



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE CBS CORPORATION LITIGATION : Consolidated
: C.A. No. 2018-0342-AGB
:

THE NAI PARTIES' MOTION TO COMPEL

National Amusements, Inc., NAI Entertainment Holdings LLC (together, "NAI"), Sumner M. Redstone, and Shari Redstone (collectively, the "NAI Parties"), through their undersigned counsel, move pursuant to Court of Chancery Rules 26, 34, and 37, to compel the production of materials that CBS Corporation ("CBS," or the "Company") and the members of its board not affiliated with NAI (together with CBS, the "CBS Parties"), intend to withhold improperly on privilege grounds.

INTRODUCTION

1. This motion is not about challenging a privilege assertion. Nor is it about claiming some privilege has been waived. It is about allowing joint clients access to their counsel's communications. This Court has ruled repeatedly that this

specific issue can and should be resolved at the outset of litigation.¹ That is the purpose of this motion.²

2. Ms. Redstone, David Andelman, and Robert Klieger (the “NAI Affiliated Directors”), as CBS directors and joint clients of in-house and outside counsel to CBS and its board (“CBS Counsel”), have “unfettered access” to any legal advice rendered to CBS or other members of its board of directors (the “Board”). That access includes privileged communications involving CBS Counsel before May 14, 2018, the date on which CBS and the CBS special committee first informed the NAI Parties of the possibility of a dilutive dividend and commenced litigation against the NAI Parties.

3. This litigation involves the decision of certain CBS directors (the “Director Defendants”) to invoke a nuclear option against CBS’s controlling stockholder, NAI. The decision was made in secret, with the assistance of senior management, and apparently based on advice of counsel (both special committee

¹ See *PWP Xerion Holding III LLC v. Red Leaf Resources, Inc.*, C.A. No. 2017-0235-JTL, at 47-48 (Del. Ch. May 22, 2018) (Transcript) (“[T]his motion is better decided now” before the preparation of privilege logs) (Ex. A hereto); *Kalisman v. Friedman*, 2013 WL 1668205 (Del. Ch.) (deciding motion 16 days after litigation commenced).

² In this regard, this motion is unlike the motion the CBS Parties are expected to file concurrently with this one. That motion focuses on challenging non-party Viacom’s privilege assertions and in particular whether communications involving Viacom, its special committee, and NAI representatives on the Viacom board are privileged.

counsel and CBS Counsel). The result is a draconian dilutive dividend (the “Dilutive Dividend”), which has a single unprecedented and impermissible objective – to dilute the voting rights of NAI and other CBS Class A stockholders for all purposes and for all time. The NAI Parties allege that by declaring the Dilutive Dividend, the Director Defendants breached their fiduciary duties for numerous reasons, including because they lacked the requisite compelling justification, took action that was not proportionate to any supposed threat, improperly sought to preclude NAI from exercising voting rights, took action without being fully informed, and wrongfully acted to appease a CEO who had long desired unfettered control of CBS. The Dilutive Dividend also violated CBS’s certificate of incorporation and bylaws.

4. The documents at issue are central to NAI’s claims in this litigation and to its defense against CBS’s and Westmoreland’s claims. They will make clear what prompted the Dilutive Dividend, who orchestrated it, and the true motivations that drove its implementation. These communications – *involving CBS Counsel who represented all directors* – cannot be withheld on the grounds of privilege from counsel’s joint clients, the NAI Affiliated Directors, unless that counsel took steps in advance to make manifest that it no longer represented them. This, counsel never did.

5. Rather, the CBS Parties (with the assistance of counsel) apparently schemed in secrecy. Under settled Delaware law, adversity perceived by counsel

but not disclosed to a joint client does not terminate the joint client relationship. Accordingly, once the Director Defendants, CBS management, or the special committees (or committee counsel) involved CBS Counsel, they should have known that under Delaware law, CBS Counsel could not, consistent with its obligations to its joint clients, keep those communications from its other clients, the NAI Affiliated Directors.

6. Thus, the NAI Parties move to compel production of the following categories of privileged materials involving communications with CBS Counsel from before May 14, 2018:

- communications with and between CBS Counsel (whether outside or in-house counsel) and any officer or director of CBS; and
- communications between the (i) members of the special committees of the CBS board formed to consider a potential CBS/Viacom transaction or committee counsel, on the one hand, and (ii) CBS Counsel, on the other hand.

7. As discussed below, the CBS committees were formed to consider a potential CBS/Viacom transaction, and the NAI Parties recognize that communications between the committee members and *committee counsel* for the purpose of facilitating the rendition of legal advice and within the scope of the

committees' mandates remain privileged and can be shielded from disclosure to the NAI Affiliated Directors who were not clients of committee counsel.

