AMERICAN BANKRUPTCY INSTITUTE

2022 Annual Spring Meeting

Privileges & Confidentiality in Bankruptcy Litigation

Philip D. Anker
WilmerHale; New York

Hon. Kevin J. Carey (ret.)
Hogan Lovells; Philadelphia

Kathryn A. Coleman
Hughes Hubbard & Reed LLP; New York

Hon. Barbara J. Houser (ret.)
U.S. Bankruptcy Court (N.D. Tex.); Dallas

CONCURRENT SESSION

2022

AMERICAN BANKRUPTCY INSTITUTE

ANNUAL SPRING MEETING

APRIL 29, 2022

11:30 AM - 12:30 PM

PRIVILEGES & CONFIDENTIALITY IN BANKRUPTCY LITIGATION

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ANNUAL SPRING MEETING
APRIL 29, 2022
PRIVILEGES & CONFIDENTIALITY IN BANKRUPTCY LITIGATION

I. Mediation Privilege in Bankruptcy

a. Traditional mediations in civil litigation often involve only two parties – a plaintiff and a defendant. Bankruptcy mediations, at least where the subject is the formulation of a plan in a Chapter 11 case, can involve multiple parties. Does that create a "square peg in a round hole" problem?

b. E.g., imagine that the debtor, one or more official committees, various ad hoc unsecured creditor groups, secured creditors, third parties with potential liability for debts of the debtor, and other parties in interest participate in a mediation. But there are separate "break-out" sessions just between the debtor and a particular creditor group. That leads to a settlement – the terms for a proposed plan – between the debtor and one such group that one or more other groups, or other creditors, oppose. Can the opposing group/creditors obtain discovery regarding the one-on-one break-out sessions?

c. Does the answer turn on the arguments made by the opposing group/creditors and/or on what the debtor and settling group say in response or in their case in chief to satisfy the requirements under Section 1129 of the Bankruptcy Code for confirmation? E.g., what if the objectors argue that the proposed plan overcompensates the settling group and that the only explanation is that the debtor was willing to give away the store to "buy" plan support? What if the debtor and supporting group say that is false – there was lots of back-and-forth, good faith negotiations between the debtor and the one group that has now settled? Have the debtor and the supporting group waived any privilege by making that argument – by arguably using the privilege as a sword, not a shield? Can the objectors obtain discovery of what happened in the one-on-one mediation to see if that claim of lots of back-and-forth negotiations is true and to see if the plan satisfies the good faith requirement in Section 1129(a)(3)?

d. Can the debtor walk the following line?: "We can present evidence that there were numerous mediation sessions conducted under the auspices of the mediator. The mere fact that there were so many sessions is probative of our good faith – or at least we can so argue. Other parties can obtain discovery as to whether there were as many sessions as we say there were. But they can't take discovery regarding the content of those sessions – what proposals were made, back and forth."

e. Can rules be established at the outset – by the bankruptcy judge presiding over the case, by the mediator, by agreement of all parties – that define what communications are, and are not, privileged and not subject even to discovery?

f. For the mediation privilege to apply, must the mediator be present for each communication? Is there a risk of the communication not being privileged if, for example, the debtor's lawyer calls a lawyer for one creditor group, and doesn't go through the mediator? Or if parties exchange plan drafts without sending them to the mediator and asking him/her to forward them?

g. The *Boy Scouts* and *Puerto Rico* cases. Lessons learned.

h. The amended Delaware Bankruptcy Local Rule.

II. The Attorney-Client Privilege, and Creditor Committee Communications with Unsecured Creditors.

a. Are communications between counsel for an official committee and members of the committee's constituency privileged if those members are not on the committee? Even if not subject to a direct attorney-client privilege (e.g., even if an unsecured creditor who is not sitting on a UCC is not a client of committee counsel), is there an argument for application of the common interest privilege?

b. Does the duty of a UCC to provide access to relevant information to general unsecured creditors, as specified in Section 1102(b)(3), affect the analysis at all?

c. Can the bankruptcy court enter an order providing protection for communications that otherwise would not be privileged?

d. When a chapter 11 trustee or an examiner succeeds to the debtor's privilege, what does that mean and how far does it go if the trustee or examiner decides to waive the privilege?

e. What happens after plan confirmation? Does a litigation trustee automatically succeed to the debtor's privilege with respect to causes of action transferred to the trust? Must the plan or trust agreement so specify? Is the result different if the debtor continues – it is reorganized – and not liquidated?

f. What happens if the debtor's assets/businesses are sold during the bankruptcy case under Section 363? What must be done to ensure not only that certain causes of action are retained by the bankruptcy estate, but that the estate representative – not the buyer – controls the privilege as to those causes of action?

