

Delaware Chancery Court Grants Plaintiffs Right to Review Special Committee Report Regarding Backdating Activities

February 2008

A Delaware Chancery Court has granted the class action plaintiffs access to Maxim Integrated Products, Inc.'s (Maxim) special committee report detailing Maxim's directors' and officers' purported backdating activities. *Ryan v. Gifford*, 2008 WL 43699 (Del Ch. Ct. Jan. 2, 2008).

In response to allegations that Maxim had engaged in stock options backdating, the Maxim board created a special committee, composed of one director, to investigate and report regarding the allegations. The special committee hired its own counsel to conduct the investigation and ultimately found significant amounts of information regarding the supposed stock options backdating at Maxim. After completing this investigation, the special committee presented the report to the board of directors, permitting the other members of the board of directors to have their own personal attorneys present at the meeting. Additionally, portions of the report were made available to the SEC and NASDAQ.

On November 30, 2007, in connection with a derivative action pending against Maxim, the court granted the class action plaintiffs' motion to compel production of the contents of the report and the communications between the special committee and its counsel. See *Ryan v. Gifford*, 2007 WL 4259557 (Del. Ch. Ct. Nov. 30, 2007). Following that decision, Maxim moved for leave to take an interlocutory appeal regarding disclosure of the report and attorney communications. The court refused to grant interlocutory review. The court stated that it was established law that disclosure to third parties, which in this case included the other directors—acting in their personal capacity—and their personal attorneys, constituted a waiver of privilege. The court also noted that Maxim had not challenged the court's ruling that there was good cause to grant discovery despite any applicable privilege given the inability to access this information otherwise.

The court then explained its decision in more detail than in the prior November 30, 2007 ruling. The court stated that portions of the report were relied upon by both Maxim and the directors in their various motions before the court and stated that its decision "simply grants a *limited procedural right* to plaintiff—access to documents that defendants have expressly relied upon in support of their motion to dismiss." The court further explained that "[t]he decision would not apply to a situation (unlike that presented in this case) in which

board members are found to be acting in their fiduciary capacity, where their personal lawyers are not present, and where the board members do not use the privileged information to exculpate themselves." The court further stated if the directors desired to maintain the privilege, "the only thing that directors [could not] do under the decision is receive purportedly privileged material while acting in their personal (as compared to fiduciary) capacity."