

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CENDANT CORPORATION, a)
Delaware corporation, a successor to)
HFS INCORPORATED, a Delaware)
corporation,)
) C.A. No. 98C-10-034 MMJ
Plaintiff ,)
)
v.)
)
COMMONWEALTH GENERAL)
CORPORATION, a Delaware)
corporation,)

Defendant.

ORDER

Upon the Court's In Camera Review of Documents Deemed Privileged

Submitted: May 31, 2006

Decided: June 30, 2006

Thomas J. Allingham, II, Esquire, James W. Brown, Esquire, Skadden, Arps, Slate, Meagher & Flom, Wilmington, Delaware, Attorneys for Plaintiff Cendant Corporation

Jon E. Abramczyk, Esquire, Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, Kevin M. Dinan, Esquire, King & Spalding, Washington, DC, Attorneys for Commonwealth General Corporation

JOHNSTON, J.

1. By Memorandum Opinion dated April 25, 2006, the Court considered Defendant Commonwealth General Corporation's Motion to Compel Production of Privileged Documents Cendant has put "At Issue." The Court granted Commonwealth's Motion, subject to the following procedure:

Cendant is hereby ordered to identify documents listed in its privilege log that are responsive to Commonwealth's requests for production. As to each listed document, Cendant may provide the Court with its position as to whether Commonwealth has or lacks substantial need for the document; and whether the information is reasonably available through other sources. The Court will review the identified documents *in camera* to evaluate whether the document is related to a subject placed at issue.

2. Cendant submitted a privilege log and a binder of 26 tabbed documents. The Court has now reviewed each document and considered Cendant's arguments as to why each document should not be produced.

3. The Court finds that the following documents are not subject to production by Cendant.

<u>Tab</u>	<u>Document Description & Potential Category</u>	<u>Discussion</u>
1	Due Diligence (Category 1) 10/23/97 letter from Hele of Merrill Lynch to Katz, with lawyer's handwriting	Cendant produced this document to Commonwealth in redacted form. The redacted handwriting is not relevant to any issue in dispute.

<u>Tab</u>	<u>Document Description & Potential Category</u>	<u>Discussion</u>
3	Due Diligence (Category 1) “Management Presentation” booklet, with lawyer’s handwriting	Cendant produced this document to Commonwealth in redacted form. The redacted parts are substantively duplicative of material already produced or not relevant to any issue in dispute.
4	Due Diligence (Category 1) 11/6/97 due diligence list (faxed), with lawyer’s handwriting	Cendant produced this document to Commonwealth in redacted form. The redacted handwriting is not relevant to any issue in dispute.
5	Due Diligence (Category 1) Cover memo dated 11/10/97. Tax and employee benefits (author and recipient are outside counsel)	Not relevant to any issue in dispute.
6	Due Diligence (Category 1) Memo - “HFS-Project Seed - Employee Benefits Due Diligence”	Not relevant to any issue in dispute.
7	Due Diligence (Category 1) Detailed listing of individual employee benefits	Not relevant to any issue in dispute.
11	Due Diligence (Category 1) Undated drafts of memo re: intellectual property	Not relevant to any issue in dispute.

<u>Tab</u>	<u>Document Description & Potential Category</u>	<u>Discussion</u>
12	Due Diligence (Category 1) Undated draft agreement sections	Not relevant to any issue in dispute.
13	Due Diligence (Category 1) Redacted memo dated 11/20/97 re: draft agreement - change in control issues	Not relevant to any issue in dispute.
14	Due Diligence (Category 1) Memos dated 11/21/97 and 11/24/97 summarizing Affiliate Agreements (author and recipient are outside counsel)	Not relevant to any issue in dispute.
15	Due Diligence (Category 1) 11/25/97 draft letter from Silverman to Hele (Providian agent) re: final definitive proposal	Cendant has already produced this document to Commonwealth in final form. The draft and final document are not materially different.
16	Due Diligence (Category 1) Memo re: divested business, properties and material agreements	Not relevant to any issue in dispute.
17	Due Diligence (Category 1) Redacted memo dated 12/2/97 re: draft agreement - change in control issues	Not relevant to any issue in dispute

<u>Tab</u>	<u>Document Description & Potential Category</u>	<u>Discussion</u>
18	Due Diligence (Category 1) 12/02/97 memo re: outstanding due diligence requests, with in-house counsel's name handwritten on front	Cendant has already produced this document to Commonwealth
23	Due Diligence (Category 1) Redacted memos dated 4/28/98 re: change in control issues	Not relevant to any issue in dispute
24	May 18 Meeting (Category 4) 05/08/98 fax of agenda for meeting, with lawyer's handwritten notes	Cendant produced this document to Commonwealth in redacted form. The handwritten notes are not responsive to the issue of what statements actually made at May 18 meeting are alleged by Cendant to be fraudulent.
25	Due Diligence, May 18 Meeting (Categories 1 and 4) Draft memos dated 6/25/98 through 7/6/98 re: Providian Stock Purchase Agreement, Representation and Current Compliance	Substantively duplicative of material already produced

<u>Tab</u>	<u>Document Description & Potential Category</u>	<u>Discussion</u>
27	Notice of Litigation (Category 3) Drafts of letter to LeBoeuf re: notice of Providian Financial Corp. Lawsuit	Cendant has already produced this document to Commonwealth in final form. The drafts and final document are not materially different

4. The Court finds that the following documents must be produced by Cendant to Commonwealth. As to each of these documents, the Court has determined that Cendant has waived the attorney-client privilege by raising one of the following four issues in the litigation:

- (1) what Cendant and its advisors did or did not learn about Providian’s business during due diligence, including what they knew about the right to use the Providian name after closing;
- (2) the negotiating history of the Stock Purchase Agreement between Commonwealth and Cendant;
- (3) when Commonwealth actually provided Cendant notice about the existence of litigation involving the Providian name; and
- (4) what statements were made at a May 18, 1998 meeting that Cendant alleges were fraudulent.

In order to fully and fairly litigate the factual and legal issues in this case, Commonwealth needs to review these documents. Other sources of the information contained in these documents are not reasonably available.

<u>Tab</u>	<u>Document Description & Potential Category</u>
2	Due Diligence, May 18 Meeting (Categories 1 and 4) Excerpts from lawyer's handwritten notes
8	Due Diligence (Category 1) Memo dated 11/13/97 re: due diligence meetings, with focus on creating an outline of "legal and regulatory" issues based on document review. Author and recipients are all outside counsel.
9	Due Diligence (Category 1) Series of draft outlines, with different draftline dated, apparently relating to binders in the due diligence room
10	Due Diligence (Category 1) Drafts of memo dated 11/20/97 re: "Preliminary Due Diligence Review."
19	Due Diligence (Category 1) Memo dated 12/3/97 re: status of title to the Providian Service Mark
20	Due Diligence (Category 1) Redacted memo dated 4/3/98 re: Providian Name Change
21	Due Diligence (Category 1) Redacted memo dated 4/3/98 re: Providian Name Change
22.	Due Diligence (Category 1) Redacted memo dated 4/14/98 re: Providian name and change in control issue

Tab Document Description & Potential Category

26 **Due Diligence (Category 1)**

Memo dated 7/30/98 re: Barker litigation

IT IS SO ORDERED.

The Honorable Mary M. Johnston