its progeny would otherwise suggest. In *Baxter*, the Court applied a narrow exception to the rule that third-party disclosure waives the attorney-client privilege: the Court held that attorney-client communications remain privileged despite third-party disclosure when such disclosure is "necessary for the client to obtain informed legal advice." 2004 WL 2158051, at *4 (Del. Ch. Sept. 17, 2004). The facts in *Baxter*, however, are distinguishable from those present here. *Baxter* involved a dispute over royalty payments made pursuant to a settlement agreement. Before suit was filed, the parties had retained an independent auditor to confirm the precise amount of the payments in dispute. The moving party sought the production of email communications between the non-moving party's management and in-house counsel that had been forwarded to the

client privilege to protect communications disclosed to the client's financial advisor in the corporate transactional context.[18]

Thus Massachusetts' law leans more to a finding of waiver of the privilege than does the law of Delaware, which would be more likely to uphold the attorney-client privilege. Because both Delaware and Massachusetts have an interest in the communications in the 3Com transaction, and because their rules of privilege seem to be in conflict on the issue of whether disclosure to an investment banker in the

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independent auditor. The moving party argued that, by disclosing to the auditor, the non-moving party had waived any attorney-client privilege it could otherwise assert over the communications. The Court ordered *in camera* review to determine both whether the non-moving party intended to keep the communications confidential and also whether their disclosure to the auditor was necessary for the provision of legal services. *Id.* *Baxter* is of limited value in the corporate transactional context where, as here, a party discloses otherwise privileged information to its own financial adviser and not an independent auditor.

[18] *See Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 2008 WL 3522445, at *1 (Del. Ch. Aug. 12, 2008) (finding that the attorney-client privilege was not destroyed by disclosure of communications between a party's counsel and its investment banker advising on a merger for the purpose of eliciting commentary on strategies to make covenants contained within the merger agreement more favorable to the client); *Cede & Co. v. Joulé Inc.*, 2005 WL 736689, at *1 (Del. Ch. Feb. 7, 2005) ("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."); *SICPA Holdings, S.A. v. Optical Coating Lab., Inc.*, 1996 WL 636161, at *10 (Del. Ch. Oct. 10, 1996) ("[The Defendant] agrees that the privilege is neither destroyed nor waived by virtue of the fact that a copy of these documents was provided to SICPA's financial advisors.").

merger context waives the attorney-client privilege, the Court must engage in a choice-of-law analysis to determine which law applies.[19]

1. Whose Law Applies?

When deciding a choice of law dispute, Delaware courts look to the Restatement (Second) of Conflict of Laws (1971) (the "Restatement") and its "most significant relationship test."[20] Restatement § 139(1), which governs communications that would be privileged in the forum state, but not in the state that may have the more significant relationship to the communications, reads as follows:

> Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the

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[19] 3Com suggests that the communications involving Goldman Sachs may be privileged even under Massachusetts law. Pl.'s Br. in Opp'n to Def.'s Mot. to Compel at 16 n.10. Likewise, Newco argues that the communications would not be protected even if Delaware law applies. Def.'s Mem. in Supp. of its Mot. to Compel at 16-18. If the two laws are the same, there is no conflict, and thus no need to engage in choice-of-law analysis. *See Tel. & Data Sys., Inc. v. Eastex Cellular L.P.*, 1993 WL 344770, at *9 (Del. Ch. Aug. 27, 1993) ("[A]s a practical matter the choice of law dispute falls by the wayside, because in all relevant jurisdictions the substantive law governing contract formation is the same."). Given the differences between Massachusetts and Delaware law, however, and the strong likelihood that they could produce disparate results regarding the privilege issue raised by Newco's motion, the Court will proceed with a choice-of-law analysis; upon selecting the governing law, the Court will then determine whether the challenged documents are privileged.

[20] *See, e.g.*, *Gloucester Holding Corp. v. U.S. Tape & Sticky Prods., LLC*, 832 A.2d 116, 124 (Del. Ch. 2003) (citing *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 41 (Del. 1991)); *Lee v. Engle*, 1995 WL 761222, at *7 n.3 (Del. Ch. Dec. 15, 1995) ("Delaware follows the Restatement's choice of law principles and the Restatement's 'most significant relationship' test.").

> forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.

Under § 139(1), the Court's first task is to determine which state, Delaware or Massachusetts, has the more significant relationship to the challenged communication. If that state is Delaware, the analysis is complete and Delaware privilege law applies. If, however, Massachusetts had the more significant relationship to the communications, then its privilege rules would be applied unless that would contravene Delaware public policy.

Newco argues that Massachusetts has the more significant relationship to the challenged communications involving Goldman Sachs. It rests its argument primarily on the commentary to Restatement § 139, which explains that the state with the most significant relationship with a communication will usually be the state where the communication took place.[21] Most of the challenged communications were received by, or originated from, 3Com personnel in Massachusetts.[22] Newco also contends that the relationship among 3Com, its counsel, and its investment

[21] Restatement § 139, cmt. e. According to comment e, the state where the communication took place is "the state where an oral interchange between persons occurred, where a written statement was received or where an inspection was made of a person or thing."
[22] Kim Aff., Ex. S at entries 1-6, 32-36, 49-57.

bankers was centered in Massachusetts.[23] Indeed, 3Com is headquartered, and has its principal place of place of business, in Massachusetts;[24] additionally, key provisions of the Merger Agreement were negotiated, and the Merger Agreement itself was finalized, in Boston.[25]

Although the commentary to the Restatement favors Newco's position, the Court finds Newco's reliance on it unpersuasive. The parties selected Delaware law to govern the Merger Agreement, and chose Delaware as the forum for any disputes arising out of the Merger Agreement. Delaware has a considerable interest in ensuring that corporate entities seeking a business combination under its laws may expect consistent and predictable treatment when appearing before its Courts.[26]

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[23] Newco points to comment e of Restatement § 139 which suggests that one may also consider other locations where the attorney-client relationship existed in addition to where the communications took place. Although the record is not entirely clear, it is reasonable to infer that the 3Com attorney-client relationship originated in Boston, thus further "centering" the privilege in Massachusetts.

[24] Compl. ¶ 14.

[25] Boyce Aff. at ¶ 8.

[26] 3Com, itself a Delaware corporation, draws the Court's attention to the internal affairs doctrine. Delaware is a strict adherent to the internal affairs doctrine, which requires that the law of the state of incorporation determine issues related to internal corporate affairs. *McDermott Inc. v. Lewis*, 531 A.2d 206, 215 (Del. 1987). The Court in *McDermott* explained how the internal affairs doctrine "serves the vital need for a single, constant and equal law to avoid the fragmentation of continuing, interdependent internal relationships" and "facilitates planning and enhances predictability." *Id.* at 216 (citation omitted). Although certainly not controlling here, the concerns underlying the internal affairs doctrine are also implicated when parties select a forum for dispute

Most mergers and other important corporate transactions necessarily entail the involvement of business people, attorneys, and financial advisors located throughout the country, if not the world. Newco's focus on the communications' location, if followed, could foster inconsistency in a context where predictability is at a premium.[27] Indeed, while the record shows that many of challenged communications originated or were received in Massachusetts, several others both originated and were received outside of that jurisdiction.[28] Applying Delaware law in this context would avoid the uncertainty generated by the varying loci of communications involved both in this case and others like it.[29] This, in turn, would

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resolution and its law to govern significant corporate transactions, such as the possible 3Com-Newco merger.

[27] Focusing on where the attorney and the client may have had a prior relationship would also be problematic. *See supra* note 23. Large-scale business transactions often involve collaboration among parties who did not previously have an especially close prior relationship with one another. Indeed, the size and complexity of these transactions generally require the engagement of specialized advisors—both legal and financial—who may not have previously worked with the client on any sustained basis.

[28] 3Com's Board of Directors met in Texas and California in addition to Massachusetts. 3Com claims that "[m]any other relevant Board of Directors and Board of Directors sub-committee meetings were telephonic; Board members participated from separate locations, including from outside Massachusetts[,] . . . and [e]lectronic mail communications were 'received' wherever 3Com personnel happened to be located at the time they read the communications, which again included locations outside of Massachusetts given personal residences and travel schedules." Pl.'s Moving Br. in Supp. of its Mot. to Compel at 11-12. Moreover, the law firm that represented 3Com is based in California.

