COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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VICE CHANCELLOR

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RE: *In re Comverge, Inc. Shareholders Litigation*
Civil Action No. 7368-VCP

Dear Counsel:

This matter is before me on the motion of Plaintiffs Gary K. Schultz, Saravanan Somlinga, and Adrienne Cohen ("Plaintiffs") to compel document production from Defendants Comverge, Inc. ("Comverge" or the "Company") and the Individual

Defendants[1] (collectively, the "Comverge Defendants"). The Comverge Defendants have refused to produce certain requested documents on the grounds of attorney–client privilege.

The documents at issue concern the Comverge Defendants' counsel's advice on the enforceability of a standstill provision contained in a November 15, 2011 Non-Disclosure Agreement (the "NDA") between Comverge and H.I.G. Capital, LLC, Peak Holding Corp., and Peak Merger Corp. (collectively, "HIG"). Plaintiffs allege that HIG breached the NDA by acquiring Comverge debt and other debt to gain an unfair negotiating advantage and to coerce the Board to agree to a buyout by HIG. In the underlying derivative action, Plaintiffs allege that the Individual Defendants breached their fiduciary duties to Comverge shareholders by failing to enforce the terms of a standstill provision in the NDA.

The Comverge Defendants contend that the documents requested are protected by attorney–client privilege and work product immunity. Plaintiffs, on the other hand, assert that the Comverge Defendants waived attorney–client privilege when they placed the communications "at issue" in this litigation. Specifically, Plaintiffs allege that at the preliminary injunction hearing and in their briefs opposing Plaintiffs' motion for a

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[1] The Individual Defendants are members of the Company's board of directors (the "Board"): R. Blake Young, Nora M. Brownell, Alec G. Dreyer, Rudolf J. Hoefling, A. Laurence Jones, David R. Kuzma, John McCarter, James J. Moore, Joseph M. O'Donnell, and John Rego.

preliminary judgment, the Comverge Defendants sought to rely on the advice of counsel. The Comverge Defendants dispute that characterization and argue that they merely relied on the fact that they received legal advice rather than the substance of privileged communications to prove that the Board was fully informed.

Plaintiffs also seek the production of heavily redacted Board minutes and draft minutes that the Comverge Defendants contend either are not responsive or are protected by the attorney–client privilege.

For the reasons stated in this Letter Opinion, I deny Plaintiffs' motion to compel with a few limited exceptions.

I. ANALYSIS

A. The "At Issue" Exception

Pursuant to Court of Chancery Rule 26(b)(1), "[p]arties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action . . . ."[2] A party asserting a privilege has the burden of proof to show that the privilege is applicable to a communication.[3]

Lawyer–client privilege is codified in Rule 502 of the Delaware Rules of Evidence. Pursuant to that Rule:

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[2] Ct. Ch. R. 26(b)(1) (emphasis added).

[3] *Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992).

> 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, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or representative of a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.[4]

A communication is confidential if it is 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."[5] In other words, "[a] communication made in furtherance of the rendition of professional legal services to the client is a confidential communication unless the client intends the information to be disclosed to persons outside the circle of confidentiality."[6]

Lawyer–client privilege, as reflected in D.R.E. 502, is not absolute and can be restricted or denied entirely when a party places an otherwise privileged communication

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4 D.R.E. 502(b).

5 *Id.* 502(a)(5).

6 *See Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 419 (Del. 2010); *Ramada Inns, Inc. v. Dow Jones & Co.*, 523 A.2d 968, 972 (Del. Super. 1986).

"at issue" in the litigation.[7] "The at issue exception [to lawyer–client privilege] is based on principles of waiver and fairness intended to ensure the party holding the privilege cannot use it both offensively and defensively."[8] A party places lawyer-client communications at issue and waives lawyer–client privilege when "(1) a party injects the privileged communications themselves into the litigation, or (2) a party injects an issue into the litigation, the truthful resolution of which requires an examination of confidential communications."[9]

Plaintiffs seek documents regarding NDA-related communications, including documents discussing how to interpret the NDA and how to respond to a potential breach of the NDA. Although the Comverge Defendants referenced those documents in their Privilege Log and Redaction Log as privileged, Plaintiffs contend that the Comverge Defendants waived attorney–client privilege by asserting in its briefs and arguments at the preliminary injunction stage that the Board did not breach its fiduciary duty because it relied on the advice of counsel in deciding not to pursue action against HIG.

