

## Chancery Court Enforces Privileged Communications Provision To Protect Seller Following Merger

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In *Shareholder Representative Services LLC v. RSI Holdco, LLC*, C.A. No. 2018-0517-KSJM (Del Ch. May 29, 2019) the Court of Chancery held that a privileged communications provision in a merger agreement protected the pre-merger communications between the seller and the seller's legal counsel in spite of the buyer's insistence that the privilege had transferred in the merger or had been waived.

Defendant RSI Holdco, LLC ("Holdco") acquired Radixx Solutions International ("Radixx") in a merger transaction in which Shareholder Representative Services LLC ("SRS") served as the representative of Radixx's selling stockholders and optionholders. After SRS filed suit claiming that Holdco breached the merger agreement, Holdco discovered that the computer systems acquired in the merger contained pre-merger emails between Radixx and its legal counsel Seyfarth Shaw LLP ("Seyfarth") and Holdco sought to use the emails as evidence in the suit. When SRS objected, Holdco filed a Motion for Disposition of Privilege Dispute.

The Court first examined the merger agreement, which provided that "any privilege attaching as a result of [Seyfarth] representing [Radixx] . . . in connection with the transaction contemplated by this Agreement shall survive the [merger's] Closing and remain in effect; *provided*, that such privilege from and after the Closing shall be assigned to and controlled by [SRS]." The agreement further provided that no party to the transaction "may use or rely on any [privileged attorney client communications between Seyfarth and Radixx] in any action or claim against or involving any of the parties hereto after the Closing."

The Court relied heavily on *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP* 80 A.3d 155 (Del. Ch. 2013) in its analysis and found that, while in the absence of any contractual agreement otherwise DGCL § 259 would normally transfer all privilege to the surviving corporation in a merger, parties to such a merger may "use their contractual freedom to exclude from the transferred assets the attorney-client communications they wish to retain as their own." Because the privileged communications provision in this merger agreement did just that, the Court held that the privilege had not been transferred in the merger. The Court also rejected Holdco's assertion that the privilege had been waived because SRS did not affirmatively seek to retain the computers on which the privileged communications were stored. Finding no authority to support Holdco's argument, the Court reasoned that this interpretation of the merger agreement was contrary to the plain meaning of the language and would render the "no use" provision meaningless. The Court also cited a provision of the merger agreement which required that all parties to the transaction "take the steps necessary to ensure that any privilege . . . remain in effect and be assigned to and controlled by [SRS]." The Court reasoned that "Holdco cannot argue that its own failure to preserve privilege should now inure to its benefit." Thus, the Court denied Holdco's motion and granted SRS's cross motion for entry of a protective order.

[\*Shareholder Representative Services LLC v. RSI Holdco, LLC, C.A. No. 2018-0517-KSJM\* \(Del Ch. May 29, 2019\)](#)

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