IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

U.S. BANK NATIONAL ASSOCIATION, in its capacity as Indenture Trustee and not in its individual capacity,	)	
Plaintiff,	)	
v.	)	C.A. No. 112-N
U.S. TIMBERLANDS KLAMATH FALLS, L.L.C., n/k/a INLAND FIBER GROUP, L.L.C.; U.S. TIMBERLANDS FINANCE CORP. n/k/a FIBER FINANCE CORP., U.S. TIMBERLANDS YAKIMA, L.L.C., n/k/a AMERICAN FOREST RESOURCES, L.L.C.; U.S. TIMBERLANDS HOLDINGS GROUP, L.L.C. n/k/a CASCADES RESOURCE HOLDINGS GROUP, L.L.C.; U.S. TIMBERLANDS SERVICES COMPANY, L.L.C., n/k/a TIMBER RESOURCES SERVICES, L.L.C.; JOHN M. RUDEY; ALAN B. ABRAMSON; AUBREY L. COLE; GEORGE R. HORNIG; ROBERT F. WRIGHT; and WILLIAM A. WYMAN,	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: June 2, 2005
Decided: June 9, 2005
Revised: August 16, 2005

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Bruce L. Silverstein, Esquire, C. Barr Flinn, Esquire, Karen E. Keller, Esquire, YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware, *Attorneys for Defendants U.S. Timberlands Yakima, L.L.C., n/k/a American Forest Resources, L.L.C., U.S. Timberlands Holdings Group, L.L.C., n/k/a Cascades Resource Holding, L.L.C., U.S. Timberlands Services Company, L.L.C., n/k/a Timber Resources Services, L.L.C., John M. Rudey, and George R. Hornig*.

Jesse A. Finkelstein, Esquire, Srinivas M. Raju, Esquire, RICHARDS, LAYTON & FINGER, Wilmington, Delaware, *Attorneys for Defendants Alan B. Abramson, Aubrey L. Cole, Robert F. Wright, and William A. Wyman*.

LAMB, Vice Chancellor.

I.[1]

This is an action by U.S. Bank National Association, an indenture trustee (the "Trustee"), seeking a declaration that the issuer of certain notes, Defendant U.S. Timberlands Klamath Falls, L.L.C. ("Klamath" or the "Issuer") violated several provisions of the notes' indenture (the "Indenture") by entering into transactions with a related third-party. The Trustee alleges that these transactions were completed to the detriment of the Issuer, and for the benefit and personal gain of other defendants.[2] The Trustee further alleges breach of fiduciary duty, actual and constructive fraud, and seeks the avoidance of certain transactions between the Issuer and the related entity and the imposition of a constructive trust on the property that was the subject of those transactions.

On December 22, 2004, this court denied the defendants' motion to dismiss, and granted the Trustee's motion for partial summary judgment.[3]

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[1] The court recites only the facts essential to the disposition of this Motion. For a thorough recitation of the facts, please see *U.S. Bank N.A. v. U.S. Timberlands Klamath Falls, L.L.C.*, 864 A.2d 930, 935-37 (Del. Ch. 2004), *vacated and remanded*, No. 36, 2005, Jacobs, J. (Del. June 6, 2005) (ORDER).

[2] These other defendants are U.S. Timberlands Services Company, L.L.C. ("Services"), U.S. Timberlands Finance Corp., U.S. Timberlands Holdings Group, L.L.C., and U.S. Timberlands Yakima L.L.C. All of these entities have since changed their names. Additionally, the five members of the board of directors of Services are named as individual defendants: John M. Rudey, Alan B. Abramson, Aubrey L. Cole, George R. Hornig, Robert F. Wright, and William A. Wyman. Rudey is also the chairman, CEO, and president of Services. Rudey formed Klamath in 1996.

[3] *U.S. Bank*, 864 A.2d at 934.

On May 3, 2005, the defendants moved to compel discovery, from the Trustee, of communications between the Trustee and QVT Financial LP and GoldenTree Asset Management, L.P., two holders of the notes (collectively, the "Noteholders"). In particular, the defendants requested an order:

> compelling the plaintiff to produce all documents withheld pursuant to the common interest doctrine for which no other privilege has been properly asserted; [] compelling the plaintiff to produce all other withheld documents for which it had not properly asserted an applicable privilege; [] compelling the plaintiff to produce Messrs. [Lawrence] Bell and [Scott] Strodthoff in the State of Delaware for additional questioning related to those subjects on which they previously refused to testify based on the plaintiff's improper assertions of the common interest doctrine. . . .