[29] This holding is also in line with this Court's recognition of the attorney-client privilege as a vital means of obtaining and enhancing effective legal representation. *See Cont'l Ins. Co. v. Rutledge*

foster predictability for parties to major corporate transactions that have availed themselves of Delaware law.[30]

In sum, Delaware is the state with the most significant relationship to the challenged communications because it has considerable interest in vindicating the reasonable expectations of those parties that engage in a merger under Delaware law; it further has an interest in defining the scope of those reasonable expectations. Because Delaware is also the forum state, its law will apply.

2. Analyzing the Communications with Goldman Sachs under Delaware Law

Newco contends that the communications between 3Com and Goldman Sachs must be produced even under Delaware law.[31] It claims that, at the least, *in camera*

& Co., Inc., 1999 WL 66528, at *1 (Del. Ch. Jan. 26, 1999) ("The importance of the attorney-client privilege is central to the American model of adversarial litigation.").

[30] When engaging in a choice-of-law analysis, this Court has turned not only to the Restatement's claim-specific provisions (i.e., § 139, which governs "Privileged Communications") but also to Restatement § 6, which contains a list of general policy objectives that should be considered when deciding any conflict of laws issue. *See In re Am. Int'l Group, Inc.*, 965 A.2d 763, 821 (Del. Ch. 2009) ("Having applied the Restatement's tort-and contract-specific considerations, I must apply § 6 of the Restatement, which entitle me to consider general policy issues, ...") (citing *McBride v. Whiting-Turner Contracting, Co.*, 625 A.2d 279 (TABLE), 1993 WL 169110, at *3-4 (Del. 1993)). Section 6 of the Restatement directs the Court to consider, among other factors, the protection of justified expectations, certainty, predictability and uniformity of result, and ease in determining the law to be applied. The Court's decision to apply Delaware law in this case furthers all of these directives.

review is necessary to determine the reason for Goldman Sachs' involvement in each communication. According to Newco, if Goldman Sachs received a particular communication for any reason other than to assure that 3Com received informed legal advice, that communication must be disclosed. The case law is clear, however, that insofar as Goldman Sachs was involved in communications between 3Com and its attorneys involving legal matters, those communications are privileged.[32] Goldman Sachs' precise role in a specific communication is not critical as long as it involved legal issues regarding the transaction and participation by 3Com's attorneys. Indeed, 3Com states that it has not asserted the privilege over communications with Goldman Sachs that addressed purely financial or business matters. If Newco seeks to challenge specific documents that it nonetheless believes reflect non-legal communications, these documents can be reviewed *in camera*.[33]

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[31] Newco's reliance on *Baxter International, Inc. v. Rhone-Poulenc Rorer, Inc.* has been addressed at note 17, *supra*.

[32] *See supra* notes 16-18 & accompanying text.

[33] Newco has drawn the Court's attention to a withheld e-mail exchange that took place exclusively between Goldman Sachs personnel. Kim Aff., Ex. S at entry 51. The fact that such an e-mail does not include a 3Com attorney raises an inference that the communication is not privileged. It is possible, however, that the Goldman Sachs personnel were discussing information of a legal nature that they received from a communication that did, in fact, involve 3Com's legal representatives. It is also possible that a Goldman Sachs employee was disclosing privileged information to a colleague. If confidential, such subsequent disclosure would not operate to waive

B. *3Com Communications Involving Mr. Goldman*

Newco has also challenged a selection of redacted documents involving Mr. Goldman.[34] As stated previously, Mr. Goldman served as 3Com's Executive Vice President, Chief Administrative and Legal Officer, and Secretary. According to Newco, Mr. Goldman also served as 3Com's chief negotiator during its discussions regarding the Merger Agreement and the events leading up to the withdrawal of the parties' CFIUS application.[35] Newco contends that Mr. Goldman, at all relevant times during this matter, was acting primarily in a business capacity, and thus the challenged communications should be discoverable.[36]

Internal communications between a company's officers and directors and its general counsel may be privileged depending upon whether the communications are legal or business in nature.[37] This principle will be applied regardless of the general

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the privilege because only 3Com may effectuate a waiver. Whether the communication was privileged as a threshold matter can be addressed by *in camera* review.

