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Discovery Order (RICHARD W. MCWHORTER)

Elizabeth E. Long
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

RICHARD W. MCWHORTER, Plaintiff, v. J. ROBERT WARD, Defendant.	)))))))))	Civil Action No.: 2006CV118867

FILED IN OFFICE
NOV - 1 2007
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

DISCOVERY ORDER

This case is before the Court on Plaintiff's Motion to Compel Discovery Responses. After reviewing the record of the case and the briefs filed on this motion, as well as performing an *in camera* inspection of the documents, the Court finds as follows:

Plaintiff filed its Motion to Compel Discovery Responses on July 12, 2007, seeking discovery of certain email communications between Mr. Devin, in-house counsel at Defendant's Land Resource Companies, LLC ("LRC"), and Mr. Vacko, CFO of LRC. Mr. Devin and Mr. Vacko were communicating at Defendant's request regarding Defendant's ability to purchase a Far Horizons loan from BB&T Bank. Defendant objected to the production of such communications on the basis of attorney-client privilege. On October 1, 2007, (the "October 1st Order") the Court issued an Order granting Plaintiff's Motion to Compel and declining to extend the attorney-client privilege to communications between Mr. Devin and Mr. Vacko.

In the course of producing the requested communications, subsequent discovery issues arose. Defendant is asserting the attorney-client and/or common interest privilege over email communications between certain individuals.

On October 15, 2007, the Court held a telephone conference with the parties to discuss the discovery dispute and agreed to review the contested emails *in camera*, to accept supplement briefs on the matter, and to issue a final ruling.

The October 1st Order relied upon Mr. Devin's deposition testimony to determine that he was acting as Mr. Ward's personal attorney in the Far Horizon's loan matter. See, Zeilinski v. Clorox Co., 270 Ga. 38, 41 (1998). The Order, however, declined to extend the narrow attorney-client privilege to communications solely between Mr. Devin and Mr. Vacko.

SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE:

Once again, Defendant urges this Court to recognize the applicability of the attorney-client privilege to client-agents and to the attorney and to shield all of the contested communications from production. Defendant, however, relies upon case law applying the attorney-corporate client privilege. See, e.g., Southern Guaranty Ins. Co. v. Ash, 192 Ga. App. 24, 27 (1989); Fire Ass'n v. Fleming, 78 Ga. 733 (1887). Defendant also relies upon the Restatement and on a Georgia evidentiary treatise. See, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 70 (2000); Paul S. Milich, GEORGIA RULES OF EVIDENCE § 21.3.

The attorney-client privilege bars the discovery or testimony of confidential communications between a lawyer and his client. O.C.G.A. §§ 24-9-21, 24, 25, & 27; NationsBank, N.A., v. SouthTrust Bank of Ga., N.A., 226 Ga. App. 888, 896 (1997). The attorney-client privilege protects any communication made between the client and the attorney in confidence for the purposes of obtaining legal advice. See, Fisher v. U.S., 425 U.S. 391, 403 (1976); Tenet Healthcare Corp. v. Louisiana Forum Corp., 273 Ga. 206 (2000); Griffin v. Williams, 179 Ga. 175 (1934); Marriott Corp., v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497 (1981). The party claiming the privilege bears the burden of establishing it. Zeilinski v. Clorox Co., 270 Ga. 38, 40 (1998).

The application of the attorney-client privilege is narrow and conservative. "Inasmuch as the exercise of the privilege results in the exclusion of evidence, a narrow construction of the privilege comports with the view that the ascertainment of as many facts as possible leads to the truth, the

discovery of which is 'the object of all legal investigation.'" Tenet Healthcare Corp., 273 Ga. at 208; McKesson HBOC, Inc. v. Adler, 254 Ga. App. 500, 502-503 (2002) ("[T]he scope of the attorney-client privilege is far narrower than that of the work-product doctrine, and it is far more readily waived by disclosure to a third party.").

The attorney-client privilege has been extended to corporate clients and the agents who act on the corporation's behalf. Marriott Corp., 157 Ga. App. at 503-505. To apply the attorney-client privilege to a corporate communication, the corporation must demonstrate that the communication was (1) made for legal advice, (2) done at the direction of the employee's corporate superior, (3) intended to secure legal advice, (4) addressed issues within the employee's corporate duties, and (5) not disseminated beyond those persons who had a need to know. Id. at 505.