8. But the NAI Affiliated Directors also reasonably expected that, until they were told otherwise, CBS Counsel continued to represent all Board members as joint clients. They had no reason to conclude that CBS Counsel had become adverse to them.

9. It is well settled that communications between counsel and one or more of its joint clients are not privileged against other joint clients, and this Court has consistently enforced that rule in the context of board members who are joint clients of company counsel. Thus, communications between CBS Counsel and management or other directors cannot be shielded from disclosure to the NAI Affiliated Directors, whether those communications took place before or after the formation of the special committees. Likewise, communications between the special committees or the committees' counsel and CBS Counsel cannot be shielded from disclosure to the NAI Affiliated Directors.

10. The CBS Parties take the remarkable position that adversity between CBS and NAI was obvious – *all the way back to 2005* – because that is when CBS split from Viacom, wanted to be run independently, yet had a controlling stockholder. In other words, according to the CBS Parties, CBS Counsel was never really counsel and was always adverse to NAI's representatives on the Board. As

explained below, this is nothing more than a Hail-Mary argument designed to shield secret communications around the origin of the Dilutive Dividend.

11. For the reasons explained herein, the Court should order the CBS Parties to produce responsive privileged materials to which the NAI Affiliated Directors are entitled as joint clients.³

BACKGROUND

12. NAI has beneficially owned approximately 80% of CBS's voting stock since CBS split from Viacom Inc. ("Viacom") in 2005. (CBS Compl. ¶ 25.) Wachtell, Lipton, Rosen & Katz has served as outside legal counsel to CBS and the Board since that time.

13. On September 29, 2016, NAI asked the boards of CBS and Viacom to consider a potential combination of the two companies, and both boards formed special committees to explore a possible merger. The CBS special committee (the "2016 Committee") retained White & Case LLP, and later, Weil, Gotshal & Manges

³ The NAI Parties are not seeking production of privileged communications between members of the CBS special committees and committee counsel relating to matters within the scope of the committees' mandates. In addition, although they reserve the right to do so, the NAI Parties are not at this time seeking production of otherwise privileged communications between members of the committees and their counsel that related to matters outside the committees' mandates. When the NAI Parties receive the CBS Parties' privilege logs, they will review any entries relating to communications between the special committees or committee counsel and members of CBS management on a case-by-case basis to determine if those communications were in furtherance of legal advice and thus privileged.

LLP (“Weil”) as its legal counsel. The 2016 Committee process lasted less than two and half months, and ended without a transaction. (*Id.* ¶ 47.)

14. In 2018, CBS and Viacom formed special committees to again consider a potential CBS/Viacom combination. The CBS special committee (the “2018 Committee”) again retained Weil. The 2018 Committee was authorized to act for the purpose of “consider[ing], negotiat[ing], and oversee[ing]” a potential CBS/Viacom combination, including, if appropriate, “to report its recommendation” in favor of or against that potential transaction. (*Id.* ¶ 53.) Importantly, the resolutions forming both the 2016 and 2018 Committees provided that the transaction would not be approved by the Board or recommended to stockholders without a favorable recommendation of the committee.

15. According to the CBS Complaint, the 2018 Committee worked “during the week of May 7, 2018 and continuing over the weekend on May 11-13,” and at some point during that time, “finally determined that a CBS/Viacom merger is not in the best interests of the CBS stockholders.” (*Id.* ¶ 67.) But that rejection of the deal was not communicated to the NAI Affiliated Directors. Instead, and despite already deciding not to recommend the merger, the 2018 Committee continued work on a covert plan to issue the Dilutive Dividend. (*See id.* ¶ 75.) From what the NAI Parties can tell from the limited documents produced thus far in discovery, members of the 2018 Committee or counsel to the 2018 Committee communicated with

members of CBS management, other directors, and CBS Counsel regarding that scheme. Indeed, according to documents produced thus far, it appears that the concept of the dividend may have been in the works at least as early as March 29, 2018, with Mr. Moonves and CBS Counsel present during those discussions – although the NAI Parties have no insight into who first raised the idea of a dividend, when, or why.

16. NAI and its representatives on the Board were kept in the dark about these machinations until the morning of May 14, when CBS filed suit and simultaneously announced that it had scheduled a special Board meeting (the “Special Meeting”) on less than 3 days’ notice to vote on the Dilutive Dividend. (*Id.* ¶¶ 75, 76.)

