IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LAUREN GLASSMAN,	)	
	)	
Plaintiff/Counterclaim Defendant,	)	
	)	
v.	)	*Civil Action No. 7717-VCG*
	)	
CROSSFIT, INC., and GREG GLASSMAN,	)	
	)	
Defendants/ Counterclaim Plaintiffs.	)	

MEMORANDUM OPINION

Date Submitted: October 8, 2012
Date Decided: October 12, 2012

Philip Trainer, Jr., and Toni-Ann Platia, of ASHBY & GEDDES, P.A., Wilmington, Delaware; Attorneys for Plaintiff/Counterclaim Defendant.

Raymond J. DiCamillo, and Kevin M. Gallagher, of RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; Attorneys for Defendants/ Counterclaim Plaintiffs.

GLASSCOCK, Vice Chancellor

This matter involves a corporation, CrossFit, Inc., a successful distributor of fitness and training regimens. CrossFit licenses its name and products to thousands of affiliated gyms across the country, and these gyms have developed a large and passionate community of members. CrossFit is wholly owned by an artificial entity, the marital community enjoyed by Greg and Lauren Glassman. The artifice of that entity is in the midst of being disassembled under the divorce jurisdiction of the Yavapi County Superior Court in Arizona. Currently, however, the marital community remains the sole stockholder of Crossfit, and the board of directors is composed of Mr. and Ms. Glassman. This governance arrangement has turned a domestic conflict into a corporate one, the only differences here being ones of scale and the corporate form.

On June 14, 2012 Ms. Glassman committed to sell her inchoate 50% stake in CrossFit to a California-based private equity firm, Anthos Capital, L.P. However, the sale is conditioned on the Arizona Court actually granting Ms. Glassman a 50% share of the company in the context of the divorce. Alternatively, the sale could proceed if Mr. Glassman gave his consent.

This matter first came before me on July 24, 2012 when Ms. Glassman requested that I enjoin CrossFit's purchase of a private airplane. Mr. Glassman had agreed to CrossFit's purchase of the plane in his capacity as an officer of the corporation; Ms. Glassman contends that the decision required board approval,

which had not been sought, and that the purchase would be harmful to CrossFit. Mr. Glassman contends that this litigation is a sham, designed to frustrate the business of CrossFit and thus encourage him to consent to the sale of Ms. Glassman's interest to Anthos. Mr. Glassman wants to purchase Ms. Glassman's interest himself. He and CrossFit have counterclaimed, asserting that Ms. Glassman breached fiduciary duties to CrossFit by providing certain due diligence documents to Anthos without the consent of the CrossFit Board of Directors. He seeks damages on behalf of the corporation, and to enjoin sale of Ms. Glassman's one-half interest to CrossFit, should it ever be created.

I. BACKGROUND

This matter is currently before me on the Defendants' Motion to Compel seeking documents relating to:

1. Communications between Ms. Glassman (or her attorneys) and Anthos, including documents containing information about CrossFit.
2. Anthos' proposed purchase of CrossFit equity.
3. Anthos' attempts to value CrossFit or Ms. Glassman's share of CrossFit.
4. Anthos' business plans for CrossFit.
5. Anthos' plans for current management of CrossFit.
6. Anthos' plans to convince Mr. Glassman to agree to Ms. Glassman's sale of her equity in CrossFit.

7. Anthos' or Ms. Glassman's plans to cause "gridlock" at CrossFit.[1]

Ms. Glassman produced some documents in response to these requests, but the Defendants were frustrated with Ms. Glassman's production, saying:

> Notably *absent* from the production were any actual communications by [Ms. Glassman] or her agents with or about Anthos . . . including drafts of the contracts, emails negotiating the terms of the sale, valuations of Ms. Glassman's equity, communications regarding Anthos' future business strategy for CrossFit, or post-contract communications regarding the present litigation or Ms. Glassman's motion to lift the preliminary injunction in the Arizona court.[2]