The analysis and application of the attorney-client privilege is difficult in this case because Defendant Ward claimed to have, and this Court agreed, a personal attorney-client relationship between himself and Mr. Devin, but now seeks to apply the attorney-client privilege to those individuals who are employed by LRC. While the Far Horizons loan matter was a purely personal investment, Defendant Ward utilized LRC's employees to effectuate his plan to purchase such loans.

Defendant urges the Court to recognize the application of the attorney-client privilege to agents of an individual client. Instead of establishing a personal agency relationship between Mr. Ward and the third party whose inclusion in the communication is at issue, Defendant Ward assumes that such third party's employee/agency relationship with LRC is transferable to him and that their communications with his personal attorneys are privileged, just as his communications are. Defendant's reasoning collapses the necessary analysis and expands the scope of the attorney-client privilege in Georgia.

Additionally, the argument advanced by Defendant Ward that he is the sole owner of LRC and is integrated into the business of LRC to such a level that necessitated the participation of LRC employees in the Far Horizons loan matter cuts against Defendant's earlier argument that Mr. Devin acted as his personal attorney. For an in-house attorney to be classified as the personal attorney for an employee/officer of the company, the person asserting the privilege must establish that the communications were clearly made for and with the employee/officer, not the company, and that the communications did not concern the company's general affairs. Zeilinski v. Clorox Co., 270 Ga. 38, 41 (1998).

Defendant Ward argued that Mr. Devin acted as his personal attorney under Zeilinski, and this Court agrees. The separation between personal and corporate endeavors that is required under Zeilinski, however, is in conflict with Defendant Ward's current argument to extend the attorney-client privilege to other LRC employees participating in the Far Horizons loan matter. These other LRC employees would have to be Defendant Ward's personal agents for the attorney-client privilege to shield their communications from discovery. Their employment with LRC and working relationship with Defendant Ward as the CEO of LRC, is insufficient to establish such a personal agency relationship. There has been no other indication that these other employees are personal agents of Defendant Ward. Under Georgia law, their communications are not privileged under the attorney-client privilege enjoyed by Defendant Ward and his attorneys. If LRC were the defendant, rather than Mr. Ward personally, the result would be different.

Work-Product Doctrine:

The work-product doctrine is an extension of the attorney-client privilege that protects trial preparation materials. The work-product doctrine prevents the discovery of documents and other tangible items prepared in anticipation of litigation or for trial, unless the party seeking the discovery

has substantial need for the materials that he is otherwise unable to obtain a reasonable substitute for without undue hardship. McKesson HBOC, Inc., v. Adler, 254 Ga. App. 500, 501-502 (2002).

Defendant argues that some of the communications at issue were made in anticipation of litigation and thus are protected. Plaintiff, however, argues that at the time of the communications, he was unaware that Defendant Ward was planning to purchase and foreclose upon the loans, thus there was no basis to anticipate litigation.

In Marriott Corporation v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497 (1981), the Georgia Court of Appeals applied the work-product doctrine to a memorandum created "one month following plaintiff's aborted convention as a record of events prepared with an eye toward assessing defendant's potential liability in the event of litigation." At the time that the memorandum was written, defendants were unaware of any intent on behalf of plaintiff to sue over the cancelled convention reservations. Id. Thus, knowledge of a pending lawsuit or intention to file a lawsuit is not required for a communication made "with an eye toward assessing...potential liability..." and is not required for the document to be protected under the work-product doctrine. Id. Thus, to the extent that the communications in question were made in anticipation of litigation, they will be so protected under the work-product doctrine.

Common Interest Privilege:

Defendant also argues that the common interest or joint defense privilege protects the communications at issue. The common interest privilege protects from discovery communications made (1) by separate parties involving matters of common interest, (2) intended to further those matters, (3) without waiving any privilege. McKesson Corp. v. Green, 266 Ga. App. 157, 161 n.8 (2004).

