

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

_____)
 ELM 3DS INNOVATIONS, LLC, a)
 Delaware limited liability company,)
)
 Plaintiff,)
)
 v.)
)
 SAMSUNG ELECTRONICS CO., LTD., a)
 Korean business entity,)
 SAMSUNG SEMICONDUCTOR, INC., a)
 California corporation,)
 SAMSUNG ELECTRONICS AMERICA,)
 INC., a New York corporation, and)
 SAMSUNG AUSTIN SEMICONDUCTOR,)
 LLC, a Delaware limited liability company,)
)
 Defendants.)
 _____)

C.A. No. 14-1430-LPS

REDACTED VERSION

**LETTER TO THE HONORABLE JENNIFER L. HALL FROM
PILAR G. KRAMAN REGARDING SAMSUNG DEFENDANTS' DISCOVERY LETTER
IN ADVANCE OF JULY 21, 2021, DISCOVERY HEARING (D.I. 422)**

Dated: July 12, 2021

In both transactions, based on the information Elm has provided to date, it appears that the Elm ownership interests may have been transferred without a corresponding action to make the transferee(s) members of Elm. Under applicable Delaware law, that would have left Elm without any members. 6 Del. C. § 18-702(b)(1), (3). It would also have automatically triggered Elm's dissolution. § 18-801(a)(4) (effective Aug. 1, 2015 to July 31, 2016); *see also Perry v. Neupert*, C.A. No. 2017-0290-JTL, 2019 WL 719000, at *32 (Del. Ch. Feb. 15, 2019) ("The transfer of a sole member's interest in a single-member LLC with an LLC agreement that lacked an automatic admission clause thus would result in the dissolution of the LLC.").

With respect to the first transaction, Elm contends that the instrument that created the Trust constitutes the necessary "written consent" for the Trust for become the lone member of Elm following Leedy's transfer of his ownership interests. *See* § 18-704(a) (effective Aug. 2, 2010 to July 31, 2016); Exhibit D. But that instrument

[REDACTED]

As for the second transaction, Elm has refused to provide any similar documentation that would allow Samsung to evaluate its position.

Only certain categories of persons may prosecute a lawsuit on behalf of a dissolved Delaware LLC. § 18-803(b). Epstein does not fall within any of those categories. *See* § 18-803(a) (applicable to LLCs whose certificate of formation was filed and effective prior to July 31, 2015). Therefore, Elm under the purported control of Epstein cannot prosecute this lawsuit because it lacks standing under Delaware law. *See* Fed. R. Civ. P. 17(b); *see also Paradise Creations, Inc. v. UV Sales, Inc.*, 315 F.3d 1304, 1308 (Fed. Cir. 2003) (evaluating a dissolved corporation's standing under the law of the state in which it was formed). Without knowing who has the authority to act on Elm's behalf with respect to this lawsuit, Samsung cannot be sure that any resolution reached in this matter would be binding on Elm.

[REDACTED]

Samsung disputes Epstein's ability to retroactively cure deficiencies with Leedy's transfer to the Trust. Elm must produce any further documents in its possession, custody, or control regarding Leedy's intentions with respect to the Trust and his transfer of ownership interests in Elm thereto. Such documents at least include any communications between Leedy, Epstein, and any other persons involved with creating the Trust.

[REDACTED]

The transfer of Elm ownership interests from the Trust to the Child Trusts raises many of the same potential issues as Leedy's previous transfer of such interests to the Trust. If Epstein in his purported role as trustee of the Trust did not affirmatively admit the Child Trusts as members at the time of the transfer from the Trust, Elm could have been left without any members and become dissolved (to the extent it was not already dissolved from Leedy's transfer to the Trust). Elm's concern that this occurred appears to have inspired [REDACTED]

Despite the implications for Elm's standing to maintain this litigation, Elm has refused to produce any discovery related to the Child Trusts. Elm should be required to produce any documents related to the Child Trusts that could affect Elm's standing, including documents regarding the following matters:

- The formation of the Child Trusts, including any certification, declaration, instrument, or agreement for each of the Child Trusts;
- The transfer of interests in Elm to the Child Trusts;
- The admission of the Child Trusts as members of Elm;
- Any other terms, conditions, requirements, or intentions for the Child Trusts;
- Epstein's authorization to act on behalf of the Child Trusts and/or on behalf of Glenn Leedy's estate (including any applicable portions of Leedy's will);
- Epstein's authorization from the Child Trusts' to act on Elm's behalf.

III. Elm Has Asserted Improper and Unsubstantiated Claims of Privilege

Elm has refused to produce a large number of documents based on deficient privilege claims. First, many of the entries in Elm's privilege log contain insufficient information to assess Elm's claim of privilege. *See* Exhibit E; Exhibit F at 1–2. Elm has the burden of providing such information. Fed. R. Civ. P. 26(b)(5)(A). Exhibit F identifies the privilege log entries lacking sufficient information. *Id.* at 1–2. The deficiencies with those entries include failing to identify the sender/recipient of particular communications, failing to identify the author of particular documents, and failing to provide a sufficient privilege description.

Second, Elm has claimed privilege over many documents either partially or entirely directed at business or other non-legal matters. *See* Exhibit E; Exhibit F at 3–4. Even for documents and communications involving an attorney, “[w]here a lawyer provides non-legal business advice, the communication is not privileged.” *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 231 (3d Cir. 2007). [REDACTED]

[REDACTED]

Elm contends that [REDACTED] established an attorney-client relationship that protects communications on or after that date. However, even if Elm's position were correct, it does not align with Elm's treatment of its privilege log entries. Elm's position means that [REDACTED] would not be privileged. Yet Elm refuses to produce documents corresponding to certain such entries on its privilege log, including at least [REDACTED]. Elm should be required to produce those [REDACTED] communications.

As for [REDACTED], Elm has waived attorney-client privilege with respect to at least some of those documents by choosing to produce a cherry-picked set of such communications in response to Samsung's complaints about Elm's privilege log. In particular, [REDACTED]. Even if such communications were originally privileged, Elm cannot produce a self-serving subset of such documents while withholding the remainder. That results in waiver of privilege over all other such documents involving the same subject matter. *See* Fed. R. Evid. 502(a); *GTECH Corp. v. Scientific Games Int'l, Inc.*, C.A. No. 04-138-JJF, 2005 WL 8170737, at * 2 (D. Del. Nov. 22, 2005) (“[I]f a partial waiver would be unfair to the party's adversary, the privilege will be waived as to all communications or materials on the same subject.”). Elm should be required to produce [REDACTED] that relate to the same subject matter as what Elm has already produced.

Even if Elm had not waived privilege over [REDACTED], many of those and other entries on Elm's privilege log constitute non-privileged business or other non-legal documents and communications. *See* Exhibit F at 3–4. To the extent that Elm contends that certain of those documents contain both business and legal advice, those documents must be produced if their “primary purpose” is to “solicit or render advice on non-legal matters.” *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 147 (D. Del. 1977). Because Elm's business is patent licensing, it appears that the documents identified in Exhibit F primarily relate to business concerns. *Immersion Corp. v. HTC Corp.*, C.A. No. 12-259-RGA, 2014 WL 3948021, at *2 (D. Del. Aug. 7, 2014) (citing *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 231 (3d Cir. 2007)) (ordering plaintiff to produce several documents related to patent licensing because “[plaintiff's] business is the licensing of patents”). Elm should produce those documents.

IV. Elm Cannot Make Relevance-Based Redactions to [REDACTED]

Elm has produced its [REDACTED] in redacted form. *See* Exhibit K. [REDACTED]

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