

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

STEWART TITLE GUARANTY
COMPANY, a Texas corporation,

Plaintiff,

v.

CREDIT SUISSE, Cayman Islands Branch,

Defendant.

Case No. 1:11-cv-00227-BLW

**MEMORANDUM DECISION AND
ORDER**

INTRODUCTION

The plaintiff Stewart Title has submitted 141 documents to the Court for an *in camera* inspection to determine if the documents are protected by the attorney/client privilege. Both parties have submitted briefing on the issue. For the reasons explained below, the Court finds that portions of the documents are protected by the privilege while other portions must be produced. The Court sets forth its decision in detail below.

BACKGROUND

This discovery dispute started when defendant Credit Suisse filed a motion to compel the production of documents containing communications between Stewart Title and its counsel at the law firm of Faegre Benson. Stewart Title objected, claiming that the documents were protected by the attorney/client privilege and the work product doctrine. The Court issued a decision finding the work product doctrine inapplicable, and giving counsel direction on the claims of privilege. The Court relied on the recent decision in *Cedell v. Farmers Insurance Co. of Washington*, 295 P.3d 239 (Wash.Sup.Ct. 2013). Adopting that holding, the Court presumed that the entire file was not protected by privilege and required Stewart Title to show how the

privilege applied to each document it sought to protect. The Court ordered Stewart Title to produce all of the challenged documents that deal primarily with the factual investigation of the lien claims and those that discuss both coverage and factual matters. In instances where there was a close question regarding the privileged content of the documents to be produced, the Court directed Stewart Title to submit the documents to the Court for *in camera* review.

Pursuant to the Court's Order, Stewart Title produced hundreds of documents to Credit Suisse, and also submitted 141 pages of documents to the Court for *in camera* review.

ANALYSIS

In the supplemental briefing, Credit Suisse pointed out that it has a fraud claim against Stewart Title. Credit Suisse claims that Stewart Title had a secret plan devised in the early fall of 2010 to deny coverage for the Banner liens, some of the largest at issue, but not tell Credit Suisse until after the state court ruled on the validity of that lien claim. According to Credit Suisse, that allowed Stewart Title to “exploit for itself the ‘negotiating leverage’ created by the timing of trial and the uncertainty of settlement with Banner II (the general contractor) [to settle claims that were clearly covered].” *See Supplemental Brief (Dkt. No. 107)* at p. 5. Stewart Title adamantly denies this claim, but it presently exists in the case and provides a legitimate basis for discovery.

There is no privilege for documents “sufficiently related to” allegations that the client is engaged in a fraudulent scheme while seeking the advice of an attorney. *See In re Napster Inc. Copyright Litig.*, 479 F.3d 1078, 1090 (9th Cir. 2007), *abrogated on other grounds by, Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009). The best evidence of the fraud “is likely to be in the hands of the party invoking the privilege” and hence is discoverable. *Id.*

This analysis gives the Court further guidance for its *in camera* review. The Court will order the production of documents (1) that are sufficiently related to Credit Suisse's fraud claim that Stewart Title decided in the fall of 2010 to deny the Banner liens, and (2) that relate to

Stewart Title’s investigation and evaluation of the lien claims. The following table contains the Court’s rulings at to each document reviewed *in camera*. The page numbers include the entire document submitted, although in most cases Stewart Title is claiming that only the yellow highlighted portions of those documents are privileged. In some instances, for a single multi-page document, the Court has decided to compel production of some pages and/or paragraphs and order the redaction of other pages and/or paragraphs.

The Court’s decisions set forth in the table below relate to the yellow highlighted material contained in the particular document referenced.

Date	Page Numbers	Decision
September 13, 2010	3961	Discoverable. Relates to fraud claim/Banner lien.
March 16, 2010	3964 (thru 0003)	Part discoverable. Redact paragraphs 3 & 4. Produce everything else as it relates to fraud claim/Banner lien and evaluation of other liens.
Undated	3965 (thru 0003)	Discoverable. Relates to fraud claim/Banner lien.
March 15, 2010	9343 (0002 to 0003)	Discoverable. Relates to fraud claim/Banner lien.
May 11 2009	14731 (thru 0002)	Privileged
March 30, 2011	17117 (thru 0002)	Privileged. Discussion of law firm retention generally.
March 25 2011	17203 (thru 0002)	Privileged. Discussion of law firm retention generally
September 10, 2010	18516	Discoverable. Relates to fraud claim/Banner lien.
September 10, 2010	18534	Discoverable. Relates to fraud claim/Banner lien.
March 31, 2011	19468 (thru 0002)	Privileged. Discussion of law firm retention generally.
June 1 2011	28223 (thru 0002)	Privileged.
Dec. 29, 2009	4694	Privileged
May 12 2009	4163	Privileged. General settlement strategy.

