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December 13, 2013

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Re: *Jefferson v. Dominion Holdings, Inc.*  
C.A. No. 8663-VCN  
Date Submitted: November 13, 2013

Dear Counsel:

Although its application is captioned as an Emergency Motion for a Protective Order, Defendant Dominion Holdings, Inc. d/b/a Source4 (“Source4”) seeks to prevent the use at trial of inadvertently produced privileged communications.

Early in this action, brought by Plaintiff Rodney Jefferson (“Jefferson”), under 8 *Del. C.* § 220 for the inspection of Source4’s books and records, the parties

entered into a Stipulation and Order Governing the Production and Exchange of Confidential Information (the “Confidentiality Stipulation”)<sup>1</sup> which established

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<sup>1</sup> Def.’s Emerg. Mot. for a Protective Order, Ex. A. Paragraph 15 of the Confidentiality Stipulation provides:

If Discovery Material that is subject to a claim of attorney-client privilege, attorney work product, or any other applicable privilege is inadvertently produced or disclosed (“Inadvertent Production Material”), such inadvertent production shall in no way prejudice or otherwise constitute a waiver of, or estoppel as to, any claim of attorney-client privilege, work product, or other applicable privilege.

(a) a claim of inadvertent production shall constitute a representation by that Party that the Inadvertent Production Material has been reviewed by an attorney for such Party and that there is a good faith basis for such claim of inadvertent production;

(b) if a claim of inadvertent production is made, pursuant to this Stipulation, with respect to Discovery Material then in the custody of another Party, that Party shall: (i) refrain from any further examination or disclosure of the claimed Inadvertent Production Material; (ii) if requested, promptly make a good faith effort to return the claimed Inadvertent Production Material and all copies thereof (including summaries and excerpts) to counsel for the Producing Party, or destroy all such claimed Inadvertent Production Material (including summaries and excerpts) and certify in writing to that fact; and (iii) not use the Inadvertent Production Material for any purpose until further order of the Court;

(c) a Party may move the Court for an order compelling production of the claimed Inadvertent Production Material. The motion shall be filed under seal and shall not assert as a ground for entering such an order the fact or circumstance of the inadvertent production. While such a motion is pending, the Discovery Material in question shall be treated in accordance with Paragraph 16(b) [sic] above;

(d) if a Party, in reviewing Discovery Material it has received from the other Party or any non-Party, finds anything it believes in good faith may be Inadvertent Production Material, that Party shall: (i) refrain from any further examination or disclosure of the potentially Inadvertent Production Material; (ii) promptly identify the material in question to the Producing Party (by document number or other equally precise description); and (iii) give the

that the inadvertent production of privileged materials would not constitute a waiver. In accordance with the Confidentiality Stipulation, when a party realizes that privileged material has been inadvertently produced, it would notify the other party which would then refrain from further use of the inadvertently produced documents and endeavor to return or to destroy them. The party receiving the inadvertently produced materials could then seek the Court's authority to use them.

During the deposition of Source4's Chief Executive Officer, Daniel Siadak ("Siadak"), Source4's counsel recognized that some of the documents used by Jefferson's counsel were privileged. The documents included a cover email from Source4's corporate counsel and a draft response to Jefferson's books and records request.<sup>2</sup> At the next break in the deposition, Source4's counsel advised that the materials were privileged and had been inadvertently produced.

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Producing Party ten (10) days to respond as to whether the material was, in fact, inadvertently produced. If the Producing Party makes a claim of inadvertent production, the provisions of Paragraph 16(b) [sic] above shall apply.

<sup>2</sup> The Court has not reviewed the privileged documents (or the deposition testimony based on them).

In a books and records action, the focus tends to be on the plaintiff's proper purpose and the scope of her request. *See, e.g.*, 8 *Del. C.* § 220(b) ("Any stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right

Jefferson's counsel agreed to destroy the documents but asserted that they had not been produced inadvertently. In addition, Jefferson's counsel would not agree to delete from the deposition transcript any testimony regarding the materials.

The documents at issue contain communications from Source4's counsel, and there is little doubt that they were—at least initially—properly subject to a claim of attorney-client privilege.<sup>3</sup> Thus, the question is whether the production of privileged materials was inadvertent. That question is further complicated by Source4's counsel's allowing questions at the deposition about the privileged materials. Both production and use at deposition of the materials preceded the raising of any privilege concerns.