Obtaining the above information is the object of the Defendant's Motion to Compel.[3]

This Motion to Compel has generated substantial briefing and argument. Happily, we have now come to a point where the parties are in general agreement about what documents are being withheld and on what bases. The Plaintiff usefully categorizes the withheld communications between Ms. Glassman and Anthos (or between their respective counsel) as those concerning (1) common plans to close the sale of Ms. Glassman's 50% interest, (2) valuations of CrossFit, (3) how Ms. Glassman evaluated Anthos' proposals, and (4) Anthos' future plans

[1] Defs.' Mot. Compel Produc. Docs. ¶ 8
[2] *Id.* ¶ 12.
[3] In her response, the Plaintiff asserts that she did actually produce "text and voicemail communications between Ms. Glassman and Mr. Kelly [a managing partner of Anthos] prior to the filing of the litigation." Pl./Countercl.-Def.'s Opp. Def./Countercl.-Pl.'s Mot. Compel Produc. Docs. ¶ 8 [hereinafter "Pl.'s Opp. Def.'s Mot. Compel"].

for CrossFit.[4] The Plaintiff seeks to withhold these documents based on common-interest doctrine and business-strategy immunity.

II. ANALYSIS

In Delaware,[5] the scope of discovery is broad: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."[6] Furthermore, the party asserting a privilege bears the burden of proving that the material in question is privileged.[7] Here, Ms. Glassman has argued that information concerning details of her negotiations with Anthos is shielded by the common-interest doctrine and by business-strategy immunity. I conclude that the Plaintiff has failed to meet her burden to show that either privilege applies to the disputed communications.

A. Common-Interest Doctrine

The common-interest doctrine is an exception to the general rule that the attorney-client privilege is waived when a party discloses privileged information to a third party.[8] Accordingly, the party asserting the privilege must demonstrate both

[4] Pl.'s Opp. Def.'s Mot. Compel ¶ 10.
[5] Despite early contentions to the contrary, the parties now agree that the law of Delaware controls this dispute over the production of documents.
[6] Ct. Ch. R. 26(b)(1).
[7] *Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992).
[8] *Corning Inc. v. SRU Biosystems, LLC*, 223 F.R.D. 189, 190 (D. Del. 2004).

that the communications at issue are protected by the attorney-client privilege and that the common-interest doctrine applies.[9]

The attorney-client privilege itself does not protect all communications with an attorney or all discussions for which an attorney may be present. As then-Chancellor Allen explained in *SICPA Holdings S.A. v. Optical Coating Laboratory, Inc.*,

> [T]he presence of a lawyer at a business meeting . . . does not itself shield the communications that occur at that meeting from discovery . . . . What are protected are 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 services.*[10]

Once a court determines that communications were made for the purpose of providing legal services and that the communications have been shared with a third party, and thus putatively waived, the party seeking to withhold these communications from discovery must show that the communications fall within the scope of the common-interest doctrine to preserve the privilege.

Codified in Rule 502 of the Delaware Rules of Evidence,[11] the common-interest doctrine "allows separately represented clients sharing a common legal interest to communicate directly with one another regarding that shared interest."[12]

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[9] *Moyer*, 602 A.2d at 72.
[10] *SICPA Hldgs. S.A. v. Optical Coating Lab., Inc.*, 1996 WL 577143, at *2 (Del. Ch. Sept. 23, 1996).
[11] D.R.E. 502(b).
[12] *Titan Inv. Fund II, LP v. Freedom Mortg. Corp.*, 2011 WL 532011, at *4 (Del. Super. Feb. 2, 2011).

The two parties' interests must be "sufficiently legal, rather than commercial."[13] The common-interest doctrine does not protect communications between parties, or even between their attorneys, when those communications primarily concern "a common commercial objective."[14] Also, the two parties' interests must be "substantially similar," not adverse.[15] In short, when parties with a common legal interest share privileged communications in furtherance of that legal interest, they do not waive the attorney-client privilege.

