



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

**THE NAI PARTIES’ MOTION TO COMPEL PRODUCTION OF
IMPROPERLY WITHHELD DOCUMENTS
POST-DATING CREATION OF 2016 SPECIAL COMMITTEE**

National Amusements, Inc., NAI Entertainment Holdings LLC (together, “NAI”), Shari Redstone, and Sumner Redstone (collectively, the “NAI Parties”), through their undersigned counsel, move pursuant to Chancery Court Rules 26, 34, and 37 to compel the production of certain documents improperly withheld as privileged by CBS Corporation (“CBS”) and the CBS directors and officers named as defendants (the “CBS Parties”).

INTRODUCTION

1. The Court’s July 13, 2018 letter decision (the “Opinion” or “Op.”) recognized that the members of the CBS board affiliated with NAI are joint clients of CBS’s in-house and outside counsel (“CBS Counsel”) and have unfettered access to legal advice rendered by CBS Counsel to CBS or other directors absent implementation of “appropriate governance procedures” that put the NAI-affiliated directors on notice that they no longer could reasonably expect to be clients of CBS

Counsel.¹ The Court determined that by forming special committees in 2016 and again in 2018 to consider a potential CBS/Viacom merger, CBS employed appropriate governance procedures that openly put the NAI-affiliated directors on notice that they would be segregated from privileged communications relating thereto.²

2. But the Court held that privileged communications with CBS Counsel could be withheld from production only if they were undertaken “in aid of the process of either of the Special Committees.”³ Beyond those specifically delineated communications, the Court granted the NAI Parties’ motion, finding that “no factual basis has been identified to support the conclusion that the NAI-affiliated directors were made aware...that CBS Counsel was not representing them jointly with the other CBS directors with respect to any matter *other than the matters falling within the purview of the Special Committees for which CBS Counsel provided assistance.*”⁴

¹ Op. at 10-12.

² *Id.* at 15.

³ *Id.* at 17-18; *see also id.* at 17 (“in aid of the process undertaken by either of the Special Committees”); Order Granting in Part and Denying in Part the NAI Parties’ Motion to Compel ¶ 3.b.

⁴ Op. at 18 (emphasis in original).

3. The CBS Parties have withheld or redacted numerous communications that, even as revealed by the sparse privilege descriptions provided, were not “undertaken in aid of the process of ... the Special Committees.”

4. First, the CBS Parties have improperly withheld or redacted communications occurring between December 12, 2016 and February 1, 2018, during which time no special committee existed.

5. Second, with respect to communications occurring when the special committees were operating (September 29, 2016 – December 12, 2016 and February 1, 2018 – May 14, 2018), the CBS Parties have improperly withheld documents that do not relate to and are not in aid of the committees’ consideration of a potential CBS/Viacom combination. These include communications regarding executive compensation and retention issues, executive employment agreements, Nominating and Governance Committee matters, and the CBS annual meeting.

6. Third, with respect to the few TigerText⁵ communications that survived destruction by the CBS Parties after they contemplated and commenced litigation, the CBS Parties have improperly redacted communications between members of CBS management and in-house counsel that likely are not privileged and in all

⁵ TigerText is a self-destructing messaging system.

events could not have been legal advice in aid of the special committee process under CBS's own policies.

7. The Court should order all of these documents produced or review them *in camera*.

BACKGROUND

8. In September 2016, NAI requested the boards of CBS and Viacom to consider a combination.

9. On September 29, 2016, the CBS board (the "Board") formed a special committee of independent directors (the "2016 Special Committee") "for the purpose of considering, negotiating and overseeing the Potential Transaction, including if appropriate recommending in favor of or against the Potential Transaction to the Board and stockholders (the 'Special Committee Matters')." ⁶ The 2016 Special Committee retained its own, separate legal counsel.

10. After less than two and a half months, the merger discussions were called off on December 12, 2016, ⁷ and the 2016 Special Committee was disbanded. ⁸

11. On February 1, 2018, the Board formed a second special committee (the "2018 Special Committee") "for the purpose of considering, negotiating, and

⁶ Op. at 4.

⁷ CBS Am. Compl. ¶ 47.

⁸ Ex. 1 at CBSNAI00012465; Ex. 2 at 96:5-101:4.

overseeing the potential combination” of CBS and Viacom.⁹ The 2018 Special Committee also retained its own, separate legal counsel.

12. The 2018 Special Committee’s work concluded at some point during the weekend of May 11-13, 2018, when it determined not to approve a CBS/Viacom merger.¹⁰ On May 14, 2018, the 2018 Special Committee recommended that the Board approve the issuance of the dilutive dividend and initiated this litigation.