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during the usual hours for business to inspect for *any proper purpose, . . .*" (emphasis added)); *Highland Select Equity Fund, L.P. v. Motient Corp.*, 906 A.2d 156, 164 (Del. Ch. 2006), *aff'd sub nom.*, *Highland Equity Fund, L.P. v. Motient Corp.*, 922 A.2d 415 (Del. 2007) ("The statute defines 'proper purpose' as any purpose 'reasonably related to such person's interest as a stockholder.'" (citation omitted)); *Kortum v. Webasto Sunroofs, Inc.*, 769 A.2d 113, 119-20 (Del. Ch. 2000) ("Once the shareholder demonstrates its entitlement to inspection, it must also show that the scope of the requested inspection is proper, *i.e.*, that the books and records sought are 'essential and sufficient' to the shareholder's stated purpose." (citation omitted)). Thus, the "thinking" of the corporation's counsel ordinarily is of limited import.

<sup>3</sup> There also is no basis for concluding that Source4 intended to waive any privilege with the production of the documents.

The parties did not agree to the “claw back” of all privileged material that was produced without the knowing intent to do so. Inadvertence was the selected standard.<sup>4</sup> In addressing the inadvertence standard, the Court should assess: “(1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery and extent of disclosure; and (4) the overall fairness, judged against the care or negligence with which the privilege is guarded.”<sup>5</sup>

Only 330 pages of documents were produced. This is not an instance in which so many documents were produced that failure to claim privilege seems to have been an inevitability. Corporate counsel and trial counsel both reviewed the documents before their production. Both missed what seems to be a rather obvious claim of privilege. Part of the problem may have been the rush near a discovery deadline. Apparently, the bulk of the privileged information comprised only a few lines of a four-page document.

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<sup>4</sup> Inadvertent has been defined as “not focusing the mind on a matter; inattentive.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 586 (10th ed. 1993).

<sup>5</sup> *In re Kent Cty. Adequate Pub. Facilities Ordinances Litig.*, 2008 WL 1851790, at \*5 (Del. Ch. Apr. 18, 2008).

The process used by Source4 to review the materials produced for privilege was reasonable. Two lawyers—with different perspectives (corporate and trial)—reviewed the documents. It may be hard to understand why the privileged materials were missed among only 330 pages, but the number of pages is not determinative. Although perhaps rushed, there is no reason to doubt that an adequate commitment of resources was devoted to the review effort.

The questioned disclosure was limited in terms of the number of instances. To the extent that a balancing is appropriate, negligence, or lack of care, on the part of Source4 does not warrant overriding its appropriate concern for the attorney-client privilege as reflected in the Confidentiality Stipulation. Thus, the initial production was inadvertent and the provisions of the Confidentiality Stipulation are applicable.

That, however, does not end the inquiry. Counsel for Source4 allowed the use of the privileged information during the Siadak deposition without asserting the privilege when the documents formed the basis of the questioning. Was that failure a waiver or does it somehow undercut the assertion of inadvertence? Had

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too much time elapsed?<sup>6</sup> The privilege issue was brought to the attention of Jefferson's counsel at the next break in Siadak's deposition. That was not a delay that should defeat the privilege or the purposes of the Confidentiality Stipulation. Had the concern not been raised until after completion of the deposition, the result might be different. On these facts, even with the second chance, Source4's production of the privileged material and its allowing the follow-up deposition questioning, collectively, fall within the concept of inadvertence. Thus, the documents and the related deposition testimony may not be used at trial.<sup>7</sup> Accordingly, Defendant's Emergency Motion for a Protective Order is granted.<sup>8</sup>

**IT IS SO ORDERED.**

Very truly yours,

*/s/ John W. Noble*

JWN/cap

cc: Register in Chancery-K

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<sup>6</sup> The delay between production and the latter part of the deposition when privilege was first raised does not appear to have been unreasonable under the circumstances.

<sup>7</sup> The Court has not considered whether Jefferson's counsel should have recognized that the materials were privileged and likely not produced with the intent to waive the privilege.

<sup>8</sup> For the same reasons, Plaintiff's Motion to Compel the re-production of the privileged materials is denied.