In *Titan Investment Fund II, L.P. v. Freedom Mortgage Corp.*, the court considered whether the common-interest doctrine applied in a dispute arising out of a failed transaction between a mortgage finance company, Freedom, and one of its investors, Titan.[16] Freedom asked the court to compel Titan to produce negotiations between Titan and one of Titan's general partners regarding the terms of their partnership.[17] The court granted the motion to compel, finding that merely sharing a commercial objective, or even sharing "legal advice on the issues concerning the transaction," was insufficient to create a common legal interest between Titan and its funding partner.[18]

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[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at *1
[17] *Id.*
[18] *Id.* at *5.

Here, Ms. Glassman argues that a number of communications shared by herself and Anthos (or between their respective attorneys) are protected by the common-interest doctrine.[19] Specifically, she argues that because the closing of the transaction was explicitly contingent on getting approval from the Arizona court handling the divorce, she and Anthos had a common *legal* interest in obtaining that approval from the Arizona court.[20] Ms. Glassman also argues that her post-signing communications with Anthos were protected by the common-interest doctrine because they were made in furtherance of defending themselves against possible legal action by the Defendants.[21]

Mr. Glassman and CrossFit argue that the common-interest doctrine does not apply to the withheld communications. Though the Defendants do concede that Ms. Glassman and Anthos would have shared a common interest if they had "discussed the threat of both being sued by Greg Glassman or CrossFit," the Defendants contend that there were no such communications.[22] The Defendants point out that, "the privilege logs have not identified such a document [coordinating legal strategy], nor has Plaintiff argued that such communications are the basis for her common-interest claim."[23]

[19] *See* Pl.'s Sur-Reply to Def.'s Mot. Compel Produc. Docs. Exs. 1-4.
[20] *Id.* at 5.
[21] *Id.*
[22] Def.'s Resp. Pl.'s Sur-Reply to Def.'s Mot. Compel Produc. Docs. ¶ 21 n.8.
[23] *Id.*

I conclude that the common-interest doctrine does not protect the documents that Ms. Glassman seeks to withhold. Many of the documents in the privilege logs are unrelated to Ms. Glassman's and Anthos' potential status as co-defendants in litigation, such as those relating to "[a]dvice re: disclosures relating to Purchase and Sale Transaction,"[24] "[c]onsiderations relating to community response regarding Purchase and Sale Transaction,"[25] and "[a]dvice re: communication with CrossFit relating to purchase of interest in company."[26] Ms. Glassman has failed to present evidence that these documents were provided for the purpose of facilitating a joint legal strategy with Anthos. Other documents noted in the privilege log which ostensibly concern legal advice regarding litigation bear ambiguous descriptions, and may or may not concern a common legal interest between Anthos and Ms. Glassman.[27] Again, Ms. Glassman has failed to show that the contents of these documents were created in furtherance of developing a joint legal defense or strategy.[28]

Ms. Glassman may not withhold relevant documents under the common-interest doctrine simply because her deal with Anthos might be affected by the

[24] Pl.'s Sur-Reply to Def.'s Mot. Compel Produc. Docs. Ex. 1 Nos. 8-34.
[25] *Id.* No. 35.
[26] *Id.* No. 47.
[27] *See, e.g., id.* Nos. 1-3.
[28] Def.'s Resp. Pl.'s Sur-Reply to Def.'s Mot. Compel Produc. Docs. ¶ 23 ("it is impossible to tell whether the communications relate to (1) the litigation about the airplane purchase, (2) the Arizona divorce litigation, (3) Defendants' counterclaims, or (4) a potential lawsuit against Anthos").