The Trustee and the Noteholders countered that these disclosures were protected by the attorney-client privilege and the work-product privilege. On June 2, 2005, the court heard oral arguments on this issue.[4] This is the court's disposition of that motion.

II.

A. Attorney-Client Privilege And Common Interest

The attorney-client privilege protects the communications between a client and an attorney acting in his professional capacity where the

[4] The court also heard oral arguments on a motion to dismiss certain counterclaims brought by the defendants and a motion to compel discovery from the Noteholders. The court disposed of both of these issues at the hearing.

communications are intended to be confidential and the confidentiality is not waived.[5] The privilege serves "to foster the confidence of the client and enables him to communicate without fear in order to seek legal advice."[6] In Delaware, the scope of the attorney-client privilege is set out in Rule 502 of the Delaware Rules of Evidence.[7] The rule also extends to the protection of confidential communications involving counsel for separate clients so long as the clients share a "common interest" sufficient to justify invocation of the privilege.[8]

In this case, all the communications that the defendants seek to discover were between or among the Trustee and its counsel, and certain noteholders. In order to participate in these communications, the noteholders were required to agree that they would maintain the

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[5] *Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992).

[6] *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709, 713 (Del. Ch. 1976).

[7] DEL. R. EVID. 502(b) states that a communication is privileged if made in confidence:

> for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

[8] *See Metro. Bank & Trust Co. v. Dovenmuehle Mortgage, Inc.*, 2001 Del. Ch. LEXIS 153, at *22 (Del. Ch. Dec. 20, 2001) (quotations omitted); *see also Reese v. Klair*, 1985 Del. Ch. LEXIS 403, at *15-*16 (Del. Ch. Feb. 20, 1985) ("The letters between attorneys, copies of which were sent to the appraiser, also remain confidential as communication between the attorneys of clients with common interests and the attorneys' representative.").

confidentiality of those communications, and were required to state that they did not have any connections to the defendants. Therefore, the court must decide whether there was a sufficient community of interest between the noteholders and the Trustee such that confidential communications between them and the Trustee's counsel in the course of, or for the purpose of, facilitating the rendition of professional legal services are protected by the attorney-client privilege.

It is clear that the Trustee and the Noteholders share a common interest. Due to the "no-action" clause contained in the Indenture, the individual noteholders cannot sue to enforce the notes. Instead, they must first give written notice to the Trustee of a continuing Event of Default and afford the Trustee a reasonable opportunity to exercise its powers under the Indenture, or to sue for the enforcement of the Indenture.[9] In addition, the no-action clause bars noteholders from bringing non-contractual claims on the notes. Instead, they must "be prosecuted by the trustees *representing* the bondholders as a group."[10] Furthermore, the Indenture requires that the Trustee, in the event of a default, prosecute such claims, if such action

[9] For a thorough discussion of the no-action clause contained in the indenture, please see *U.S. Bank.*, 864 A.2d at 939-43.

[10] *U.S. Bank.*, 864 A.2d at 941 (quoting *Feldbaum v. McCrory Corp.*, 1992 Del. Ch. LEXIS 113, at *27-*28 (Del. Ch. June 1, 1992) (emphasis added).

would be reasonable.[11] Therefore, the noteholders are required by the Indenture to rely upon the Trustee to bring suit, and the Trustee is contractually obligated to do so. It is difficult to see how the Noteholders' and the Trustees interest in prosecuting claims of this nature could be more closely aligned.

That being said, there are situations where their interests diverge, for example, where the Trustee seeks indemnification from the noteholders for bringing suit. In this situation, the parties' interests are actually antagonistic. Any documents containing communications relating to indemnification of the Trustee are, therefore, discoverable. However, after the Trustee made the decision to bring this suit, sometime in 2003, the Trustee's and the Noteholders' interests were clearly aligned. Therefore, otherwise privileged communications between the Trustee, its counsel, and the Noteholders after this time are not discoverable.