III. Common Interest Privilege

a. Can one-time adversaries in bankruptcy form a common interest that protects their communications by agreeing to settle? E.g., debtor disputes claims or required treatment for a class of unsecured or secured bondholders. Their communications are presumably not privileged, since they are adverse. But what

if one day they reach an agreement in principle on those claims or treatment? Are their communications thereafter, made through counsel, on, for example, the best strategy to implement that agreement and obtain bankruptcy court approval for a plan embodying the agreement subject to a common interest privilege, such that the communications are not discoverable by other creditor groups opposing the settlement?

b. Is there a need to document such a common interest and a shared expectation of confidentiality? Even if not, is that a good practice?

c. Does it matter if the debtor reserves a "fiduciary out" in any plan support or other agreement documenting the deal?

d. Even before there is any agreement, can the debtor and the bondholder group have a shared common interest, such that their communications through counsel are privileged, on some subjects, if not on others? E.g., imagine that there is no agreement between the debtor and the bondholder group regarding the claims or treatment of the bondholders; their communications, even if made through counsel, on that subject are presumably not privileged. But could they share a common interest regarding a different subject – e.g., the treatment of some other creditor group?

LOCAL RULES

FOR

THE UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

(Effective February 1, ~~2021~~2022)

Redline Local Rules 2021 882912v8 and Local Rules 2022 901412v10
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Rule 9019-5 Mediation.

(a) Types of Matters Subject to Mediation. The Court may assign to mediation any dispute arising in an adversary proceeding, contested matter or otherwise in a bankruptcy case. Except as may be otherwise ordered by the Court, all adversary proceedings filed in a business case shall be referred to mandatory mediation, except an adversary proceeding in which (i) the United States Trustee is the plaintiff; (ii) one or both parties are *pro se*; or (iii) the plaintiff is seeking a preliminary injunction or temporary restraining order. Parties may also stipulate to mediation, subject to Court approval.

(b) Effects of Mediation on Pending Matters. The assignment of a matter to mediation does not relieve the parties to that matter from complying with any other Court orders or applicable provisions of the Code, the Fed. R. Bankr. P. or these Local Rules. Unless otherwise ordered by the Court, the assignment to mediation does not delay or stay discovery, pretrial hearing dates or trial schedules.

(c) The Mediation Process.

(i) Cost of Mediation. Unless otherwise ordered by the Court, or agreed by the parties, (1) in an adversary proceeding that includes a claim to avoid and recover any alleged avoidable transfer pursuant to 11 U.S.C. §§ 544, 547, 548 and/or 550, the bankruptcy estate (or if there is no bankruptcy estate, the plaintiff in the adversary proceeding) shall pay the fees and costs of the mediator and (2) in all other matters, the fees and costs of the mediator shall be shared equally by the parties.

(ii) Time and Place of Mediation Conference. After consulting with all counsel and *pro se* parties, the mediator shall schedule a time and place for the mediation conference that is acceptable to the parties and the mediator. Failing agreement of the parties on the date and location for the mediation conference, the mediator shall establish the time and place of the mediation conference on no less than twenty-one (21) days' written notice to all counsel and *pro se* parties.

(iii) Submission Materials. Unless otherwise instructed by the mediator, not less than seven (7) days before the mediation conference, each party shall submit directly to the mediator and serve on all counsel and *pro se* parties such materials (the "Submission") in form and content as the mediator directs. Any instruction by the mediator regarding submissions shall be made at least twenty-one (21) days in advance of a scheduled mediation conference. Prior to the mediation conference, the mediator may talk with the participants to determine what materials would be helpful. The Submission shall not be filed with the Court and the Court shall not have access to the Submission.

(iv) Attendance at Mediation Conference.