17. Before May 14, neither CBS, the Board, the 2018 Committee, nor any of their advisors informed NAI or its representatives on the Board that they were considering taking action to dilute or otherwise alter NAI’s voting power. (NAI Compl. ¶ 106.) Nor had CBS counsel ever informed the NAI Affiliated Directors that counsel was no longer representing them or was representing clients adverse to them with respect to any issue. Indeed, to this day, CBS counsel continues to represent one of the NAI Affiliated Directors, Mr. Andelman, in stockholder

litigation in this Court challenging conduct by the Board related to NAI, Mr. Redstone, and Ms. Redstone.⁴

18. On June 11, after the parties' respective suits were consolidated, the NAI Parties, through their counsel, wrote to counsel for the CBS Parties to confirm their agreement that the NAI Affiliated Directors are joint clients of CBS Counsel and entitled to all communications involving such counsel before May 14, 2018. In a June 15 response letter (the "June 15 Letter"), the CBS Parties stated that they intended to withhold such communications from production. The NAI Parties responded in a June 18 letter, and the parties met and conferred regarding privilege issues on June 21 and June 26. CBS continues to maintain its positions that the NAI Parties are not entitled to the communications at issue.

ARGUMENT

I. CBS And Its Counsel Cannot Assert The Attorney-Client Privilege Or The Work Product Doctrine Against The NAI Affiliated Directors For Communications Before May 14, 2018.

19. As a general rule, "a corporation cannot assert the privilege to deny a director access to legal advice furnished to the board during the director's tenure."⁵ The rationale for this rule is that directors are joint clients with respect to "legal

⁴ See *Feuer v. Redstone, et al.*, C.A. No. 12575-CB.

⁵ *Kalisman*, 2013 WL 1668205, at *4 (quoting *Moore Bus. Forms, Inc. v. Cordant Holdings Corp.*, 1996 WL 307444, at *4 (Del. Ch.)).

advice ... rendered to the corporation through one of its officers and directors.”⁶ “Because the attorney-client privilege belongs to the client, it would be perverse to allow the privilege to be asserted *against* the client.”⁷ The same rule applies to work product.⁸ As a result, a director’s right to information is “essentially unfettered.”⁹

20. Ms. Redstone has been a director of CBS since it split from Viacom in 2005. She is therefore a joint client legally entitled to receive legal advice rendered by CBS Counsel to CBS or any of its directors. Neither CBS nor the Board can assert privilege to withhold information from Ms. Redstone or the other NAI Affiliated Directors. One joint client “cannot assert the privilege against the other if they subsequently become adversaries.”¹⁰ Moreover, because the NAI Affiliated Directors are NAI’s representatives on the Board, NAI is entitled to the same privileged information in discovery to which the NAI Affiliated Directors are entitled.¹¹

⁶ *Kalisman*, 2013 WL 1668205, at *4 (internal quotations and citations omitted); *see Moore*, 1996 WL 307444, at *7 & n.4; *Kirby v. Kirby*, 1987 WL 14862, at *7 (Del. Ch.).

⁷ *Moore*, 1996 WL 307444, at *6.

⁸ *Kalisman*, 2013 WL 1668205, at *7 (“A law firm cannot invoke the work product doctrine against its own client.”). References in this motion to privileged material also include work product.

⁹ *Schoon v. Troy Corp.*, 2006 WL 1851481, at *1 & n.8 (Del. Ch.).

¹⁰ *Kalisman*, 2013 WL 1668205, at *4 (internal quotations and citations omitted).

¹¹ *Kalisman*, 2013 WL 1668205, at *6 (“[W]hen it is understood that the director acts as the stockholder’s representative, then the stockholder is generally entitled to

II. “Sufficient Adversity” Did Not Exist Before May 14, 2018.

21. The CBS Parties can only invoke privilege against the NAI Affiliated Directors for periods after “sufficient adversity existed between them such that [the NAI Affiliated Directors] could no longer have a reasonable expectation that they were clients of [CBS’s] counsel.”¹² “As the party seeking to assert privilege, [CBS] has the burden to establish when sufficient adversity existed.”¹³ As this Court has repeatedly held, adversity perceived by counsel but undisclosed to a joint client is not sufficient.¹⁴

22. No adversity – at least none that was communicated to the NAI Affiliated Directors – existed with respect to the Dilutive Dividend or the purported reasons for such dividend until May 14, 2018, the day CBS and the 2018 Committee first informed the NAI Affiliated Directors of the proposed Dilutive Dividend.

the same information as the director”); *In re Oxbow Carbon LLC, Unitholder Litig.*, 2017 WL 898380, at *2 (Del. Ch.); *AOC Ltd. P’ship v. Horsham Corp.*, 1992 WL 97220, at *1 (Del. Ch.); *PWP Xerion Holding III LLC v. Red Leaf Resources, Inc.*, C.A. No. 2017-0235-JTL, at 47 (Del. Ch. May 22, 2018) (Transcript) (granting motion to compel production of company privileged communications because plaintiff stockholder had a representative on defendant’s board, even though the director was not a party to the litigation).