Defendant, in his supplemental brief, supports the common interest privilege argument by citing the breakup of the business relationship between himself and Plaintiff in 2004, that resulted in four law suits being filed (some involving Defendant Ward individually and some involving his company, LRC). Defendant argues that the communications in question and those individuals participating in them were all involved in the litigation of the various business disputes between Defendant/LRC and Plaintiff.

Defendant Ward and LRC had a common interest in defending or prosecuting lawsuits against McWhorter. To the extent that the emails at issue contained legal, factual or strategic communications regarding the various lawsuits against McWhorter, the common interest privilege shall apply.

Application of Privileges to Certain Individuals:

Mr. Edward Krugman

Mr. Krugman, an attorney, represented both LRC and Defendant personally. In the affidavit submitted by Mr. Krugman in conjunction with Defendant's supplemental brief, he stated that he represented LRC and Defendant and continues to represent Defendant in this action even though he is not counsel of record. Mr. Krugman concludes, "[t]hus, at the time of the email communications that are the subject of the plaintiff's motion to compel, I was representing not only LRC but also Mr. Ward individually." Thus, communications where Mr. Krugman's legal advice is sought or given in matters concerning either LRC or Defendant Ward individually, shall be protected by the attorney-client privilege, if not otherwise waived.

Mr. Devin

Mr. Devin's classification as Defendant's Ward's personal attorney in the Far Horizons matter and as LRC's General Counsel has already been established in the October 1st Order. Thus, communications where Mr. Devin's legal advice is sought or given in matters concerning either LRC

or Defendant Ward individually, shall be protected by the attorney-client privilege, if not otherwise waived.

Other LRC Employees

As discussed above, other LRC employees are not within the ambit of Defendant Ward's personal attorney-client relationship with attorneys Devin and Krugman. Such employees, however, may not destroy the protection afforded to communications that are protected under the work-product doctrine or under a common interest privilege.

In light of the above-stated reasoning, the email communications shall be treated accordingly and, where appropriate, shall be promptly produced to Plaintiff:

PRIVILEGED DOCUMENTS

	Document Bates Number	**Treatment**
1.	WARD00180-182-ss	Privileged per Attorney-Client Privilege
2.	WARD00602-603	Privileged per Work-Product Doctrine
3.	WARD00604-605	Privileged per Work-Product Doctrine
4.	WARD00609-614	Privileged per Work-Product Doctrine/ Common Interest
5.	WARD00615-617	Privileged per Work-Product Doctrine/ Common Interest
6.	WARD00618-623	Privileged per Work-Product Doctrine/ Common Interest
7.	WARD00624-631	Privileged per Work-Product Doctrine/ Common Interest
8.	WARD00632-636	Privileged per Attorney-Client Privilege/Work-Product Doctrine/ Common Interest
9.	WARD00661	Privileged per Work-Product Doctrine/ Common Interest
10.	WARD00662	Privileged per Work-Product Doctrine/Common Interest
11.	WARD00666	Privileged per Work-Product Doctrine/ Common Interest
12.	WARD00668-69	Privileged per Work-Product Doctrine

	Document Bates Number	Treatment
13.	WARD00672	Privileged per Work-Product Doctrine
14.	WARD00686-87	Privileged per Work-Product Doctrine
15.	WARD00688-89	Privileged per Work-Product Doctrine
16.	WARD00721-725	Privileged per Work-Product Doctrine/Common Interest
17.	WARD00726-730	Privileged per Work-Product Doctrine/ Common Interest
18.	WARD00732-735	Privileged per Attorney-Client Privilege & Work Product
19.	WARD00736-738	Privileged per Attorney-Client Privilege & Work Product
20.	WARD00739-740	Privileged per Attorney-Client Privilege
21.	WARD00741-742	Privileged per Attorney-Client Privilege
22.	WARD00743-744	Privileged per Attorney-Client Privilege
23.	WARD00745	Privileged per Attorney-Client Privilege & Work Product
24.	WARD00753-754	Privileged per Attorney-Client Privilege
25.	WARD00755	Privileged per Attorney-Client Privilege
26.	WARD00757-758	Privileged per Attorney-Client Privilege
27.	WARD00767	Privileged per Attorney-Client Privilege & Work Product
28.	WARD00774	Privileged per Attorney-Client Privilege
29.	WARD00778-779	Privileged per Attorney-Client Privilege
30.	WARD00780	Privileged per Attorney-Client Privilege
31.	WARD00784	Privileged per Attorney-Client Privilege
32.	WARD00785-786	Privileged per Attorney-Client Privilege
33.	WARD00788-789	Privileged per Attorney-Client Privilege
34.	WARD00795-796	Privileged per Work-Product Doctrine/Common Interest
35.	WARD00797-799	Privileged per Work-Product Doctrine/Common Interest

