

## CORPORATE AND SECURITIES LAW ALERT

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

### **Delaware Court Reaffirms that Legal Communications Involving Investment Bankers Are Privileged**

**June 22, 2010**

In the action styled *3Com Corporation v. Diamond II Holdings, Inc.*, C.A. No. 3933 – VCN (Del. Ct. Ch. May 31, 2010) (Noble, V.C.), a Delaware Court of Chancery recently reaffirmed that, in the context of a corporate transaction, communications made between a corporate client and its legal counsel which involve the corporate client's investment bankers are subject to the attorney-client privilege under Delaware law. Additionally, the court found that, even though many of the communications at issue originated from or were received in another state, they were privileged because the parties had selected Delaware law as the governing law of the merger agreement and had consented to the exclusive jurisdiction and venue of the state courts of Delaware for the resolution of any dispute arising out of the merger agreement.

A copy of the decision is [available here](#).

#### **The *3Com* Action**

On September 28, 2007, 3Com Corporation entered into a merger agreement with Diamond II Holdings, Inc., an entity which had been formed by Bain Capital Partners LLC for the purpose of acquiring 3Com. Huawei Technologies Co. Ltd. and its affiliates (collectively, "Huawei"), which are China-based companies, were also parties to the merger agreement. The parties terminated the merger agreement shortly after being informed by the Committee on Foreign Investment in the United States that the president would not approve the merger in respect of the committee's recommendation. 3Com filed an action to recover the \$66 million termination fee that was purportedly owed as a result of the failed merger.

#### **Legal Communications Involving Investment Bankers Are Privileged**

During the course of drafting and negotiating the merger agreement, 3Com, its legal counsel and its investment bankers engaged in various communications regarding the merger. Central to the outcome of the discovery motions filed in the *3Com* action was the determination of whether the laws of Delaware or Massachusetts regarding privilege would apply - a decision that would determine the legal protection to be afforded to such communications. In framing its analysis, the court noted that the majority of the disputed communications originated from or were received in Massachusetts but that the parties had selected Delaware law and Delaware as the forum for the resolution of any disputes arising under the merger agreement.

Thereafter, the court analyzed the difference in the manner in which Delaware and Massachusetts determine whether the attorney-client privilege is waived through certain third-party disclosure and found that Massachusetts courts espouse a more narrow interpretation of whether communications involving third parties, including investment bankers, are privileged. Specifically, the court noted that, in *Commissioner of Revenue v. Comcast*, the Massachusetts Supreme Judicial Court had recently held that disclosures made to a third party would preclude the application of the attorney-client privilege to such communications unless the third party's involvement was "necessary" for "effective consultation" between the client and legal counsel and that the "necessity element" means that the communication must be "more than 'just useful and convenient.'" Accordingly, in Massachusetts, the third-party's role must be to "clarify or facilitate" communications between the client and legal counsel such as when the third party serves as an interpreter or translator. Notably, *Comcast* addressed disclosures made to an accountant, though the language used and cases cited in the *Comcast* decision strongly suggest that the holding would be applied to disclosures made to other third-parties, including investment bankers.

In contrast, the court stated that Delaware employs a broader rule when determining whether communications are privileged and expressly reaffirmed that Delaware law permits the application of the attorney-client privilege to communications between a corporate client and its legal counsel which include an investment banker, especially within the context of a pending corporate transaction. Relying upon the seminal Delaware case styled *Jedwab v. MGM Grand Hotels, Inc.*, 1986 WL 3426 (Del. Ch. Mar. 20, 1986) in support of its reaffirmation, the court explained that Delaware law recognizes the need for consistent application of the privilege in the context of complex corporate transactions which necessarily require simultaneous collaboration (including the exchange of communications involving legal matters) between corporate clients, legal counsel and financial advisors.

Ultimately, the court determined that Delaware law regarding privilege applied to the parties' discovery motions and that, in accordance with settled Delaware precedent, the communications between 3Com and its legal counsel which concerned legal matters and which involved the investment bankers were privileged, regardless of the precise role of the investment bankers in or the place of origin or receipt of any such communication.

### **Recommended Practices**

Although Delaware law recognizes that the attorney-client privilege is applicable to legal communications which involve an investment banker, legal counsel should continue to take appropriate precautions to ensure the availability of the privilege regardless of the parties' selection of governing law and jurisdiction and venue provisions in applicable transaction documents.

### **Corporate Finance/1933 Act Subgroup**

Bass, Berry & Sims PLC's Corporate Finance/1933 Act Subgroup monitors and advises on developments in the area of initial public offerings, follow-on public offerings and private placements of equity and debt securities and Rule 144A offerings. If you have any questions regarding the issues addressed in this alert or if you would like to set up a meeting with us and your management team or board of directors regarding these developments, please feel free to

communicate with your regular contacts in our Corporate and Securities Group or any of the attorneys in our Subgroup listed below.

John A. Good	(901) 543-5901	<a href="mailto:jgood@bassberry.com">jgood@bassberry.com</a>
Laura R. Brothers	(615) 742-7705	<a href="mailto:lbrothers@bassberry.com">lbrothers@bassberry.com</a>
Helen W. Brown	(901) 543-5918	<a href="mailto:hwbrown@bassberry.com">hwbrown@bassberry.com</a>
Wes Scott	(901) 543-5983	<a href="mailto:wscott@bassberry.com">wscott@bassberry.com</a>

### Bass, Berry & Sims PLC Corporate and Securities Group

The Corporate and Securities Group includes the following subgroups comprised of our attorneys with a particular expertise who are focused on current trends and developments in these areas of the law. This Alert has been brought to you courtesy of the Corporate Finance/1933 Act subgroup.

#### Corporate Finance/1933 Act

Cross-Border Transactions

Executive Compensation

Financial Institutions

Joint Ventures

Periodic and Current Reporting

Real Estate Capital Markets

Shareholder Activism

Transactional Tax

Corporate Governance

Distressed M&A

Fiduciary Duties

Investor Relations/Earnings Releases

M&A Trends and Developments

Private Equity/Venture Capital

Securities Laws Liabilities/

SEC Priorities and Enforcement

Trading by Insiders/

Equity and Debt Repurchases

*The materials contained herein have been abridged from the statutory sources and should not be construed or relied upon for legal advice. Readers are urged to consult legal counsel concerning particular situations and specific legal questions.*

*To ensure compliance with requirements imposed by the IRS, we inform you that this message is not intended to be used, and cannot be used by the addressee or any other person for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code.*

150 Third Avenue South, Suite 2800 • Nashville, TN 37201 • (615) 742-6200

The Tower at Peabody Place • 100 Peabody Place, Suite 900 • Memphis, TN 38103 • (901) 543-5900

1700 Riverview Tower • 900 South Gay Street • Knoxville, TN 37902 • (865) 521-6200