13. As noted, the Opinion held that, for documents post-dating the creation of the 2016 Special Committee, the CBS Parties may not withhold from production privileged communications involving CBS Counsel except for those made “in aid of the process undertaken by either of the Special Committees.”¹¹

14. The CBS Parties have nonetheless withheld or redacted documents post-dating September 29, 2016 for which there is no basis for asserting privilege against the NAI Parties under the Court’s July 13 Opinion.

15. In response to a letter from the NAI Parties,¹² the CBS Parties agreed to re-review certain privilege log entries.¹³ The CBS Parties provided a revised log

⁹ Ex. 3 at CBS00000231.

¹⁰ CBS Am. Compl. ¶ 67.

¹¹ Op. at 17.

¹² Ex. 4.

¹³ Ex. 5.

on August 16 that continues to improperly withhold documents from after September 29, 2016 on the basis of privilege.

ARGUMENT

16. The CBS Parties bear the burden of demonstrating for each document withheld after the 2016 Special Committee's formation that the legal advice reflected therein was rendered in aid of the special committee processes.¹⁴ The CBS Parties have not met that burden as to numerous redacted and withheld documents.

I. Communications When No Special Committee Existed.

17. The CBS Parties' logs include documents from the period after the 2016 Special Committee was disbanded (December 12, 2016) and before the 2018 Special Committee was formed (February 1, 2018). During that time, there was no special committee in existence for CBS Counsel to aid. The privilege log descriptions for these documents provide no explanation as to how they were in aid of either the disbanded 2016 Special Committee or the not-yet-formed 2018 Special Committee.

18. With limited exceptions,¹⁵ the communications involving CBS Counsel during this period cannot have been related to or in aid of the processes of either

¹⁴ See *In re Oxbow Carbon LLC*, 2017 WL 898380, at *1 (Del. Ch. Mar. 07, 2017).

¹⁵ The CBS Parties' logs include certain entries dated between December 12, 2016 and February 1, 2018 that relate to draft meeting minutes of the 2016 Special Committee and the formation of the 2018 Special Committee in the days before it

special committee because neither was in existence. Thus, under the Court's July 13 Opinion, these documents cannot be withheld from production or redacted. Annex A hereto contains the CBS Parties' privilege log entries relating to this category of improperly withheld or redacted documents. All of them should be produced.

II. Communications Bearing No Connection To The Special Committees' Work Cannot Be In Aid Thereof.

19. With respect to documents and communications dated within the special committee time periods, the CBS Parties' logs include various communications that, based on the log descriptions and the unredacted portions of documents produced, do not contain legal advice on issues in aid of the work of the special committees. These include relevant communications about:

- Proxy statements,
- Executive compensation and employment agreements,
- Nominating and Governance Committee matters,
- Strategy Committee matters,¹⁶
- Legal proceedings concerning Mr. Redstone,

was formed. *See* CBS Log Nos. 264-65, 268-71, 274-79, 288-90, 333-370. The NAI Parties are not seeking production of those communications.

¹⁶ *See* Annex C for log entries related to the Strategy Committee included on the privilege log for counsel to the Strategy Committee, White & Case.

- CBS annual meeting issues,
- CBS Board materials,
- NAI's actions by written consent at Viacom,
- A video of Mr. Redstone taken at his home by CBS Board member Arnold Kopelson without Mr. Redstone's consent,¹⁷
- The composition of the Board and committees thereto, including considerations of qualified independent directors, and
- Concerns raised about the fitness of CBS Board member Chad Gifford.

20. The log does not suggest that these documents have any bearing on the special committees' work and certainly does not show that the documents reflect legal advice "in aid of" the committees' work. Further demonstrating how divorced these communications apparently are from the special committee process, most only include members of management or management and in-house counsel, and do not involve committee members, committee counsel, or even outside CBS counsel. In fact, many log entries include personal counsel for Messrs. Moonves and Iannellio.

¹⁷ Mr. Kopelson's recently revised interrogatory responses state [REDACTED]

The suggestion that personal counsel to CBS executives provided legal advice in aid of the special committee process belies reality, especially when the log description for the communications purport to concern draft employment agreements, the “viability of the Special Committee process,” “media coverage,” and “CBS management and effe[c]t of a potential merger.” Indeed, as to these issues, management appears to be adverse to the Company and special committees, which were negotiating a merger transaction that might have impacted management.

21. Annexes B and C hereto contain the privilege log entries for documents dated within the special committee time periods but for which the CBS Parties’ have not satisfied their burden of showing they were in aid of either special committee process. The Court should order all of these documents produced in unredacted form or should review the documents *in camera*.