(A) Persons Required to Attend. Except as provided by subsection (j)(ix)(A) herein, or unless excused by the Mediator upon a showing of hardship, which, for purposes of this subsection shall mean serious or disabling illness to a party or party representative; death of an immediate family member of a party or party representative; act of God; state or national emergency; or other circumstances of similar unforeseeable nature, the following persons must attend the mediation conference personally:

(1) Each party that is a natural person;

(2) If the party is not a natural person, including a governmental entity, a representative who is not the party's attorney of record and who has full authority to negotiate and settle the matter on behalf of the party;

(3) If the party is a governmental entity that requires settlement approval by an elected official or legislative body, a representative who has authority to recommend a settlement to the elected official or legislative body;

(4) The attorney who has primary responsibility for each party's case, including Delaware counsel if engaged at the time of mediation regardless of whether Delaware counsel has primary responsibility for a party, unless Delaware counsel requests to be and is excused from attendance by the mediator in advance of the mediation conference; and

(5) Other interested parties, such as insurers or indemnitors or one or more of their representatives, whose presence is necessary for a full resolution of the matter assigned to mediation.

(B) Failure to Attend. Willful failure to attend any mediation conference, and any other material violation of this Local Rule, shall be reported to the Court by the mediator and may result in the imposition of sanctions by the Court. Any such report of the mediator shall comply with the confidentiality requirement of Local Rule 9019-5(d).

(v) Mediation Conference Procedures. The mediator may establish procedures for the mediation conference.

(vi) Settlement Prior to Mediation Conference. In the event the parties reach a settlement in principle after the matter has been assigned to mediation but prior to the mediation conference, the plaintiff shall advise the mediator in writing within one (1) business day of the settlement in principle.

(d) Confidentiality of Mediation Proceedings. Confidentiality is necessary to the mediation process, and mediations shall be confidential under these rules and to the fullest extent permissible under otherwise applicable law. The provisions of this Local Rule 9019-5(d) shall apply to all mediations occurring in cases, contested matters and adversary proceedings pending before the Court, whether such mediation is ordered or referred by the Court or voluntarily undertaken by the parties provided that such mediation is approved by the Court. Without limiting the foregoing, except as may be otherwise ordered by the Court,

the following provisions shall apply to any mediation under these rules:

(i) ~~Protection of Information Disclosed at Mediation. The mediator and the participants in mediation are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the parties or by witnesses in the course of the mediation. No~~F.R.E. 408. To the fullest extent applicable, Rule 408 of the Federal Rules of Evidence (and any applicable federal or state statute, rule, common law or judicial precedent relating to the protection of settlement communications) shall apply to the mediation conference and any communications with the mediator related thereto. In addition to the limitations of admissibility of evidence under Rule 408, no person may rely on or introduce as evidence in connection with any arbitral, judicial or other proceeding, ~~evidence pertaining to any aspect of the mediation effort,~~ including~~, but not limited to:~~ any hearing held by this Court in connection with the referred matter, whether oral or written, (~~A~~i) views expressed or suggestions made by a party with respect to a possible settlement of the dispute~~; (B) the fact that~~, including whether another party had or had not indicated a willingness to accept a proposal for settlement~~ made by the mediator;~~, (~~C~~ii) proposals made or views expressed by the mediator~~; (D) statements or~~, or (iii) admissions made by a party in the course of the mediation~~; and (E) documents prepared for the purpose of, in the course of, or pursuant to the mediation. In addition, without limiting the foregoing, Rule 408 of the Federal Rules of Evidence, any applicable federal or state statute, rule, common law or judicial precedent relating to the privileged nature of settlement discussions, mediations or other alternative dispute resolution procedures shall apply.~~ .

(ii) Protection of Information Disclosed to the Mediator or During Mediation. Subject to subparagraph (iv) herein, the mediator and the participants in mediation are prohibited from divulging, outside of the mediation, any oral or written information

disclosed by the parties or witnesses to or in the presence of the mediator, or between the parties during any mediation conference.

(iii) Confidential Submissions to the Mediator. Subject to subparagraph (iv) herein, any submission of information or documents to the mediator, including any Submission (as defined in Del. Bankr. L.R. 9019-5(c)(iii)), prepared by or on behalf of any participant in mediation and intended to be confidential shall not be subject to disclosure, regardless of whether such Submission is shared with other participants in the mediation during a mediation conference.

