COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

April 18, 2013

Stephen P. Lamb, Esquire
Paul, Weiss, Rifkind, Wharton
& Garrison LLP
500 Delaware Avenue, Suite 200
Wilmington, DE 19801

Kevin G. Abrams, Esquire
Abrams & Bayliss LLP
20 Montchanin Road, Suite 200
Wilmington, DE 19807

Thad J. Bracegirdle, Esquire
Wilks, Lukoff & Bracegirdle, LLC
1300 N. Grant Avenue, Suite 100
Wilmington, DE 19806

Andre G. Bouchard, Esquire
Bouchard, Margules & Friedlander, P.A.
222 Delaware Avenue, Suite 1400
Wilmington, DE 19801

Re: *AM General Holdings LLC v. The Renco Group, Inc.*
C.A. No. 7639-VCN
The Renco Group, Inc. v. MacAndrews AMG Holdings LLC
C.A. No. 7668-VCN
Date Submitted: March 21, 2013

Dear Counsel:

These actions trace back to a series of transactions between The Renco Group, Inc. ("Renco") and MacAndrews & Forbes Holdings Inc. ("MacAndrews & Forbes") in 2004. Renco and MacAndrews AMG Holdings LLC ("AMG"), wholly owned by MacAndrews & Forbes, formed AM General Holdings LLC ("Holdco"). AMG is the managing member of Holdco which owns all of

AM General, which produces vehicles, and a portion of Ilshar Capital LLC ("Ilshar") which was formed at the same time as an investment vehicle. ILR Capital LLC ("ILR"), a Renco affiliate, is the managing member of Ilshar.

Two discovery motions are pending. In one, Renco challenges the use of the attorney-client privilege and the work product doctrine to obstruct its access to documents designed to assess the reasonableness of AMG's efforts to revalue the capital accounts of Holdco's members. In the other, Renco seeks to preclude Holdco discovery into what Holdco describes as Prohibited Investments under Ilshar's limited liability company agreement and Holdco's inquiry into an action filed against Ilshar, Renco, and other Renco-related entities by the Pension Benefit Guaranty Corporation ("PBGC").

I. Renco's Motion to Compel

Renco's Motion to Compel challenges AMG's assertion of the attorney-client privilege or work product doctrine protection for a sizeable number of

documents.[1] Renco has put the withheld documents into four categories: (1) the documents either are not privileged or the privilege has been waived; (2) attachments to emails are not privileged even though the email to which they are attached may be privileged; (3) the descriptions of the documents in AMG's privilege log are inadequate, and the privilege has accordingly been waived as to those documents; (4) some documents, for which privilege had earlier been asserted, have been reclassified as non-responsive, instead of privileged. In essence, Renco argues that these documents must have been responsive when the privilege was asserted, and reclassifying them as non-responsive does not change their discoverable nature.

A. *Work Product & Attorney-Client Privilege*

The core of the parties' dispute is relatively easy to describe; disentangling the threads of their dispute is more difficult. AMG, as the managing member of Holdco, was, as a matter of contract, required to value the Revalued Capital

[1] A history of the parties' disputes can be found at: *AM Gen. Hldgs. LLC v. The Renco Gp., Inc.*, 2012 WL 6681994 (Del. Ch. Dec. 21, 2012), and *The Renco Gp., Inc. v. MacAndrews AMG Hldgs. LLC*, 2013 WL 209124 (Del. Ch. Jan. 18, 2013).

Accounts. This is a business function, one that on its own would not typically support a decision under the work product doctrine. The individuals who performed the necessary work, or directed the performance of that work, are lawyers. Simply because the persons doing the work are lawyers does not necessarily support the conclusion that lawyer-based privileges are in effect.[2] Fundamental business functions cannot be shielded simply by assigning the tasks to lawyers. Yet, when the work was performed, AMG could reasonably have foreseen that the work product would relate to the focus of litigation. The conclusions were reached because the work would be—and has now become—a topic for litigation. The key question is why was each document created? If created because of a contract requirement, it is likely not privileged.[3] If created in anticipation of litigation, it is likely privileged. The difficulty arises when both considerations played a role in the preparation of the document. Renco offers the simple answer that the work product privilege only applies if the only reason for

[2] *Lee v. Engle*, 1995 WL 761222, at *3 (Del. Ch. Dec. 15, 1995) (noting that a lawyer performing a business function "cannot avail himself of the protection associated with the attorney-client privilege or the work product doctrine").
[3] *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 959 A.2d 47, 52 (Del. Ch. 2008).

preparation of the document was in anticipation of litigation. It asserts incorrectly that a document prepared with both purposes in mind cannot be treated as protected by the work product doctrine (or the attorney-client privilege).[4]

Part of the problem traces to the seemingly inevitable cryptic nature of document descriptions in a privilege log. It is not easy to discern whether a lawyer was seriously engaged in legal analysis when the document was being prepared. If a contract calls for a particular calculation, then, as a general matter, reviewing the contract would be necessary. Is following the directions in a contract legal analysis, if performed by a lawyer? When does the process of gaining an understanding of a contract transform into legal analysis? Defining the line is not easy; figuring out where the preparation of a contractually-required document falls on a continuum between performance of a basic contractual function and performing legal analysis is not an easy one, especially where the descriptions of the documents are meager.