[34] Specifically, Newco has challenged the partial withholding of thirty-six communications or documents involving Mr. Goldman. Kim Aff., Ex. V.

[35] Boyce Aff. at ¶¶ 6, 8.

[36] Newco, however, has not challenged communications involving Mr. Goldman and outside counsel that were made for the purpose of seeking legal advice.

[37] *See Amirsaleh v. Bd. of Trade of the City of N.Y., Inc.*, 2008 WL 241616, at *2 (Del. Ch. Jan. 17, 2008) ("[D]efendants 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

counsel's role in a particular transaction or negotiation, although that role may very well inform the nature of the communication. 3Com claims that it only withheld those portions of communications involving Mr. Goldman where he provided legal advice or advice so intertwined with legal issues that it, "as a whole was primarily legal in nature." Nonetheless, given Mr. Goldman's prominent business role in the transaction, the Court is of the view that *in camera* review is appropriate here to determine whether Mr. Goldman was acting in primarily a legal or business capacity at the time that the challenged communications were made.[38]

C. *3Com's Work Product Assertions*

Newco's next challenge pertains to 3Com's assertion of the attorney-work product doctrine with respect to a number of the withheld communications

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constitute legal advice and those communications are the ones for which defendants claim privilege."); *Khanna v. McMinn*, 2006 WL 1388744, at *37-38 (Del. Ch. May 9, 2006) (discussing how advice transmitted to or offered by general counsel will not be privileged when it is "business diction" as opposed to legal advice). Neither party argues that Massachusetts or Delaware law is in disagreement on this issue, and both parties have applied Delaware law in their respective briefs.

[38] The parties are in substantial agreement that *in camera* review is appropriate and necessary to resolve this dispute.

involving Goldman Sachs and Mr. Goldman. Newco questions the plausibility that all of these documents were prepared because of the prospect of litigation.[39]

Whether the work-product protection applies to the withheld Goldman Sachs documents has been resolved by the Court's application of Delaware law to govern the attorney-client privilege.[40] As for the communications involving Mr. Goldman, when conducting its *in camera* review of these documents to determine whether they are shielded by the attorney-client privilege, the Court can also decide whether they alternatively represent attorney work-product.[41]

D. *The E-Mail Subject Lines*

As a final matter, Newco challenges 3Com's omission of e-mail subject lines from its privilege logs in violation of the Scheduling Order. 3Com counters that the

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[39] Both Delaware and Massachusetts follow the "because of" test to determine application of the attorney work-product privilege. Under this test, the Court asks whether a document would have been produced but for existing or expected litigation. *Compare Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 959 A.2d 47, 52 (Del. Ch. 2008) *with Comcast*, 901 N.E.2d at 1203-04.

[40] Of course, if Newco requests that the Court review any of those documents *in camera* to determine whether they involved primarily business matters, it will also review the documents to determine application of the attorney work-product privilege.

[41] There appear to be four documents that 3Com has labeled as attorney work-product, but which have not been labeled as privileged for any other reason. Kim Aff., Ex. A3 at entries 303, 313-14, 331. Newco has requested production of documents 313 and 331. These documents supposedly pertain to communications regarding CFIUS approval or withdrawal. Newco is skeptical that CFIUS-related documents were created because of anticipated litigation. The Court can review these documents *in camera* as well.

Scheduling Order required that the party asserting privilege only provide any withheld document's title.[42] Title, according to 3Com, does not mean subject line.

At oral argument 3Com, while maintaining the position taken in its brief, expressed willingness to produce the e-mail subject lines. It suggested that the subject lines actually provide less information than the titles or the document descriptions. Instead of delving into the merits of the parties' dispute, the Court simply directs that 3Com provide the subject lines.

E. *Did Huawei and Newco Have a Common Interest when Negotiating the Side-Letter?*

3Com's main challenge pertains to the assertion of the attorney-client privilege by Newco over certain communications between Newco and Huawei. As stated previously, Newco was formed by Bain for the purpose of acquiring 3Com; Huawei was to take a 16.5% interest in the acquisition. Newco claims that it and Huawei shared a common interest in pursuing the merger with 3Com, and thus the communications sought by 3Com are privileged.