¹² *Oxbow*, 2017 WL 898380, at *1.

¹³ *Id.*

¹⁴ *Kalisman*, 2013 WL 1668205, at *5; *see also Oxbow*, 2017 WL 898380, at *2; *Kalisman v. Friedman*, C.A. No. 8447-VCL, at 27 (Del. Ch. May 8, 2013) (Transcript) (Ex. B hereto) (adversity did not exist before corporation “openly made clear to [the allegedly adverse director] that he was no longer part of the team”).

Before that time, the NAI Affiliated Directors had no knowledge of that secret plan, let alone knowledge that CBS Counsel was actively involved. Neither CBS nor its counsel ever informed the NAI Affiliated Directors that CBS Counsel no longer represented them along with the other CBS directors, nor did they evidence adversity sufficient to give rise to such an understanding. Until CBS and the 2018 Committee noticed the Special Meeting and sued the NAI Parties on May 14, the NAI Affiliated Directors had a reasonable expectation that they remained joint clients of CBS Counsel. Because CBS and the other directors “chose to respond in secret and to conceal their activities ... it would be inequitable to give them the benefit of an earlier date” to determine sufficient adversity.¹⁵

23. In its June 15 Letter, CBS took the position that sufficient adversity existed since “at the very latest” September 2016 “as to all matters related to the potential CBS/Viacom transaction, including the [2018] Committee’s eventual decision to recommend the stock dividend.” (June 15 Letter at 2.) In an even more sweeping contention, the June 15 Letter argues that the NAI Affiliated Directors should *never* have reasonably expected to be joint clients of CBS Counsel, based on an amorphous “specter of controller overreach” allegedly existing since 2005. (June 15 Letter at 2.) Neither contention comes close to establishing sufficient adversity

¹⁵ *Kalisman*, 2013 WL 1668205, at *5.

to demonstrate that the NAI Affiliated Directors reasonably expected that CBS Counsel no longer represented them as joint clients.

A. The Creation Of The Committees Did Not Establish Sufficient Adversity As To Either Category Of CBS Counsel Communications.

24. For several reasons, CBS is incorrect that formation of the special committees to consider a potential transaction with Viacom established sufficient adversity between CBS Counsel and the NAI Affiliated Directors such that they no longer had a reasonable basis to believe CBS Counsel represented them. *First*, the NAI Affiliated Directors did not cease to be joint clients of the Company's counsel upon the formation of either special committee to consider a potential Viacom/CBS combination. Those committees were formed specifically to consider a potential combination of CBS/Viacom, and had the authority to say no. The 2016 Committee process ended that year with no transaction (CBS Compl. ¶ 47). A new special committee process was not formed until February 2018, again to consider a potential Viacom/CBS transaction and again having the power to say no. The formation of committees to consider a potential transaction—represented by separate committee counsel and with the power to say no—did not create adversity between NAI and CBS Counsel, and no one advised the NAI Affiliated Directors that because a special committee was formed, they could no longer rely on CBS Counsel.

25. *Second*, while the Committees may assert privilege to shield communications with *committee counsel* relating to the Committees' consideration of a possible CBS/Viacom combination, CBS cannot use the formation of those Committees to cut the NAI Affiliated Directors off from communications involving CBS Counsel. This is true both for communications between CBS Counsel and management or other directors in which the Committees and committee counsel were not involved at all and for communications between the Committees or committee counsel, on the one hand, and CBS counsel, on the other. The Committees were formed for the purpose of evaluating and negotiating a potential CBS/Viacom combination, and to allow the CBS/Viacom merger discussions to be conducted outside the presence of the NAI Affiliated Directors and management due to NAI's ownership interest in both CBS and Viacom and the inherent conflicts of management in any proposed business combination. The Committees thus retained separate counsel. The NAI Affiliated Directors had no expectation that they would be within the circle of privilege for communications between committee members and *committee counsel*.

26. But the NAI Affiliated Directors remained joint clients of CBS Counsel. Indeed, one of the purposes of forming the Committees and having them retain their own, separate counsel was so counsel to CBS and the Board could continue to serve in that role, representing all Board members jointly.

27. It is well settled that communications between counsel and one or more of its joint clients cannot be shielded from disclosure to other joint clients.¹⁶ Thus, communications between CBS Counsel and management or other members of the CBS Board cannot be shielded from the NAI Affiliated Directors, who were joint clients. The fact that the Committees were formed with their own counsel means that the NAI Affiliated Directors were not joint clients of committee counsel, but it in no way changes the fact they remained joint clients of CBS Counsel.