Plaintiffs base their contentions on several assertions made by the Comverge Defendants. These assertions include that: (1) "[t]he Board discussed with its legal

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7 *Zirn v. VLI Corp.*, 621 A.2d 773, 781 (Del. 1993).

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

9 *Alaska Elec. Pension Fund*, 988 A.2d at 419.

advisors what action, if any, it could and/or should take relative to HIG's actions";[10] (2) "the Committee and Board were exceptionally active and well informed. . . . The Board received advice throughout this period from five different teams of financial advisors, and the Committee received advice from three different financial advisors and three law firms";[11] (3) "the Committee, the full Board, and management, with the advice of outside counsel, actively considered the question of whether to sue HIG for allegedly breaching the NDA";[12] and (4) "[the Board] sought legal advice from board and company counsel on multiple occasions."[13]

The Comverge Defendants, on the other hand, argue that those statements address the question of whether the Board sought and received legal advice, and not the substance of that advice or whether the Board relied on the advice. The Comverge Defendants further assert that it was Plaintiffs that first injected this issue into the litigation. For example, Plaintiffs' opening brief in support of their motion for preliminary injunction

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10 The Comverge Defs.' Answering Br. in Opp'n to Pls.' Mot. for Prelim. Inj. ("Comverge Defs.' Opp'n Br. to PI") 17.

11 *Id.* at 30.

12 *Id.* at 37.

13 The Comverge Defs.' Opp'n to Pls.' Mot. to Compel ("Comverge Defs.' Opp'n Br.") Ex. A, Unredacted Tr. for Arg. on Pls.' Mot. for Prelim. Inj. ("PI Tr."), 35; *see also id.* at 38–39.

stated that "the Strategy Committee did not seek advice of legal counsel."[14] Similarly, at the argument on the motion for a preliminary injunction, Plaintiffs' counsel stated "[t]he board just made a decision 'We're not going to pursue legal action' without seeking even legal advice" and "[t]hey never sought legal counsel."[15]

1. Prong 1: Injecting privileged communications into the litigation

The first prong of the at issue exemption is whether the party injected privileged lawyer–client communications into the litigation. The first prong usually applies when a party asserts lawyer–client privilege to protect a communication and then later seeks to admit that same communication as evidence.[16]

Here, the Comverge Defendants have not injected or sought to inject any specific attorney–client communications into the litigation. Questions regarding the existence or nonexistence of such communications were raised by Plaintiffs and not the Comverge Defendants. Therefore, the first prong of the "at issue" exemption does not apply to the circumstances of this case. The at issue exemption, however, still would apply if Plaintiffs prove the second prong.

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14 Pls.' Opening Br. in Supp. of Mot. for Prelim. Inj. ("Pls.' Opening Br. for PI") 14.

15 PI Tr. 16; *see also id.* at 17, 28.

16 *See* Donald J. Wolfe & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 7.02[c][2][ii], at 7-35 to 36 (2012); *see also Baxter Int'l, Inc. v. Rhône-Poulenc Rorer, Inc.*, 2004 WL 2158051, at *3 (Del. Ch. Sept. 17, 2004).

2. Prong 2: Injecting an issue into the litigation, the truthful resolution of which requires an examination of confidential communications

The second prong of the "at issue" exemption is whether a party injects an issue into the litigation, the truthful resolution of which requires an examination of confidential privileged communications. "[A] party may not make bare factual assertions, 'the veracity of which are central to the resolution of the parties' dispute, and then assert the attorney-client privilege as a barrier to prevent a full understanding of the facts disclosed.'"[17] In other words, a party cannot raise an issue that the party can only prove by examining confidential communications, and then attempt to shield those communications from discovery as privileged.[18]

Plaintiffs assert that the Comverge Defendants injected the issue of relying on the advice of counsel into this litigation. Specifically, Plaintiffs point to statements by the Comverge Defendants in their opposition brief to Plaintiffs' motion for a preliminary injunction and at the preliminary injunction hearing.[19] According to Plaintiffs, these statements indicate that the Board is relying on the advice of counsel as part of their defense.

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[17] *In re Kent Cty. Adequate Pub. Facilities Ordinances Litig.*, 2008 WL 1851790, at *5 (Del. Ch. Apr. 18, 2008) (quoting *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 259 (Del. 1995)).

[18] *See* Wolfe & Pittenger, *supra* note 16, § 7.02[c][1], at 7-34.