[4] *See Jedwab v. MGM Grand Hotels, Inc.*, 1986 WL 3426, at *3 (Del. Ch. Mar. 20, 1986).

The documents fall generally into two timeframes—summer to fall 2012 and December 2012. During the earlier sequence, AMG was confronted with Renco's initial complaint, which challenged the valuation of AMG's Revalued Capital Account, and Renco's October 12 letter which announced that it was withholding the Holdco Preferred Return. There was no contractual requirement for the valuation work at that time because there were no funds to distribute. From the imperfect observation tower of the bench, the better inference is that the work at that time was carried out primarily for the purpose of assessing legal options, strategies, and consequences. As such, the lawyers' work (or lawyer-directed work) during this period can fairly be characterized as attorney-work product.[5]

By late 2012 with a distribution likely and the need to calculate the Revalued Capital Accounts imminent, the better inference is that the documents were created

[5] AMG has not waived the work product protection or attorney-client privilege by partially disclosing certain documents relating to its valuation of the Revalued Capital Accounts. AMG has not injected the documents to which it has asserted any privilege into this litigation and has assured the Court that it will not rely upon the documents for which it asserts privilege to show that it made a reasonable determination. Thus, Renco will not be placed at an unfair disadvantage. AMG has also not injected the issue of a reasonable determination of the Revalued Capital Accounts into the litigation; Renco, by filing suit, has done so. Renco has also not demonstrated a substantial need for these documents. *See Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622, at *6 n.43 (Del. Ch. Nov. 13, 2002).

because of the contractual directive to perform the valuation.[6] Thus, the role of the attorneys, *qua* attorneys, dwindled. Because these documents were created because of contractual compliance, the work-product doctrine is not broadly available, and AMG has not demonstrated that the documents from that period are generally entitled to work-product (or attorney-client) protection.[7]

This conclusion amply demonstrates the risks of a general assertion of privilege. Typically, judicial review of each document is not a desired or efficient effort. Broad categories may frequently be the most effective approach to assessing documents of the number at issue here. Yet, AMG credibly points out that some of these documents will nevertheless contain potential settlement considerations, predictions as to what the Court might do, and discussions of how the dispute might evolve. That type of information—lying at the core of the

[6] Whether the Court applies the primary purpose test or the because of litigation test, the outcome would be the same. *See Hexion Specialty Chems., Inc.*, 959 A.2d at 52.

[7] An overly-broad designation of documents as privileged may result in the loss of privilege even for those documents within the set that should otherwise have been protected. In this instance, the line dividing the privileged from the non-privileged is so fine that no sanction—or adverse consequence—should result from a bad—but not unreasonable—guess as to where the Court would draw the line.

attorney-client relationship—deserves protection. It is the expression of the attorneys' discrete thought processes. It is not merely something that, if reviewed by opposing parties or counsel, might be interpreted or construed in a way to gain some insight into the lawyer's thought process—and such intrusive analysis that should be avoided but sometimes cannot be avoided with confidence. Thus, documents from the December 2012 period will not be subject to protection under the work product privilege. They should, however, be reviewed again for the purposes of redacting those clearly-expressed attorney thoughts that were addressed previously.[8]

[8] AMG has also asserted the attorney-client privilege for a small number of documents from the December 2012 period. These are Document Nos. 92-93, 578-79, 583-84, 586-87, 678, 680, 682, 684, 686, 688, 690, 692, 703, 707, 721, 723, 732, 798-99, and 809. The "attorney-client privilege generally protects the [confidential] communications between a client and an attorney acting in his professional capacity." *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 419 (Del. 2010) (internal quotation marks omitted) (quoting *Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992)). Importantly, the attorney-client privilege protects "legal advice, as opposed to business or personal advice" and communications, as opposed to underlying facts. *Pharmathene, Inc. v. Siga Techs., Inc.*, 2009 WL 2031793, at *2 (Del. Ch. July 10, 2009). Thus, if a lawyer-employee was engaged in a communication regarding a business matter, instead of a legal matter, the attorney-client privilege would not protect that communication. However,

> communications that contain an inseparable combination of business and legal advice may be protected by the attorney-client privilege. Where it is a close call

Accordingly, Renco's Motion to Compel is denied with respect to documents from the period of July 2012 through November 2012,[9] but it is granted with respect to the documents from December 2012, subject to AMG's opportunity to review the documents one more time for specific statements or materials

---

> whether a communication reflected in a document and pertaining to a mixture of legal-related and business-related matters is more closely related to legal advice as opposed to business advice, the party asserting the privilege will be given the benefit of the doubt.