(iv) Information Otherwise Discoverable. Information, facts or documents otherwise discoverable or admissible in evidence ~~does~~do not become exempt from discovery~~,~~ or inadmissible in evidence~~,~~ merely by being disclosed or otherwise used ~~by a party~~ in the mediation~~. However, except as set forth in the previous sentence, no person shall seek discovery from any participant in the mediation with respect to any information disclosed during mediation~~ conference or in any Submission to the mediator.

(~~ii~~v) Discovery from the Mediator. The mediator shall not be compelled to disclose to the Court or to any person outside the mediation ~~conference~~ any ~~of the~~ records, reports, summaries, notes, communications, Submissions, recommendations made under subpart (e) of this Local Rule, or other documents received or made by or to the mediator while serving in such capacity. The mediator shall not testify~~ or be~~, be subpoenaed or compelled to testify ~~in regard to~~regarding the mediation in connection with any arbitral, judicial or other proceeding. The mediator shall not be a necessary party in any proceedings relating to the mediation. Nothing contained in this paragraph shall prevent the mediator from reporting the status, but not the substance, of the mediation effort to the Court in writing, from filing a ~~final report~~Certificate of Completion as required ~~herein~~by Local Rule 9019-5(f), or from otherwise complying with the obligations set forth in this Local Rule.

(~~iii~~vi) Protection of ~~Proprietary~~Confidential Information. ~~The parties, the mediator and all mediation participants shall protect proprietary information.~~For the avoidance of doubt, nothing in this sub-part 9019-5(d) is intended to or shall modify any rights or obligations any entity has in connection with confidential information or information potentially subject to protection under Section 107 of the Bankruptcy Code.

(~~iv~~vii) Preservation of Privileges. ~~The~~Notwithstanding Rule 502 of the Federal Rules of Evidence, the disclosure by a party of privileged information to the mediator does not waive or otherwise adversely affect the privileged nature of the information.

(e) Recommendations by Mediator. The mediator is not required to prepare written comments or recommendations to the parties. Mediators may present a written settlement recommendation memorandum to attorneys or *pro se* litigants, but not to the Court.

(f) Post-Mediation Procedures.

(i) Filings by the Parties. If a settlement is reached at a mediation, the plaintiff shall file a Notice of Settlement or, where required, a motion and proposed order seeking Court approval of the settlement within twenty-eight (28) days after such settlement is reached. Within sixty (60) days after the filing or the Notice of Settlement or the entry of an order approving the settlement, the parties shall file a Stipulation of Dismissal dismissing the action on such terms as the parties may agree. If the plaintiff fails to timely file the Stipulation of Dismissal, the Clerk's office will close the case.

(ii) Mediator's Certificate of Completion. No later than fourteen (14) days after the conclusion of the mediation conference or receipt of notice from the parties that the matter has settled prior to the mediation conference, unless the Court orders otherwise, the mediator shall file with the Court a certificate in the form provided by the Court ("Certificate of Completion") showing compliance or noncompliance with the mediation conference

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	Chapter 11
	Case No. 20-10343 (LSS)
BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC,	
	Courtroom No. 2
	824 North Market Street
	Wilmington, Delaware 19801
Debtors.	Monday, October 25, 2021
	11:00 A.M.

TRANSCRIPT OF TELEPHONIC RULING
BEFORE THE HONORABLE LAURIE SELBER SILVERSTEIN
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtor:	Derek Abbott, Esquire MORRIS, NICHOLS, ARSHT & TUNNELL LLP 1201 North Market Street, 16th Floor Wilmington, Delaware 19899
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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

(Proceedings commence at 11:03 a.m.)

THE COURT: Good morning.

This is Judge Silverstein. We're here for my ruling on the debtors' motion for protective order and I will read it into the record.

Debtors filed what they titled a motion for protective order on September 17th. Debtors want me to make multiple rulings regarding both discovery issues and admissibility issues related to the ongoing mediation proceedings for purposes of the scheduled confirmation hearing.

In considering the objections filed by the TCC, the Zalkin and Cochran Law Firms, certain insurers, the AIG Companies, and the joinders by other insurers I conclude that the motion is overly broad in the relief debtors seek at this time, but there is one aspect of the motion that I can rule on; namely, issues surrounding the trust distribution procedures.

Some background is helpful:

At the request of BSA, on June 9th of last year, I entered an order sending parties to mediation. There were objections, both as to the need for mediation at that time as well as to particular provisions of the proposed order, and with respect to the identity of the mediators. Even though modifications were made to address certain objections I would

not call it a consensual order.