Arizona litigation or because the deal might be subject to litigation by the Defendants. The court in *Titan* quoted approvingly a decision limiting the scope of Delaware's common-interest doctrine, saying "it is of no moment that the parties may have been developing a business deal that included as a component the desire to avoid litigation."[29] In other words, communications about a business deal, even when the parties are seeking to structure a deal so as to avoid the threat of litigation, will generally not be privileged under the common-interest doctrine. The doctrine only protects those communications that directly relate to the parties' legal interests, such as their potential common defense strategies. The burden is on Ms. Glassman to demonstrate that the documents were subject to a privilege and that the communications therein furthered a common legal interest of Ms. Glassman and Anthos. This she has failed to do.

Because Mrs. Glassman has failed to show that the documents she has withheld from discovery—(1) common plans to close the sale of Ms. Glassman's 50% interest, (2) documents showing valuations of CrossFit, (3) documents showing how Ms. Glassman evaluated Anthos' proposals, and (4) documents showing Anthos' future plans for CrossFit[30]—were made for the purpose of

[29] *Titan*, 2011 WL 532011, at *4 (quoting *Bank of America, N.A. v. Terra Nova Ins. Co.*, 211 F. Supp. 2d 493, 497 (S.D.N.Y. 2002)).
[30] Pl.'s Opp Defs.' Mot. Compel Produc. Docs. ¶ 10.

planning a joint legal strategy against future litigation, she may not withhold them from discovery under the common-interest doctrine.

B. Business-Strategy Immunity

Unlike the common-interest doctrine, the business-strategy privilege is not a traditional privilege, in that it does not arise from a party's entitlement to confidential communication.[31] Rather, this Court invokes the protection of business-strategy immunity through its inherent power under Rule 26(c) to "enter protective orders as justice requires to shield the parties from prejudice."[32] The Court most commonly protects information under this immunity when "a target corporation [seeks] to shield itself from discovery of time-sensitive information in the takeover context."[33] More fundamentally, the business-strategy immunity may apply if a court fears that "information disclosed may not be used for proper legal purposes, but rather for practical business advantages."[34]

In determining whether the business-strategy immunity applies, the Court may consider such factors as "the importance of the matter sought to be discovered to the party seeking it; the risk of non-litigation injury that might occur to the target corporation if discovery is permitted; and the stage of the company's efforts as

[31] *Grand Metro. PLC v. Pillsbury Co.*, 1988 WL 130637 (Del. Ch. Nov. 22, 1988) (unpaginated).
[32] *Pfizer Inc. v. Warner-Lambert Co.*, 1999 WL 33236240, at *2 (Del. Ch. Dec. 8, 1999).
[33] *Id.*
[34] *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, 959 A.2d 47, 53 (Del. Ch. 2008).

well as the stage of the litigation."[35] In other words, the Court may invoke the business-strategy privilege when, after balancing the risk of extralegal prejudice from disclosure against the evidentiary value of the contested information, the court concludes that disclosure would impede the interests of justice.

This Court has been reluctant to allow parties to withhold relevant evidence by invoking the business-strategy privilege, even when the disclosure might benefit one of the parties outside of litigation. In *Hexion Specialty Chemicals v. Huntsman Inc.*, the Court concluded that the business-strategy immunity did not protect information just because it might lead one of the parties to renegotiate an existing transaction.[36] Furthermore, even in the context of a hostile takeover, the scope of the business-strategy immunity is limited. For example, in *Pfizer v. Warner-Lambert Co.*, the Court allowed a party to withhold internal valuation materials related to a merger on the grounds that disclosure would harm the target of a potential takeover. The Court then emphasized that the business-strategy immunity only protects "companies' ongoing strategies still being contemplated" but not deals already consummated.[37] Similarly, the Court in *Atlantic Research Corp. v. Clabir Corp.* held that the business-strategy immunity did not protect

[35] *Pfizer*, 1999 WL 33236240, at *2.
[36] *Hexion*, 959 A.2d at 53.
[37] *Pfizer*, 1999 WL 33236240, at *2.

material relating to a transaction where the transaction had already been publicly disclosed through a securities filing.[38]

Here, Ms. Glassman does not bear undue risk of prejudice from the disclosure of confidential strategic or pricing information, because the information in this case concerns a transaction that has already been publicly announced. Indeed, many important details of the deal between Ms. Glassman and Anthos Capital are widely known.[39] As this Court has held in *Pfizer* and *Atlantic Research*, the application of the business-strategy immunity is less compelling when a party seeks information about a deal which has already been publicly disclosed than when a party seeks to uncover an adversary's confidential future plans.