Id.

Despite giving AMG the benefit of the doubt, there is a strong presumption that, given the timing, the calculation of the Revalued Capital Accounts in December 2012 was primarily done as a business function. Thus, AMG must produce those documents that pertain to the determination of the Revalued Capital Accounts. In this category are Document Nos. 92-93, 578-79, 583-84, 586-87, 678, 680, 682, 684, 686, 688, 690, 692, 703, 707, 721, 723, 732, and 798-99. However, AMG should redact those portions of the documents that are protected by the attorney-client privilege (*i.e.*, where legal advice is given and where there are communications reflecting the thought processes and impressions of attorneys). *See id*. The description of Document No. 809 suggests that it contains substantial legal advice, rather than business advice, and thus, it should be protected.

[9] Discovery of work product is available where a party is able to show that it has a "substantial need" of the documents at issue and that "the party is unable without undue hardship to obtain the substantial equivalent" by other means. Ct. Ch. R. 26(b)(3). Renco has not shown that it has a substantial need for the documents from the earlier period. Unlike the documents from December 2012, which are more likely to show what AMG did in order to make a reasonable determination of the Revalued Capital Accounts, the earlier documents are more likely to show AMG's analysis of the Revalued Capital Accounts in the context of Renco's legal claims. Thus, Renco's need for those earlier documents is substantially less than its need for the December 2012 documents, and even less so now that Renco will have access to the later documents.

expressly revealing the attorney's thoughts or communication of legal advice to the client.[10]

B. *Attachments to Emails*

If emails are privileged, but the attachments to the emails do not independently earn that protection, then the attachments may not be withheld on the grounds of privilege emanating from the email which they accompanied. AMG has assured the Court that no documents attached to any email were being withheld on grounds that the email is privileged. Rather, AMG asserts that all of the attachments are independently privileged. To the extent that this is not the case, the attachments must be produced.

[10] To the extent that there are documents that do not have a date associated with them, AMG must produce those documents, unless AMG can identify the proper date of the document and that date corresponds with the earlier period. These documents include: Document Numbers 511, 739, 741, 743, 745, 747, 767, 769-71, 773, 775-76, 778-80, 782-85, 787-93, 795-96, 800-03, 805, 807, and 810. Document Number 801 need not be produced as it clearly is covered by the work product protection. For documents in this category for which the attorney-client privilege has been asserted, AMG may redact those portions of the documents which contain legal advice, if those document otherwise need to be produced.

C. *Insufficient Descriptions in the Privilege Log*

The descriptions in AMG's privilege log could easily have been more informative.[11] Nonetheless, the Court cannot conclude that they fail to provide a specific description and designation of privilege so as to give the Court "no basis upon which to weigh the application of the privilege."[12] Thus, the Court will not reject AMG's claim of privilege based on Renco's argument that inadequate descriptions in the privilege log preclude or waive the effective assertion of the privilege.

D. *The Re-Designation of Privileged Documents to Non-Responsive*

Renco challenges AMG's re-designation of some twenty-four documents from privileged to non-responsive.[13] If the documents really are non-responsive to Renco's discovery request, there was no reason to have asserted a privilege in

---

[11] Among other things, a privilege log should contain "a short but still 'meaningful' and document-specific description of the subject matter of the privileged information." Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 7.04, at 7-58 (2012).
[12] *Reese v. Claire*, 1985 WL 21127, at *5 (Del. Ch. Feb. 20, 1985).
[13] Supp. Transmittal Aff. of J. Peter Shindel, Jr. Ex. 10 (These documents are identified by numbers 452, 535, 537, 617, 620, 629-30, 636-37, 643-44, 703, 707, 732, 739, 741, 743, 745, 747, 752, 755, 757, 759, and 761.).

order to withhold them. That, of course, may be true, but discovery depends upon the proper conduct of the party responding to discovery. Renco has offered no basis to suspect that AMG is not acting with integrity in this regard, and the Court accepts AMG's classification of documents here, just as it has accepted AMG's initial characterizations of some unknown number of other reviewed, but not identified documents.

II. Renco's Motion for a Protective Order

Renco seeks a protective order addressed to two categories of documents sought by Holdco. First, Holdco seeks documents related to alleged Prohibited Investments made by Ilshar under the direction of Renco.[14] Second, Holdco seeks documents related to an action filed against Ilshar and several Renco-related entities by the PBGC involving underfunded pensions of an entity controlled by Renco (or one of its affiliates) and of which Ilshar might be part of the "controlled group" and, thus, potentially liable for pension-related claims.