The order appointed three mediators,

"For the purpose of mediating the comprehensive resolution of issues and claims in BSA's Chapter 11 case and through a Chapter 11 plan."

The debtors, the FCR, the TCC, the UCC, and the ad hoc committee of Local Councils were very willing participants. Certain insurance companies either signed on right away or apparently joined later. At the time the mediation order was entered the coalition did not yet exist or, at least, had not yet appeared in the case. With one exception the mediation order provides that Local Rule 9019-5(d) shall govern the mediation. Rule 9019-5 is very broad in application.

With respect to discovery the last sentence provides that,

"No person shall seek discovery from any participant in the mediation with respect to any information disclosed during mediation."

This sentence is of recent vintage and has not been interpreted, to my knowledge, by any of my colleagues current or former.

The one exception in the mediation order is important. It provides that,

"If a party puts at issue any good faith finding

concerning the mediation and any subsequent action concerning insurance coverage the parties right to seek discovery, if any, is preserved."

At the time this provision was inserted into the mediation order there were no proposed findings regarding trust distribution procedures in a plan or conditions precedent to confirmation before the court. By the motion for protective order, and as more particularly argued at the hearing, debtors have identified three categories of documents they seek to shield from discovery or redact based on privileges.

The three categories of documents that debtors seek to shield are minutes of board meetings of BSA's national executive board, national executive committee and bankruptcy task force; communications between mediation parties about the terms of the Hartford settlement agreement, the TCJC settlement agreement, RSA, plan, TDP's or other documents filed with the plan; and drafts of settlement proposals exchanged between the mediation parties including, without limitation, the Hartford settlement agreement, TCJC settlement agreement, RSA, plan, TDP's or other documents filed with the plan.

The motion references three grounds for withholding or redacting comments; attorney/client privilege, work product doctrine and the so called mediation privilege, argument

focused on the mediation privilege, and the debtors and the objectors focus mostly on 1129(a)(3) and the TDP's.

All objectors preliminarily argued, however, that the request for a protective order is premature, requests an advisory opinion or as more in the nature of a motion *in limine*. They argue that no specific discovery requests are before me and no motions to compel have been filed.

As relayed to me at argument, in fact, further discovery requests were recently propounded and responses were filed the day before the hearing. Understandably, then, parties propounding the discovery did not have the opportunity to review those responses in detail nor to meet and confer.

I agree with the objectors that the portion of debtors' motions requesting rulings on admissibility of evidence or premature. I will not make these rulings divorced from context. It appears that debtors seek to have me bless or not the adequacy of the record they will make at confirmation. On at least two occasions during argument Mr. Kurtz stated that debtors have nothing to hide and are willing to and want to put in all evidence and make any record that the court wants at confirmation.

Debtors are confused. Debtors, not the court, must determine what record they need to make or at least offer to obtain an order confirming their plan. I will consider the admissibility of evidence and any objections to it at trial or

perhaps on any motion *in limine* once objections to the plan are filed and the issues are definitively framed.

The discovery dispute related to the TDP's has crystalized over the last few months and I can address it. To start let me contrast the request before me now to the privilege issues raised at the RSA hearing. There I was asked to find not only that the RSA was the product of debtors' business judgment, a Section 363 standard, but also that the RSA was negotiated in good faith.

I questioned what the term "good faith" meant in the context of approving the RSA as it was not part of the relevant standard. The RSA parties then withdrew their request for a good faith finding and I proceeded with the hearing only on business judgement. The standard before me at the RSA hearing was whether debtors were reasonably informed when making the decision to enter into the RSA. I addressed admissibility issues and privilege assertions at the hearing and in that context.

A debtors entry into an RSA is entirely different then a debtor proposing a plan. Entry into an RSA, while not an insignificant undertaking, is, in any real sense, only an interim measure. As I said at that time debtors could file the plan envisioned by the RSA without permission from the court. Now with discovery addressed to confirmation there are two aspects to the context in which the privileged decisions

have been teed up. The first is 1129(a)(3) standard. The second are the conditions precedent baked into the plan.

Turing to 1129(a)(3) first, section 1129(a)(3) provides that a plan,

"Be proposed in good faith and not by any means forbidden by law."