	Document Bates Number	Treatment
36.	WARD00800-801	Privileged per Work-Product Doctrine/Common Interest
37.	WARD00830-832	Privileged per Work-Product Doctrine/Common Interest
38.	WARD00838	Privileged per Work-Product Doctrine/Common Interest
39.	WARD00839	Privileged per Work-Product Doctrine/Common Interest
40.	WARD00842	Privileged per Work-Product Doctrine/Common Interest
41.	WARD00843-845	Privileged per Work-Product Doctrine/ Common Interest
42.	WARD00846-847	Privileged per Work-Product Doctrine/Common Interest
43.	WARD00850-852	Privileged per Work-Product Doctrine/Common Interest

DOCUMENTS TO BE REDACTED

Partially Privileged under the Attorney-Client, Work-Product, or Common Interest Privileges

	Document Bates Number	Treatment
44.	WARD00178-179-SS	Redact—the latest 2 communications (11:02 am & 11:00 am), produce the remainder of the email.
45.	WARD00185-187-SS	Redact—the latest communication\ (3:34 pm), produce remainder of email
46.	WARD00325-327-SS	Redact—2 latest communications (10:18 am & 11:00 pm), produce the remainder of the email.
47.	WARD00579-581	Redact everything but the last communication (3:02 pm) on the email
48.	WARD00582-583	Redact everything but the last communication (3:02 pm) on the email
49.	WARD00584-587	Redact everything but the last communication (3:02 pm) on the email
50.	WARD00588-592	Redact everything but the last communication (3:02 pm) on the email

	Document Bates Number	Treatment
51.	WARD00637-641	Redact everything but the last communication (3:02 pm) on the email
52.	WARD00644-649	Redact everything but the last communication (3:02 pm) on the email
53.	WARD00650-653	Redact everything but the last communication (3:02 pm) on the email
54.	WARD00655-	Redact—1st communication (3:21pm), produce the remainder of the email.
55.	WARD00656-657	Redact—2 latest communications (3:40 pm & 3:21 pm), produce the remainder of the email.
56.	WARD00658-660	Redact everything but the last communication (3:02 pm) on the email
57.	WARD00679-683	Redact everything but the last communication (3:02 pm) on the email
58.	WARD00679-683	Redact everything but the last communication (3:02 pm) on the email
59.	WARD00690-692	Redact everything but the last communication (3:02 pm) on the email
60.	WARD00693-694	Redact everything but the last communication (3:02 pm) on the email
61.	WARD00695-698	Redact everything but the last communication (3:02 pm) on the email
62.	WARD00746-749	Redact—latest communication (10:45 am), produce the remainder of the email
63.	WARD00790-792	Redact—latest communication (2:24 pm) and produce the remainder of the email

	Document Bates Number	Treatment
64.	WARD00825-829	Redact everything but the last communication (3:02 pm) on the email
65.	WARD00833-834	Redact everything but the last communication (3:02 pm) on the email

DOCUMENTS TO BE PRODUCED

	Document Bates Number	Treatment
66.	WARD00006-7-SS	Non-privileged, Produce
67.	WARD00035-38SS	Non-privileged, Produce
68.	WARD00046-47-SS	Non-privileged, Produce
69.	WARD00081-82-SS	Non-privileged, Produce
70.	WARD00084-85-SS	Non-privileged, Produce
71.	WARD00119-122-SS	Non-privileged, Produce
72.	WARD00183-184-SS	Non-privileged, Produce
73.	WARD00188-SS, 189-SS, 190-SS	Non-privileged, Produce
74.	WARD00197-198-SS	Non-privileged, Produce
75.	WARD00199-200-SS	Non-privileged, Produce
76.	WARD00205-SS, 206-SS	Non-privileged, Produce
77.	WARD00209-210-SS	Non-privileged, Produce
78.	WARD00240-243-SS	Non-privileged, Produce
79.	WARD00321-322-SS	Non-privileged, Produce
80.	WARD00323-324-SS	Non-privileged, Produce
81.	WARD00365-366-SS	Non-privileged, Produce