[14] Renco also contests the appropriateness of two depositions related to the Prohibited Investments. Resolution of the related document debate also resolves the question about those depositions.

A. *The Prohibited Investment Discovery*

Renco's principal argument regarding Prohibited Investment discovery turns on the fact that Holdco has now moved for partial summary judgment with respect to one set of alleged Prohibited Investments.[15] That, however, does not preclude investigation into whether other Prohibited Investments were made in the same or different funds. Generally, discovery is sought with respect to the type, amount of, and results of Ilshar's investments. Whether Holdco is successful on its partial summary judgment motion will only have, at most, marginal consequences for the scope of discovery to which it is entitled. Discovery about the potential damages from the alleged Prohibited Investments is proper because, even if it loses its motion, its claims regarding those unknown investments will not necessarily go away. Furthermore, in light of the apparent failure of Renco to describe (or confirm the propriety of) its investment of Ilshar funds, additional scrutiny into other possibly Prohibited Investments should not be precluded.[16] Perhaps it would

[15] Holdco challenges decisions to invest in certain "Madoff feeder funds."
[16] Holdco's contract claims regarding the Prohibited Investments have not been met with a motion to dismiss.

have been more efficient if Holdco had evaluated all of its potential Prohibited Investment claims at one time, but nothing prohibits Holdco from immediately pursuing the claim which it believes to be ready for resolution.

Thus, Renco's application for a protective order regarding discovery into Prohibited Investments is denied.

B. *The PBGC Discovery*

The PBGC action essentially challenges steps allegedly taken to avoid the pension obligations of another entity that is part of the same Renco controlled group as Ilshar.[17] Because Ilshar is a member of that controlled group,[18] it may also be required to share in the potential pension liability. A finding that Ilshar is liable could put Holdco's interest in Ilshar in jeopardy.[19]

[17] This description of the PBGC litigation is simplistic and is intended only to provide minimal context for the dispute now before this Court. The PBGC litigation is pending in the United States District Court for the Southern District of New York.
[18] Ilshar has been a member of the Renco controlled group since its creation.
[19] Two deposition notices and several third-party subpoenas (including those served by Renco on March 4, 2013) seeking documents regarding the PBGC action also are targets of Renco's protective order motion. Their resolution is the same as the conclusion regarding the document production debate.

Holdco's claims relating to the PBGC action have two aspects: First, it seeks to be indemnified for damages caused to Ilshar but attributable to Renco (or related entities) and, second, it seeks to replace ILR as the manager of Ilshar's defense to the PBGC claims.[20] Renco has moved to dismiss both of the claims relating to the PBGC action.[21] The discovery sought by Holdco is not limited to its indemnification claim. In addition, it seems to seek the documents that would be pertinent to the PBGC action directly.

Renco asks for a stay of this discovery. When, as here, there is a pending motion to dismiss but no special circumstances warranting discovery at that time, a stay is frequently granted.[22] There are practical reasons supporting the stay. If the

[20] Renco has reported to the Court that Ilshar is not bearing its attorneys' fees in the PBGC action. *See* Letter of Kevin G. Abrams, Esquire, to the Court, March 22, 2013.

[21] Fraud claims are asserted broadly against Defendants in the PBGC action. A careful reading of the complaint shows that no fraud is pleaded because of any action by Ilshar. Liability, if any, may flow from Ilshar's membership in the Renco controlled group. That status was a matter of concern before Renco and MacAndrews & Forbes agreed to proceed with Ilshar.

[22] *See, e.g.*, *TravelCenters of Am. LLC v. Brog*, 2008 WL 5101619, at *1 (Del. Ch. Nov. 21, 2008). These special circumstances, which might warrant denial of a stay when there is a pending motion to dismiss, but are not present here, include: "(1) the plaintiff has made a colorable claim of irreparable harm and has requested preliminary relief; (2) the information sought may become unavailable or difficult to obtain; or (3) the motion does not offer a reasonable expectation that further litigation in the matter will be avoided." *Id.*

motion to dismiss is successful, the need for discovery on the PBGC issues would be obviated.[23] There is no reason to believe that evidence—if the discovery is delayed while the motion to dismiss is resolved—will be lost. The indemnification aspect of Holdco's claims is not time-sensitive because no damages have been suffered by Ilshar and none appears to be imminent. As for the breach of fiduciary duty claim to support ILR's displacement as litigation manager—as a component of its managing member duties—the record at this point amounts to little more than a mixture of apprehension and supposition. Again, the timing of any untoward consequences does not comport with a practical need for immediate discovery.

Accordingly, pending resolution of the motion to dismiss, discovery regarding the PBGC action is stayed.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[23] The proposed depositions of individuals who likely will be questioned about other matters pending in these proceedings are likely. Thus, multiple depositions probably would not be avoided.