Debtors take the position that 1129(a)(3) is basically a process test. What is the process by which the plan is proposed. Debtors were quite candid at the hearing about the evidence that they will adduce at confirmation to meet this requirement. Debtors are going to put into evidence the fact of mediation itself, the mediation order, the identity of the mediating parties, the identity of the mediators, the number of mediation sessions, and the dates of the sessions.

This evidence, debtors argue, imbue the process with good faith. They also argue that all of this evidence is non-privileged and so it is both admissible and does not waive any privileges that exist.

The TCC, somewhat surprisingly, believes the process was tainted. I say somewhat because at one point they signed onto the RSA which forms a substantial basis of the plan. Century and other insurers, not surprisingly, also believed the process was tainted. Both the TCC and Century want the ability to discover and admit evidence to that

effect. The TCC does not tell me what in particular they believe is tainted, but the insurers are clear. As they have repeatedly stated, insurers believe that debtors handed over the pin to the abuse survivors to draft the TDP's which the survivors then intend to use against the insurers in future coverage litigation.

The code does not define good faith in the context of 1129(a)(3). The Third Circuits various expositions on 1129(a)(3) are fairly captured in Judge Owens decision in Emerge Energy Services, 2019 Westlaw 7634308, and Judge Andrews decision from earlier this year in Exide, 2021 Westlaw 3145612.

To quote liberally from those cases the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the bankruptcy code. A plan must be proposed with honesty and good intentions, and with a basis for expecting that reorganization can be achieved, and with fundamental fairness in dealing with creditors."

In making the good faith determination courts must consider the totality of the circumstances focusing more to the process of plan development then the content of the plan. Good faith is shown when the plan has been proposed for the purpose of reorganizing the debtor, preserving the value of the bankruptcy estate and delivering value to creditors. Good

faith has been found to be lacking if a plan is proposed with ulterior motives.

At least as illuminating as the stated standards are the circumstances courts have looked at in an 1129(a)(3) analysis; for example, in Combustion Engineering, 391 F.3d 190 (2004), the Third Circuit recognized that the good faith requirement is an additional check on a debtor's intentional impairment of claims. That the classification and treatment of classes of claims is always subject to good faith. And that the Court can examine the motive of a debtor with respect to classification under the good faith requirement.

In American Capital Equipment, LLC, 688 F.3d 145 (2012), the Third Circuit stated that collusive plans are not in good faith and do not meet the requirements of 1129(a)(3). It also ruled that a plan does not fairly achieve the Bankruptcy Code's objectives when it establishes an inherent conflict of interest under especially concerning circumstances. It also observed that the fact that there is at least one valid purpose to the plan is not dispositive because the purpose must be fairly achieved.

And in Washington Mutual, 461 B.R. 240, the Bankruptcy Court considered in its good faith analysis the role of certain noteholders in settlement negotiations, plan drafting, and review, and the degree of control certain noteholders exercise over the case. Moreover, the Court

looked at whether any harm caused by the noteholders' influence could be remedied by other means.

These cases reveal that good faith includes process, but is not necessarily exclusively concerned with process or, perhaps, process, in substance, can overlap in certain instances.

While the focus is on the plan, debtors' motivation in proposing the plan, others' participation in the drafting of the plan, as well as the requirement that the plan fairly achieve results consistent with the purposes of the Bankruptcy Code permit, in an appropriate case, evidence beyond what BSA characterizes as process.

Turning to the conditions precedent baked into the plan, Findings (J), (Q), (R), (S), and (T) were a focus of the disclosure statement hearing.

Findings (R), (S), and (T), in particular, are directed at the trust-distribution procedures.

It does not appear that these findings have a code or a confirmation-related purpose; rather, even as modified, they appear to be more directed at most-confirmation litigation with insurers. To the extent these findings are confirmation-related, however, they clearly open up discovery related to the correctness of those findings.

It is in this setting that I turn to debtors' invitation of the mediation privilege. No party cited to me a

case in which the Third Circuit has acknowledged a federal common law mediation privilege. And, in, In re Lake Lotawana Community Improvement District, 563 B.R. 909 (2016), the Bankruptcy Court stated that of the circuits addressing the issue, only the Sixth Circuit had adopted such a privilege.

