

# One Minute Memo®



## Chancery Court Finds Merger Agreement's "No Use" Provision Preserves Seller's Privilege

By Christopher Robertson, Alison Eggers, and Andrew Stark

In *Shareholder Representative Services LLC v. RSI Holdco, LLC*, C.A. No. 2018-0517-KSJM (Del. Ch. May 29, 2019), the Delaware Court of Chancery held that a merger agreement provision assigning pre-merger privilege held by sellers to Shareholder Representative Services and further prohibiting "use" of such communications in subsequent litigation between the parties precluded the purchasing entity from accessing and using the seller's privileged email against the seller in post-closing litigation.

The ruling by Vice Chancellor Kathleen S. McCormick was the first opinion by the Chancery Court since *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLP*, 80 A.3d 155 (Del. Ch. 2013), to squarely address the scope of provisions preserving pre-merger privilege.

### Background

In September 2016, RSI Holdco ("RSI"), an affiliate of TA Associates, acquired Radixx Solutions International, Inc. ("Radixx"), a cloud-based provider of travel distribution and passenger service system software for airline reservations, distribution, and merchandising. Seyfarth Shaw LLP ("Seyfarth") served as counsel to Radixx in connection with the merger. The merger agreement designated Shareholder Representative Services ("SRS") as representative of Radixx's selling stockholders. Through the merger, RSI obtained possession of Radixx's computers and email servers, including approximately 1,200 pre-merger emails between Radixx and Seyfarth. The emails were not excised or segregated from Radixx's other communication at the time of the merger; rather, the parties negotiated a provision preserving the pre-merger privilege and assigning that privilege to SRS. The parties further negotiated a "no use" provision, which prohibited any party from using pre-merger privileged communications in subsequent litigation between the parties.

Despite these provisions, RSI sought to access and use the pre-merger privileged communications in litigation between RSI, SRS, and certain of the former Radixx shareholders. RSI moved the Chancery Court for an order declaring that any privilege with respect to the pre-merger emails between Radixx and Seyfarth has been waived and that RSI may access and review the emails. SRS cross-moved for a protective order.

### Analysis

In *Great Hill*, a buyer discovered pre-acquisition communications between the seller and its attorneys on the surviving company's computer systems. Unlike the merger agreement at issue in *SRS v. RSI*, the *Great Hill* parties' merger agreement did not carve pre-merger attorney-client communications out of the assets transferred to the buyer at closing. The Chancery Court held that under those circumstances, Delaware's default rule—that "all property, rights, privileges, powers and

franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation”—applied and “the privilege over all pre-merger communications. . . passed to the surviving corporation in the merger.” The Chancery Court noted, however, that parties may contract out of the default rule, which many parties chose to do in post-*Great Hill* mergers and acquisitions.

Radix did just that. Its Seyfarth Shaw attorneys negotiated not only a so-called “*Great Hill*” provision preserving privilege over the pre-merger communications and assigning that privilege to SRS, but also a “no use” provision, which provided that a second level of protection by expressly precluding any party from “us[ing] or rely[ing] on any of the Privileged Communications in any action or claim against or involving any of the parties [to the Merger Agreement] after the Closing.”

Despite these provisions, RSI sought leave of the Court to access and review the pre-merger privileged communications. RSI argued that the “no use” clause did not apply because the provision only applied to privileged communications and the emails it sought to review were no longer privileged because sellers took no steps post-closing to segregate, excise, or demand the return of the emails, and thereby waived the privilege. The Chancery Court rejected RSI’s arguments and found that the argument ran counter to the express language of the merger agreement. The Court further noted that RSI’s argument for waiver would “undermine the guidance of *Great Hill*—which cautioned parties to negotiate for contractual protections” and also render the express language negotiated by the parties meaningless.

The Court also pointed out that the merger agreement required all parties to “take the steps necessary to ensure that any privilege attaching as a result of [Seyfarth] representing [Radix]. . . in connection with the transactions contemplated by this Agreement shall survive the Closing, remain in effect and be assigned to and controlled by the [Representative].” For that privilege to be waived, the Court found that it would necessarily be due in part to RSI’s own failure to “take the steps necessary” to preserve it and that RSI could not argue that its own failure to preserve privilege should now inure to its benefit.

## Conclusion

The Court’s opinion illustrates the importance of expressly preserving the privilege attached to pre-merger communications at the time of closing and assigning control of that privilege. The decision also highlights the utility of provisions that require all parties to take steps necessary to ensure the privileges remain in effect and to expressly preclude the buyer from using the privileged communications in post-closing litigation against the sellers.

[Christopher Robertson](#) is a partner in Seyfarth’s Boston office and [Alison Eggers](#) and [Andrew Stark](#) are associates in Seyfarth’s Boston office. If you would like further information, contact Christopher Robertson at [crobertson@seyfarth.com](mailto:crobertson@seyfarth.com), Alison Eggers at [aeggers@seyfarth.com](mailto:aeggers@seyfarth.com), or Andrew Stark at [astark@seyfarth.com](mailto:astark@seyfarth.com).

[www.seyfarth.com](http://www.seyfarth.com)

Attorney Advertising. This One Minute Memo is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

---

Seyfarth Shaw LLP One Minute Memo® | June 4, 2019

©2019 Seyfarth Shaw LLP. All rights reserved. “Seyfarth Shaw” refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.