28. The rule is no different with respect to communications between the Committees or committee counsel, on the one hand, and CBS Counsel, on the other. The Committee members and committee counsel knew that CBS Counsel represented all directors and that the Committees had retained their own counsel for precisely that reason. In choosing to communicate with CBS Counsel, they knew or should have known that privileged communications could not be shielded from other joint clients of CBS Counsel.

29. *Third*, and critically, even assuming for the sake of argument that CBS Counsel believed following the formation of the 2016 Committee that it had become adverse to the NAI Affiliated Directors, counsel was obligated to disclose any such perceived conflict and inform the NAI Affiliated Directors they were no longer

¹⁶ See *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 366 (3d. Cir. 2007) (citing Del. R. Evid. 502(d)(6)); *Kalisman*, 2013 WL 1668205, at *4.

represented by CBS Counsel. No such disclosures were made. Thus, the NAI Affiliated Directors had no reason to believe they were no longer represented as joint clients of CBS Counsel.¹⁷

B. No Adversity Existed By Virtue Of An Alleged “Specter of Controller Overreach.”

30. The CBS Parties’ back-up argument – that there was always wholesale adversity between CBS and NAI due to an omnipresent “specter of controller overreach” (their words) – is a throw-away that finds no support in Delaware law. CBS Counsel has actively advised the full Board for years on matters relating to NAI’s control, including public disclosures and the annual election of directors. It is frankly shocking for CBS to claim now, for the first time, that CBS Counsel purportedly viewed the NAI Affiliated Directors as adverse and not as clients during that whole time but nonetheless conveyed legal advice they could rely upon.¹⁸

31. Moreover, this Court has consistently rejected efforts to establish the requisite adversity by reference to such generalized allegations, even when there

¹⁷ See *Kalisman*, 2013 WL 1668205, at *5; *PWP Xerion Holding III LLC v. Red Leaf Resources, Inc.*, C.A. No. 2017-0235-JTL, at 48 (Del. Ch. May 22, 2018) (Transcript).

¹⁸ The “specter of controller overreach” argument is also inconsistent with the allegations of the CBS Parties’ Verified Amended Complaint, which alleges in the estoppel claim that the CBS Parties reasonably relied since 2005 on a belief that NAI would never exercise its control and that NAI is therefore somehow estopped from challenging the Dilutive Dividend.

existed open hostility between the corporation and a stockholder or the stockholder's board representative.¹⁹ Indeed, neither “burgeoning tension”²⁰ nor explicit threats of litigation²¹ are enough to cut off the joint client relationship between directors and company counsel. Rather, this Court has held that sufficient adversity requires a direct manifestation that company counsel would no longer communicate freely with all members of the board.²²

32. A generalized allegation of a “specter of controller overreach” therefore cannot justify excluding the NAI Affiliated Directors from legal advice rendered to CBS or other CBS directors by counsel who represented them jointly.²³

* * *

33. For the foregoing reasons, sufficient adversity did not exist before May 14, 2018. The NAI Parties are entitled to access all privileged communications involving CBS Counsel before that date, whether between CBS Counsel and

¹⁹ *SBC Interactive, Inc. v. Corp. Media Partners*, 1997 WL 770715, at *6 (Del. Ch.); *Kalisman*, 2013 WL 1668205, at *5; *see also Oxbow*, 2017 WL 898380, at *1.

²⁰ *PWP Xerion Holding III LLC v. Red Leaf Resources, Inc.*, C.A. No. 2017-0235-JTL, at 48 (Del. Ch. May 22, 2018) (Transcript).

²¹ *Kalisman v. Friedman*, C.A. No. 8447-VCL, at 26-28 (Del. Ch. May 8, 2013) (Transcript) (sufficient adversity did not exist even though stockholder affiliated with director had threatened litigation and commenced a proxy contest).

²² *Oxbow*, 2017 WL 898380, at *1 (company triggered sufficient adversity only when its counsel wrote to the investors' counsel informing them that the investors were not entitled to any information regarding company counsel's advice to the company).

²³ *Kalisman*, 2013 WL 1668205, at *5; *Oxbow*, 2017 WL 898380, at *1.

management or other directors or between CBS Counsel and the Committees or committee counsel.

CONCLUSION

34. The NAI Parties request that the Court grant the motion to compel and enter an order in the form submitted herewith.

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Order Granted

Dated: June 28, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 2018, a copy of the foregoing document was served via *File & ServeXpress* upon the following attorneys of record:

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