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[42] The Scheduling Order provides that "[t]he parties' (and their advisors') privilege logs shall contain the following information: As to documents withheld in their entirety, the logs shall include the author(s) of the documents, all recipients of the document, the date of the document, *its title*, *and a brief description of the document*, including the basis for assertion of privilege." (emphasis added).

Bain and Huawei signed a "Termination Fee Side Letter" (the "Side Letter") on or around September 28, 2007.[43] The "Side Letter" made reference to limited guarantees provided to 3Com by both a Bain affiliate and Huawei that guaranteed their respective pro rata shares of the Merger Agreement's termination fee. According to the Side Letter, Huawei would be responsible for 7.5% of the termination fee, with Bain accountable for the remaining 92.5%. Of particular importance here, the Side Letter also provided that in the event that either Bain or Huawei's conduct (or lack thereof) caused the fee to be owed, the party that acted wrongfully would reimburse the other for its pro rata obligation.

The Court once again looks to Rule 502(b) of the Delaware Rules of Evidence, which extends the attorney-client privilege to certain communications made by the client, his representative, or lawyer, to a lawyer "representing another in a matter of common interest."[44] In the transactional context, "common interest" has been defined as an interest "so parallel and non-adverse that, at least with

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[43] Polizoti Aff., Ex. Y.

[44] The parties do not dispute that Delaware law governs this particular issue. Indeed, Newco contends that "Massachusetts law is not dissimilar." Def.'s Mem. in Opp'n to Pl.'s Mot. to Compel at 5 n.2 (citing *Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.*, 870 N.E.2d 1105, 1109 (Mass. 2007)); *see also* Mass. G. Evid. § 502(d)(5).

respect to the transaction involved, [the two parties] may be regarded as acting as joint venturers."[45]

Newco and Huawei appear to have had a common interest in obtaining CFIUS approval and seeing the merger to its completion. The two companies, however, had adverse interests both in negotiating the Side Letter and in determining, if necessary, responsibility for the Merger Agreement's termination. Because of their potentially conflicted relationship, the Court will review the challenged communications *in camera* to determine Newco and Huawei's position vis-à-vis one another at the time each challenged communication was made.[46] If the parties were in common interest with respect to the matters addressed, the communication will remain privileged.[47]

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[45] *Jedwab*, 1986 WL 3426, at *2; *see also Zirn v. VLI Corp.*, 1990 WL 119685, at *8 (Del. Ch. Aug. 13, 1990) (finding that certain communications could not be privileged "as a matter of common interest" because when formed the "parties still had adverse interests in renegotiating and restructuring the original agreement").

[46] 3Com's challenges appear directed to communications between Newco and Huawei that may have been adversarial. Specifically, 3Com seeks the production of two documents concerning communications from February 15, 2008 regarding the Side Letter. 3Com also seeks production of twelve documents involving communications made after the CFIUS withdrawal; these communications supposedly pertained to potential amendments to the Merger Agreement or a new deal. Lastly, 3Com seeks the production of eleven communications regarding the CFIUS process that took place before the CFIUS withdrawal.

[47] Newco raises no objection to the possibility and appropriateness of *in camera* review.

F. *The Redactions to the Handwritten Notes and E-Mail Communications with Limited or No Attorney Involvement*

Finally, 3Com challenges ten sets of handwritten notes that it believes may have been inappropriately redacted. Newco has filed affidavits to establish a basis for applying the attorney-client privilege to these communications. 3Com, however, considers the responses contained in the affidavits to be "skeletal," and it remains skeptical that the notes pertained to legal matters. Likewise, 3Com challenges a number of e-mail communications that involved either limited or no attorney participation. It argues that Newco's response as to why these communications are in fact privileged is too vague to support the communications' redaction or non-production, especially given the lack of attorney participation.

Newco does not contest the use of *in camera* review to resolve the issue. Given the relatively limited number of challenged communications and documents, the Court will indeed review the documents *in camera* to determine whether the attorney-client privilege applies.

V. CONCLUSION

For the foregoing reasons, the Court concludes that Delaware law applies to the withheld communications involving 3Com's investment banker. Thus, there

was no waiver of the attorney-client privilege as to those documents. The subject lines of privileged emails will be produced. Otherwise, the Court directs the parties to submit the remaining challenged documents for *in camera* review.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K