B. Application Of Attorney-Client Privilege And Common Interest Doctrines To The Depositions

The defendants have also asserted that, during the deposition of certain witnesses, counsel for the plaintiff instructed the deponents not to respond to certain questions based on the attorney-client privilege. This included, the defendants allege, questions regarding conversations between

[11] *See* Indenture §§ 6.3 & 7.1.

the Trustee and the Noteholders with respect to issues where their interests were not in common, for instance questions relating to the Trustee withholding interest payments on the debentures to fund its lawsuit.

It is improper for an attorney to instruct a deposition witness not to answer a question based on the attorney-client privilege, when the question relates to information that is partially privileged, but partially not. The proper procedure is to instruct the witness not to disclose privileged information while answering the question. After reviewing the transcript of the deposition about which the defendants complain, the court is convinced that counsel for the plaintiff did not overly invoke the attorney-client privilege and that the defendants received answers to their questions, to the extent the common interest doctrine was not implicated.

When counsel for the defendants questioned the deponent as to issues where the Trustees and Noteholders had divergent interests, counsel for the plaintiff did not instruct the deponent to refuse to answer entirely, as the defendants contend. Instead, counsel for the plaintiff simply instructed the deponent to not reveal privileged communications while answering. The following exchange is typical of what occurred.

> Q (By Mr. Flinn) Did any note holder at any time ever voice to the Trustee any concern about the possibility of or [sic] Trustees having withheld interest?

> MR. MIRANOWSKI: I'm going to instruct you not to answer to the extent it discloses communications in the presence of Counsel.
>
> A I talked to note holders who had questions about the withholding of the interest payments.
>
> Q (By Mr. Flinn) What note holders were those?
>
> A Some of them were the note holders we've already referred to such as Oppenheimer and Golden Tree [sic] and QVT. As a result of the withholding the interest, there were a number of individual holders who identified themselves to us at that time.
>
> Q Who were the individual holders?
>
> A I'm sorry, I can't remember their names.[12]

The court finds that counsel for the plaintiff did not act improperly in instructing the deponent. The court further finds that the defendants were able to receive responsive answers to their questions, when the attorney-client privilege was not implicated. Therefore, they are not entitled to depose Messrs. Bell and Strodthoff again.

III.

Defendants also complain that the Trustee's privilege log does not adequately disclose the factual basis for the assertion of the attorney-client privilege or the work-product privilege. The defendants argue that, as a matter of law, many of these documents cannot be protected by the attorney-client privilege or the work-product privilege, because the authors of the documents are not attorneys and the log does not reveal that these

[12] Bell Dep. of Mar. 31, 1995 at 209-10.

documents were sent to, or copied to, attorneys. The Trustee did not respond in writing to these contentions, undoubtedly because the defendants made these arguments in their reply brief.

The work-product privilege can apply to documents prepared by non-attorneys, if those documents were prepared in anticipation of litigation.[13] Furthermore, communications originating from non-attorneys can be protected by the attorney-client privilege, if those communications relay legal advice from counsel to a party with a common interest.[14]

However, after reviewing the Trustee's privilege log, the court finds that, while the basis for asserting the work-product privilege to many of these documents is obvious from the log, the basis for asserting the attorney-client privilege is not. The court concludes that the proper procedure is to allow the Trustee to amend its log to state more clearly the basis for its claim of the attorney-client privilege with respect to the challenged documents. After such an amendment, the court will be in a better position to judge

[13] *See, e.g.*, *Mullins v. Vakili*, 506 A.2d 192, 196 (Del. Super. Ct. 1986) "[T]he qualified work product immunity . . . extends not only to non-attorneys, but also to material prepared before litigation commences."

[14] *See* DEL. R. EVID. 502(b); *see also Am. Legacy Found. v. Lorillard Tobacco Co.*, 2004 Del. Ch. LEXIS 157, at *10 n.14 (Del. Ch. Nov. 3, 2004) (stating that the attorney-client privilege protects communications "by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest.").

whether the Trustee's assertion that these documents are privileged is tenable.

CONCLUSION

For the above reasons, defendants' motion to compel is GRANTED in part and DENIED in part. IT IS SO ORDERED.