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Re: *Grunstein v. Silva*
C.A. No. 3932-VCN
Date Submitted: November 19, 2012

Dear Counsel:

Plaintiffs have moved in limine to preclude evidence regarding Defendants' claims that (1) adherence to the Mariner Model would have resulted in half a billion dollars' worth of tax liability, and (2) the sale of Beverly's durable medical equipment business ("DME") would have been illegal. During deposition, Defendants or their counsel asserted the attorney client privilege when asked about the basis for Defendants' claims. With regard to the tax liability, Mr. Silva unequivocally invoked the attorney client privilege when asked what his conclusion was based upon.

Q: And can you explain to me the nature of the tax problem.

A: In summary, the transfer of the real estate outside of the parent acquisition company would have subjected the company to approximately half a billion dollars' worth of tax, so there would have been a step up in the taxable basis of the property.

Q: And what was your conclusion based upon?

A: Attorney-client privilege.

Q: When you say "attorney-client privilege," you're talk—

A: Discussions with our attorneys.¹

Defendants' counsel also instructed Joseph Heil, one of Defendants' attorneys, not to disclose privileged communications with Mr. Silva regarding the sale of Beverly's medical equipment business.

Q: Did you ever have any discussion with Ron Silva regarding the legality of selling the DME business?

Mr. Escher: Once again, don't disclose the content of a communication.²

Under Delaware law, "a party cannot take a position in litigation and then erect the attorney-client privilege in order to shield itself from discovery by an

¹ Silva Dep. 330 (Mar. 18, 2008).

² Heil Dep. 58 (Mar. 20, 2008)

adverse party who challenges that position.”³ Similarly, “Delaware decisions involving the ‘sword and shield’ concept have precluded a party from shielding evidence from an opposing party and then relying on the evidence at trial to meet its burden of proof on an issue central to the resolution of the parties’ dispute.”⁴ “The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication.”⁵

Importantly, Plaintiffs have not sought the discovery of any privileged documents. Instead, Plaintiffs have not and do not dispute the applicability of the privilege, but they argue that Defendants should be precluded from using the privileged information as a sword at trial—*after* having used the privilege as a shield during discovery. Because Defendants’ knowledge and understanding of these issues are based on the advice of counsel,⁶ the Court will not allow Defendants to use this evidence when Plaintiffs have been shielded from it.

³ *Pfizer Inc. v. Warner-Lambert Co.*, 1999 WL 33236240, at *1 (Del. Ch. Dec. 8, 1999).

⁴ *Air Prods. & Chems., Inc.* 2011 WL 284989, at *3 (Del. Ch. Jan. 20, 2011).

⁵ *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F. 3d 851, 863 (3d Cir. 1994).

⁶ Thus, to the extent that the Defendants rely upon privileged communications to support the validity of these claims, they are barred from doing so.

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Defendants' argument that Mr. Silva should be permitted to testify as to his own understanding of the privileged communications would circumvent the sword and shield doctrine. Such a result would hinder Plaintiffs' ability to contest Defendants' claims. Thus, Plaintiffs' motion in limine to preclude evidence based on Defendants' assertion of the lawyer-client privilege is granted.⁷

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

⁷ The Court's ruling, however, does not necessarily resolve all issues implicit in this motion because the boundary between privileged information and non-confidential information has not been precisely delineated.