[19] *See supra* notes 10–13 and accompanying text.

The Comverge Defendants counter that: (1) Plaintiffs first raised the issue by averring that the Comverge Defendants failed to solicit legal advice; and (2) the Comverge Defendants have not asserted a defense based on reliance upon the substance of any communications between the Board and its counsel.

The Comverge Defendants are correct that it was Plaintiffs who first raised the issue of whether the Board solicited the advice of legal counsel.[20] Moreover, the examination of privileged communications is not required for the truthful resolution of this litigation because the Comverge Defendants merely seek to rely on the fact that they sought and obtained legal advice rather than that they relied on the substance of privileged communications to prove that the Board was fully informed. Thus, the Comverge Defendants did not "inequitably us[e] attorney-client privilege as a sword" or inject a privilege-laden issue into the litigation.[21]

Plaintiffs point to, for example, the Comverge Defendants' statement that "[the Board] sought legal advice from board and company counsel on multiple occasions."[22] That particular statement reflects the fact that the Comverge Defendants *sought* legal advice. It does not reflect reliance on that advice, however. Nor does it inject the substance of any specific advice into this case. Indeed, at oral argument, the Comverge

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[20] *See supra* notes 14–15 and accompanying text.

[21] *Baxter Int'l, Inc.*, 2004 WL 2158051, at *3.

[22] PI Tr. 38–39.

Defendants reaffirmed that "we have always maintained that we are not relying on an advice-of-counsel defense. All we are saying is that . . . we sought legal counsel."[23]

In that regard, a number of cases have held that it is the existence of legal advice that is material to the question of whether the board acted with due care, not the substance of that advice. For example, in *Hollinger International, Inc. v. Black*,[24] the Court dismissed a breach of fiduciary duty claimed because the defendants adequately had informed themselves by seeking the advice of counsel. The Court, however, made clear that it did not rely on the content of that advice, stating:

> I begin with a preliminary observation about the CRC's level of care. For perfectly understandable reasons given Black's conduct, International has not waived the attorney-client privilege. As a result, *I do not have testimony about the legal advice given the CRC regarding the operation of the Rights Plan*. The defendants seized on this and delighted in asking the independent directors detailed questions about the operation of the Rights Plan. I am not convinced by these quizzes that the independent directors did not inform themselves sufficiently before adopting the Rights Plan.[25]

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[23] Mot. to Compel Tr. 30.

[24] 844 A.2d 1022 (Del. Ch. 2004), *aff'd*, 872 A.2d 559 (Del. 2005).

[25] *Id.* at 1084–85 (emphasis added).

Similarly, in *Baxter International, Inc. v. Rhône-Poulenc Rorer Inc.*,[26] the Court noted that "while the subject matter of the emails may be at issue (as is often the case with privileged material), the communications themselves are not."[27]

Nonetheless, Plaintiffs contend that three cases, namely, *In re ML-Lee Acquisition Fund II, L.P.*,[28] *In re Unitrin, Inc. Shareholders Litigation*,[29] and *Tenneco Automotive Inc. v. El Paso Corp.*,[30] compel a different result here. *ML-Lee Acquisition* is distinguishable because the underlying claim in that case arose under Section 57 of the Investment Company Act of 1940 (the "1940 Act") and the defendants relied upon the advice of counsel to justify the transaction in issue.[31] Indeed, the defendants answered the complaint by stating that they "believed in good faith that the . . . transactions challenged in the Complaint were lawful . . . in reliance upon review of the transactions by counsel with respect to the requirements of Section 57 of the 1940 Act."[32] Moreover, the Court explicitly disagreed with the assertion "that the Lee Defend ants' denials [were]

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26 2004 WL 2158051 (Del. Ch. Sept. 17, 2004).

27 *Id.* at *3.

28 859 F. Supp. 765 (D. Del. 1994).

29 1994 WL 507859 (Del. Ch. Sept. 7, 1994).

30 2001 WL 1456487 (Del. Ch. Nov. 7, 2001).

31 15 U.S.C. § 80a-56.

32 *In re ML-Lee Acq. Fund II, L.P.*, 859 F. Supp. 765, 767 (D. Del. 1994).

simple, or lack substantive content."[33] Thus, unlike the situation in this case, the party claiming privilege in *ML-Lee Acquisition* sought to rely on the substance of the advice from counsel.