I must also consider, however, the risk that the Defendants might use the information sought through discovery to obtain an unfair advantage outside of this litigation in another manner. Since this litigation began, CrossFit has been waging a public campaign against Anthos' attempts to buy an equity stake in CrossFit.[40]

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[38] *Atl. Research Corp. v. Clabir Corp.*, 1987 WL 758584, at *4 (Del. Ch. Feb. 10, 1987).

[39] *See, e.g.*, Diana Samuels, *Divorce Leaves CrossFit's Fate Uncertain; Anthos Makes Offer*, Silicon Valley/San Jose Bus. J. (Aug. 14, 2012, 6:01 PM), http://www.bizjournals.com /sanjose/news/2012/08/14/divorce-leaves-crossfits-fate.html?page=all.

[40] Russell Greene, *Stop Anthos Taking Over CrossFit*, CrossFit Discussion Board (July 28, 2012, 5:41 PM), http://www.board.crossfit.com/showthread.php?t=76936 ("Anthos does not view CrossFit affiliates the way we all do. Anthos doesn't care about professional trainers improving people's lives; they see CrossFit affiliates as a mechanism to sell more supplements and equipment. If they succeed, Anthos' first step will be to force all CrossFit affiliates to morph from professional training facilities into supplement and equipment peddlers. In that case,

Ms. Glassman argues that the Defendants could use information about Anthos' future plans for CrossFit and Anthos' valuation methodologies to persuade CrossFit affiliate gyms and their members that Anthos is an undesirable business partner. Ms. Glassman fears that this might prejudice her business interest in completing her deal with Anthos.

Notwithstanding these risks, I conclude that the business-strategy immunity does not protect the information that the Defendants seek. First, while the probative value of the desired information might be low when it comes to establishing whether Ms. Glassman has breached her fiduciary duties, business plans and valuation materials could be useful to prove, as the Defendants/Counterclaim Plaintiffs must, that CrossFit would be irreparably harmed by the deal.[41]

The parties have also mitigated risks to Ms. Glassman by agreeing to a Confidentiality Order to prevent public disclosures of sensitive materials.[42] Defendants' counsel assured me at oral argument that the materials sought are for litigation purposes only, and that under no circumstances will CrossFit or Mr. Glassman use confidential information obtained through this litigation to attempt

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affiliates will lose the right to choose between an array of competing brands . . . . [And] [a]ffiliates will be forced to sell the Anthos company's endorsed line of products.").

[41] Along with the Defendants' counterclaims, the Defendants have moved for a temporary restraining order against the sale and will bear the burden of showing that the sale would cause irreparable harm.

[42] *See* Stip. [Proposed] Ord. Governing Produc. Exch. Confident'l/Highly Confident'l Info.

to further turn the CrossFit community against a potential deal between Ms. Glassman and Anthos. I will take Defendants' counsel at his word, and I conclude that the risk of improper non-litigation use of the discovery sought is insufficient to invoke the business-strategy immunity. Let me add, however, that if I were to discover that the Defendants are using this information to gain a business advantage outside this litigation, I would not hesitate to redress that situation.

III. CONCLUSION

In conclusion, I emphasize that I have not ruled on the application of these, or other, discovery doctrines as they pertain to the Defendants' outstanding Motions to Compel brought against third parties which are not yet submitted for decision. As to the documents in Ms. Glassman's possession, however, I find that the requested communications are not protected by the common-interest doctrine or by the business-strategy immunity. Accordingly, the Defendant's Motion to Compel the Production of Documents is hereby granted.

IT IS SO ORDERED.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III