May 12 2009	3921	Privileged. General settlement strategy.
Dec. 16 2009	3398 (thru 0002)	Privileged. General settlement strategy.
June 10 2009	2077 (thru 0002)	Privileged.
Sept 7 2010	1834 (thru 0002)	Discoverable. Relates to fraud claim/Banner lien.
Sept 7 2010	1764	Privileged. General settlement strategy.
Sept 7 2010	1708	Privileged.
May 11 2009	146 (thru 0002)	Privileged.
June 12 2009	89 (thru 0002)	The highlighted portion in the e-mail of June 12 2009 relates to the fraud claim/Banner lien and is discoverable. The highlighted portion in the e-mail dated June 10 2009 is privileged.
May 12 2009	07	Privileged. Bond discussion.
May 12 2009	08	Privileged. Bond discussion.
May 11 2009	01	Privileged. (same as 146)
Undated	1635 (thru 0003)	Discoverable. Relates to fraud claim/Banner lien.
June 26 2009	3378	Privileged.
August 11 2009	1618 (thru 0003)	Privileged. Counsel general strategy
August 18, 2009	600 (thru 0004)	Discoverable. Appears to relate to lien investigations.
August 31 2009	601 (thru 0002)	Discoverable. Appears to relate to lien investigations.
Nov. 20 2009	23046 (thru 0002)	Privileged.
Nov 20 2009	23049	Privileged.
March 9 2010	627 (thru 0002)	Paragraphs 1 (all subparts), 3, 5, 8 and 9 are all discoverable as they related to fraud/Banner liens. Other paragraphs are privileged.
March 15 2010	1608 (thru 0003)	Discoverable. Relates to fraud claim/Banner lien.

March 23 2010	633 (thru 0004)	Discoverable. Relates to fraud claim/Banner lien.
September 2 2010	18590	Discoverable. Relates to fraud claim/Banner lien.
Sept 10 2010	18518 (647 thru 648-0003)	Discoverable. Relates to fraud claim/Banner lien.
Sept 10 2010	18519 (thru 0003)	Discoverable. Relates to fraud claim/Banner lien.
May 6 2009	3430	Privileged. General legal research.
May 7 2009	3430	Privileged (same e-mail as above)
Aug 13 2009	19136 (thru 012)	Privileged. General legal research
Sept 18 2009	1623 to 1624 (thru 0007) & 19135 (thru 002)	Privileged. General legal research
March 12 2010	632 (thru 0007)	Privileged. Memo regarding counsel.
Aug 19 2010	649 (thru 0003)	Privileged. General legal research.
Aug 19 2010	638 (thru 0006)	Privileged. General legal research.
Sept 3 2009	19141 (pages -10 to -14)	Privileged.
Dec 15 2009	373 (pages -012 to -015)	Privileged.
April 15, 2010	434 (thru 0019)	The only portions that are privileged are (1) the "Policy Defenses" paragraph on pages -0014 to -0015; and (2) the fourth bullet point on page -0016, and (3) all bullet points on page -0017. They shall be redacted and the remainder of the memo shall be produced.
August 23 2010	485 (thru -0033)	The following highlighted portions are not privileged as they related to fraud claim/Banner liens: (1) paragraph (3) at page -0009; (2) paragraph highlighted at page -0013; (3) second bullet point on page -0016 carried over to -0017 and including first full bullet point on -0017; and (4) two paragraphs highlighted on page -0024.
Nov 16 2009	23116	Privileged.

Oct 18 2010	18169 (at page -0002) 0007)	Privileged.
April 16 2010	9158 (thru -0002)	Privileged. LID related.
April 26 2010	9095 (thru -0003)	Privileged. Gold course related.
Oct 18 2010	1776 (thru -0006)	Privileged. Golf course related.
June 1 2010	1668	Privileged. LID related.
May 27 2010	1525 (thru 0006)	Privileged. Golf course related.
March 21 2011	17296	Discoverable. Relates to fraud claim/Banner lien.
March 11 2011	17297	Discoverable. Letter to opposing counsel, not to client.
Undated	17298 (thru 0022)	Privileged. Draft complaint.
March 16 2011	17302	Discoverable. Relates to fraud claim/Banner lien.

Conclusion

In its earlier decision, *see Memorandum Decision (Dkt. No. 81)*, the Court ruled on Credit Suisse's motion to compel by granting it in part and reserving a decision in part pending this *in camera* review. Now that the *in camera* review has been completed, the Court will grant the motion in part and deny it in part in accordance with the rulings made above.

Stewart Title is directed to make the redactions noted above and produce the material immediately to Credit Suisse.

ORDER

In accordance with the Memorandum Decision set forth above,

NOW THEREFORE IT IS HEREBY ORDERED, that the motion to compel (docket no. 61) is GRANTED IN PART AND DENIED IN PART in accordance with the rulings made above.



DATED: August 14, 2013

A handwritten signature in black ink that reads "B. Lynn Winmill". The signature is written in a cursive style and is positioned above a horizontal line.

B. Lynn Winmill
Chief Judge
United States District Court