Plaintiffs' reliance on *Unitrin* is also misplaced because the defendants in that case partially disclosed privileged communications and sought to use the advice received from counsel as both a sword and a shield.[34] Here, Plaintiffs have not alleged that the Comverge Defendants partially disclosed confidential communications.

Finally, *Tenneco* is distinguishable because there the plaintiffs' complaint raised the issue of whether the defendants had provided appropriate notice of certain insurance settlements.[35] By so doing, the plaintiffs injected the state of their own knowledge into the litigation. The Court concluded that confidential information and privileged communications concerning what the plaintiffs knew and when they acquired that knowledge should be disclosed because it could not "be reliably obtained from another source" and that "there is no acceptable substitute for intrusion into otherwise

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33 *Id.* at 768.

34 *In re Unitrin, Inc. S'holders Litig.*, 1994 WL 507859, at *2 (Del. Ch. Sept. 7, 1994) ("By disclosing some of the privileged communications between the board and its counsel, argue plaintiffs, defendants have waived the remainder of the communications which relate to the same subject matter.").

35 *Tenneco Auto. Inc. v. El Paso Corp.*, 2001 WL 1456487, at *3 (Del. Ch. Nov. 7, 2001).

confidential communications."[36] Unlike the plaintiffs in *Tenneco*, however, the Comverge Defendants did not inject an issue into this case that requires examination of the substance of any privileged communications or of the Comverge Defendants' state of mind.[37]

In sum, the cases relied on by Plaintiffs dealt with situations where the party claiming privilege either injected an issue into the litigation, the truthful resolution of which required an examination of confidential communications, or partially disclosed the confidential communications. In contrast, the Comverge Defendants have not injected a privilege-laden issue into this litigation, attempted to rely on the substance of a privileged communication, or partially disclosed such a communication. Indeed, a close examination of the Comverge Defendants' statements reveals that they have adhered fairly assiduously to assertions that the Board sought, obtained, received, or considered the advice of counsel.[38] Those statements, however, do not go as far as to say that the

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36 *Id.* at *4.

37 *See supra* notes 14–21 and accompanying text.

38 *See supra* notes 10–13 and accompanying text; *see also* PI Tr. 44 ("In trying to decide whether to take . . . legal action or not, we considered legal advice around the enforceability of the document, any facts that we had relative to [the] evidence of confidentiality being breached, which we had none, about the expense that would be associated with taking action, about the disruption to management given where -- given the task at hand of addressing liquidity questions. And after an active dialogue at the board level, as defined here, we decided not to take legal action.").

Comverge Defendants acted in accordance with the legal advice they received or that those Defendants cannot be liable because they relied on some specific advice of legal counsel.[39] Instead, the information the Comverge Defendants have disclosed in this action regarding any privileged communications is summary in nature and comparable to what would be disclosed in a privilege log. I therefore reject Plaintiffs' argument that the Comverge Defendants waived the attorney–client privilege through the at issue exception.

B. The March 1, 2012 Minutes

At argument, I strongly suggested, if not ordered, the production of the March 1, 2012 draft Board minutes.[40] I hereby confirm that my previous comments were intended

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[39] At argument on the preliminary injunction motion, for example, the Comverge Defendants' counsel stated that the strategic committee received "legal advice about what does the NDA mean, what are the rights under the NDA." PI Tr. 41. In response to a deposition question from Plaintiffs' counsel regarding whether the committee or the Board received legal advice "with respect to whether HIG used confidential information in connection with its purchase of the PFG note," the chairman of the strategic committee responded, "[w]e asked the lawyers about the document, the enforceability of the document, and that was what [the] discussion with [our] lawyers was about." *Id.* at 44 (alterations in original). Thus, the Comverge Defendants acknowledge that the committee and the Board did consider legal issues. Indeed, Jones evidently testified that they obtained advice as to whether there had been a violation of the securities laws. *Id.* at 45.

[40] Tr. 38–39 ("I would prefer to have [the March 1 draft minutes] produced."); *see also id.* at 43 ("I would like the document with the statement about what the audit committee knew or didn't know and the draft produced.").

as an order. That order, however, was limited in scope and did not address the issue of whether all drafts of Board minutes would have to be produced going forward.[41]

C. The March 24, 2012 Minutes

I consider next whether the Comverge Defendants should be compelled to produce an unredacted version of the minutes of the March 24, 2012 Board meeting (the "March 24 Minutes"). Plaintiffs argue that the Comverge Defendants' redactions of the March 24 Minutes are overbroad and cover counsel's recital of business facts that are not protected by attorney–client privilege. At argument, I agreed to conduct an in camera review to determine whether those redactions were overbroad.