	Document Bates Number	Treatment
82.	WARD00570-578	Non-privileged, Produce
83.	WARD00593	Non-privileged, Produce
84.	WARD00594-595	Non-privileged, Produce
85.	WARD00596	Non-privileged, Produce
86.	WARD00597	Non-privileged, Produce
87.	WARD00598-599	Non-privileged, Produce
88.	WARD00600	Non-privileged, Produce
89.	WARD00665	Non-privileged, Produce
90.	WARD00667	Non-privileged, Produce
91.	WARD00670-671	Non-privileged, Produce
92.	WARD00673	Non-privileged, Produce
93.	WARD00674	Non-privileged, Produce
94.	WARD00675	Non-privileged, Produce
95.	WARD00676	Non-privileged, Produce
96.	WARD00684-685	Non-privileged, Produce
97.	WARD00700	Non-privileged, Produce
98.	WARD00701-702	Non-privileged, Produce
99.	WARD703-704	Non-privileged, Produce
100.	WARD00705	Non-privileged, Produce
101.	WARD00706	Non-privileged, Produce
102.	WARD00707	Non-privileged, Produce
103.	WARD00708-709	Non-privileged, Produce

	Document Bates Number	Treatment
104.	WARD00710-711	Non-privileged, Produce
105.	WARD00712	Non-privileged, Produce
106.	WARD00713	Non-privileged, Produce
107.	WARD00714	Non-privileged, Produce
108.	WARD00715	Non-privileged, Produce
109.	WARD 00760-761	Non-privileged, Produce
110.	WARD00762-763	Non-privileged, Produce
111.	WARD00764-766	Non-privileged, Produce
112.	WARD00768-770	Non-privileged, Produce
113.	WARD00771-773	Non-privileged, Produce
114.	WARD00774-775	Non-privileged, Produce
115.	WARD00783	Non-privileged, Produce
116.	WARD00793-794	Non-privileged, Produce
117.	WARD00804	Non-privileged, Produce
118.	WARD00805	Non-privileged, Produce
119.	WARD00811-812	Non-privileged, Produce
120.	WARD00815	Non-privileged, Produce
121.	WARD00824	Non-privileged, Produce
122.	WARD00817	Non-privileged, Produce
123.	WARD00821	Non-privileged, Produce
124.	WARD00840	Non-privileged, Produce
125.	WARD00841	Non-privileged, Produce

	Document Bates Number	Treatment
126.	WARD00848	Non-privileged, Produce
127.	WARD00857-858	Non-privileged, Produce
128.	WARD00857-858	Non-privileged, Produce
129.	WARD00857	Non-privileged, Produce
130.	WARD00859-860	Non-privileged, Produce
131.	WARD00861	Non-privileged, Produce
132.	WARD00862	Non-privileged, Produce
133.	WARD00863	Non-privileged, Produce
134.	WARD00864	Non-privileged, Produce
135.	WARD00865	Non-privileged, Produce
136.	WARD00866	Non-privileged, Produce
137.	WARD00867-868	Non-privileged, Produce
138.	WARD00869-870	Non-privileged, Produce
139.	WARD00871	Non-privileged, Produce
140.	WARD00872-873	Non-privileged, Produce
141.	WARD00874	Non-privileged, Produce
142.	WARD00875-876	Non-privileged, Produce
143.	WARD00877-878	Non-privileged, Produce
144.	WARD00879	Non-privileged, Turn Over

Deposition of Mr. Vacko:

During the October 15, 2007, telephone conference and in its supplemental briefs, Plaintiff petitioned the Court for leave to resume Mr. Vacko's deposition to inquire about the communications which are the subject of this Order. Plaintiff's request is hereby GRANTED. Prior to the scheduled hearing on the motion for summary judgment, Plaintiff may redepose Mr. Vacko regarding the email communications produced in accordance with this Order.

SO ORDERED this 1st day of November, 2007.

ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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