III. The Redacted TigerTexts Were Not In Aid Of The Special Committee.

22. TigerText is a messaging system that, unlike ordinary text messages, automatically deletes messages that are sent and received from the user’s device.¹⁸ CBS began using TigerText in November 2015 and enacted a policy governing

¹⁸ TigerText is marketed for the use by doctors and nurses to communicate in a manner compliant with HIPAA, but is widely known to be more commonly used by individuals who do not wish to create a record of communications. *See, e.g.*, “TigerText: The App for Spies and Cheaters,” PC World (Feb. 27, 2010).

employee use of the application.¹⁹ The policy prohibits employees from using TigerText for communications concerning issues that could be subject to litigation.

23. [REDACTED]

[REDACTED] As a result, the vast majority of TigerTexts have been lost and cannot be produced.²²

¹⁹ Ex. 7.

²⁰ According to CBS's privilege log, [REDACTED]

²¹ [REDACTED]

²² The NAI Parties reserve the right to move before or during trial for one or more orders precluding the CBS Parties from introducing evidence and testimony on particular topics and for the Court to make adverse inferences against the CBS

24. CBS has, however, produced a relatively small number of TigerTexts that survived. Those messages show that CBS management and in-house counsel used the ephemeral messaging application to scheme, plot, and speculate. Thus, the TigerText communications provide crucial, real-time insight into the actions and motivations of CBS management, who were the driving force pushing for the dilutive dividend.

25. Assuming that CBS senior management and in-house counsel complied with their own policy in early May 2018 – namely, that TigerTexts could not be used for topics and issues relating to potential litigation – their use of TigerText could not have been to facilitate the rendition of legal advice in aid of the 2018 Special Committee, which was actively planning to commence litigation concerning the dilutive dividend at the times of these communications.

26. Indeed, the privilege log entries and unredacted portions of these messages make clear that the redactions are unfounded. The privilege descriptions for several redacted TigerTexts show that the purported legal advice relates to issues unrelated to the 2018 Special Committee, such as restrictions on securities

Parties as a result of the CBS Parties' spoliation of critical evidence, both during the time they were planning this litigation and after they filed this litigation.

transactions, the CBS annual meeting, and a video of Sumner Redstone taken without his consent by CBS director Arnold Kopelson.²³

27. Many of the TigerTexts were sent by or to members of CBS management who concede in the unredacted portions of the message that they are not “in [the] loop”²⁴ with respect to any potential transaction. For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁵ Later in that same conversation, a TigerText is redacted in its entirety.²⁶ In another heavily redacted²⁷ conversation spanning multiple TigerTexts, one of the parties [REDACTED]

[REDACTED]

[REDACTED]²⁸

²³ As noted above, [REDACTED]

²⁴ [REDACTED]

²⁵ Exs. 11 & 12.

²⁶ Ex. 13.

²⁷ Exs. 14-27.

²⁸ Ex. 15.

28. The privilege log entries for the redacted TigerText messages during this period are included in Annex D hereto. There is no credible basis for the CBS Parties to contend that these TigerTexts reflect privileged communications in aid of the special committees and none has been offered. The TigerTexts are among the most relevant evidence produced to date of the motivations of management to push through a self-interested dilutive dividend.

29. Testimony by the CBS witnesses deposed to date underscores the need for review and production of the full unredacted TigerTexts. It is both troubling and telling that each of the three CBS management members who have testified so far have given testimony that is flatly contradicted by the few TigerTexts that have been produced. For example, Larry Tu, CBS's General Counsel, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁹ Ex. 2 at 267:16-268:2.

30. When shown the TigerText, Mr. Tu did not claim that his contradictory testimony was inadvertent or due to a failed recollection, and CBS counsel did not even try to elicit that explanation on redirect. Similarly, Adam Townsend (CBS's Head of Investor Relations) and Anthony Ambrosio (CBS's Chief Administrative Officer and Chief Human Resources Officer) repeatedly testified, among other things, that [REDACTED]

This testimony is flatly contradicted by numerous TigerTexts that Messrs. Townsend and Ambrosio exchanged with each other and other members of senior management.³²

31. This inaccurate testimony further establishes that the withheld TigerTexts are unlikely to contain privileged advice in aid of the special committee process, but that they are likely to undercut CBS's claim that the dilutive dividend was the result of the considered judgment of the 2018 Special Committee untainted by self-interested management members.

³⁰ Ex. 28.

³¹ Ex. 8 at 236:19-237:9; Ex. 29 at 281:17-282:7

³² Exs. 30-34.

32. The few TigerTexts that still exist should be produced in unredacted form or, in the alternative, reviewed by the Court *in camera* to determine whether the redactions are appropriate.

CONCLUSION

33. The NAI Parties respectfully request that the Court compel the CBS Parties to produce all three of the above categories of communications, or, in the alternative, review the documents *in camera* to determine if the communications were in fact made in aid of the special committee process.

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