"[T]he presence of a lawyer at a business meeting called to consider a problem that has legal implications does not itself shield the communications that occur at that meeting from discovery."[42] Rather, it is "communications to a lawyer by or on behalf of a client for the purpose of the rendition of legal services or lawyer statements constituting legal service" that are protected.[43] Moreover, "attorney–client privilege protects legal

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41 *Id.* at 39 ("I am not prejudging the issue of whether all drafts have to be produced.").

42 *SICPA Hldgs. S.A. v. Optical Coating Lab., Inc.*, 1996 WL 577143, at *2 (Del. Ch. Sept. 23, 1996).

43 *Id.*

advice, as opposed to business or personal advice."[44] "[C]ommunications that contain an inseparable combination of business and legal advice may be protected by the attorney–client privilege."[45] "Where it is a close call whether a communication reflected in a document and pertaining to a mixture of legal-related and business-related matters is more closely related to legal advice as opposed to business advice, the party asserting the privilege will be given the benefit of the doubt."[46]

Apart from an Appendix consisting primarily of the resolutions the Board actually adopted, the March 24 Minutes are twenty-four pages in length. Perhaps understandably, Plaintiffs complain that, with the exception of numerous headings and subheadings, almost seventeen of those pages were entirely redacted. In response to Plaintiffs' Motion to Compel, the Court has reviewed all of the redactions in the March 24 Minutes. Except for the few minor excerpts identified below, the redactions the Comverge Defendants made are appropriate.

The exceptions are as follows:

1. On page 2, the first redacted paragraph, which appears directly under the heading "Review of the HIG Transaction," is factual in nature, relates to a business

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[44] *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2009 WL 2031793, at *2 (Del. Ch. July 10, 2009) (citing *Lee v. Engle*, 1995 WL 761222, at *1 (Del. Ch. Dec. 15, 1995)).

[45] *Id.* (citing *Sealy Mattress Co. of N.J. v. Sealy Inc.*, 1987 WL 12500, at *3 (Del. Ch. June 19, 1987)).

[46] *Id.* (citing *SICPA Hldgs. S.A.*, 1996 WL 577143, at *6).

matter, and does not contain or reflect confidential legal advice. Therefore, it should be produced.

2. On page 4, under the subheading "*Negotiation Process/Deal Structure*," the first three sentences should be unredacted. Those sentences state:

> Mr. Hanley [Board Counsel] then provided an overview of the negotiation and deliberative process in which the Strategy Committee engaged. He discussed that the HIG offer is at $1.75 per share. In addition, since the Company had issues of being a standalone company, the Transaction will also include bridge financing of up to $12 million. He explained that this Transaction is a typical cash buyout transaction and will be conducted in a two-step process where existing shareholders will be bought out.[47]

Although these statements were attributed to a lawyer, Thomas Hanley, none of the sentences reflects the communication of confidential information for the purpose of facilitating the rendition of legal services. Rather, these sentences reflect background facts or relate to purely business aspects of the transaction.

3. On page 15, four lines from the bottom, the following statement by Comverge's Chief Financial Officer should be unredacted: "Mr. David Mathieson reviewed the current covenants under all loans and stated that if the business performs, the Company can meet the covenants in the short term, however, the multiple covenants would be difficult to meet over the duration of the loan."[48] This statement is not

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[47] COMV00002585.

[48] COMV00002596.

privileged for two reasons: (1) the communication concerns business advice; and (2) the statement does not disclose any communication to a lawyer by or on behalf of a client for the purpose of the rendition of legal services.

4. On page 23, the last sentence under the heading "Communications Package Discussions" should be unredacted.

II. CONCLUSION

For the foregoing reasons, I deny Plaintiffs' Motion to Compel as it relates to the at issue exemption. I grant in part and deny in part the Motion to Compel as it relates to the March 24 Minutes. Specifically, I order the Comverge Defendants to produce within five business days a modified version of the redacted March 24 Minutes consistent with the rulings in this Letter Opinion. In all other respects, the motion is denied.

IT IS SO ORDERED.

Sincerely,

/s/ Donald F. Parsons, Jr.

Donald F. Parsons, Jr.
Vice Chancellor

DFP/ptp