Without a federal mediation privilege, relevant information, exchanged in a confidential mediation is subject to discovery, when jurisdiction is based on a federal statute. But notwithstanding the lack of binding precedent in this circuit, Local Rule 9019-5 exists and was incorporated into my order. As I've already said, the last sentence provides that:

"Except as set forth in the previous sentence, no person shall seek discovery from any participant in the mediation with respect to any information disclosed during the mediation."

Aside from having absolutely no idea how this sentence works in practice, it appears to be inconsistent with mediation privilege, the collective nature of a bankruptcy proceeding, and the fact that, notwithstanding a settlement of a dispute within mediation, the Court ultimately must rule on most settlements in the context of the bankruptcy case. If the approval process is met with objection, it complicates, at least, the discovery process.

This is my "square peg, round hole" comment. Much of the law around mediation appears to be designed for two-

party disputes, in which the parties determine to attempt to resolve their dispute consensually through mediation. While recognizing the Uniform Mediation Act has only been adopted by 12 jurisdictions, I found the commentary helpful in attempting to understand the utility of mediation and what the precatory note for the Uniform Act calls, "The appropriate relationship of mediation with the justice system."

The drafters of the Uniform Act recognized that because of the confidential nature of mediation, it was necessary to tie confidentiality to the fairness of the mediation process. Fairness, in turn, is dependent upon the integrity of the process and knowing consent.

Successful mediation is based on the integrity of the process, act of party involvement, and informed self-determination or, in other words, the ability to control the outcome of the dispute. These principles work well in traditional, two-party disputes, in which the parties voluntarily determine to try to resolve their dispute by mediation and choose a mediator.

If both parties agree to an outcome in the mediation, their dispute is resolved and litigation is avoided; this is the essence of self-determination.

These principles do not describe the multiparty mediation reflected in the mediation order, "Of a comprehensive resolution of issues and claims in BSA's Chapter

11 case through a Chapter 11 plan."

Not all parties are involved in every aspect of the comprehensive resolution. Not all parties agree with the comprehensive resolution. And even if there is an agreed-to resolution by most or even all of the mediation parties, creditors must still vote on the plan and the Court must still conclude that the relevant standards are met. This is whole not wholly consistent with self-determination.

Considering both, the 1129(a)(3) arguments and the findings contained in the conditions precedent to confirming the plan, I conclude that the communications regarding the TDPs are discoverable. There are three reasons.

First, debtors want to use the fact of mediation as evidence of good faith. From the argument, it appears that the fact of mediation may be the primary evidence debtors will induce to meet the good faith standard; as such, they have put the mediation, at least with respect to the good faith of the TDPs, at issue.

Debtors are correct that the facts that they seek to put into evidence may not be privileged and courts have relied upon such facts in determining good faith in the context of class actions and settlements, but none of the decided cases discuss any related discovery or admissibility disputes.

It cannot be the case that if a party is relying on

the very fact of mediation to meet its standard of proof, that discovery is prohibited regarding the *bona fides* of the mediation.

Second, a find that the injection of the findings, particularly (R), (S), and (T), into the confirmation process has accelerated the insurers' reservation in the mediation order with respect to discovery. While it is true that the good faith reservation is with respect to subsequent actions, it is clear that the survivor representatives seek to injection matters into this confirmation hearing that would otherwise be determined in a subsequent action.

Based on the survivors submissions supporting the RSA, with these findings, the survivors seek to foreclose rulings that would otherwise be made in post-confirmation litigation. The survivors argue that these findings are necessary to confirmation.

At this point, however, it is not clear whether these findings are necessary in full or part, or whether these findings are simply a desire to shore up disputes with non-settling insurers.

And at that point, insurers are choosing to engage on these findings; certain insurers are. Whether they will continue to do so or simply argue that the findings are not appropriate, I don't know, but in the meantime, discovery is appropriate.

Third, debtors do not suggest that evidence with respect to the negotiation of the trust distribution procedures is otherwise available from another source outside the mediation process; accordingly, I deny debtors' motion to the extent that debtors seek to shield discovery communications, oral and written, regarding the trust distribution procedures, based on the mediation privilege.

I make no ruling as to admissibility at this time.

I also deny the motion, but without prejudice, with respect to debtors' other requests. I find them to be premature.

No objector has brought discovery disputes regarding the Hartford settlement agreement or the TCJC settlement agreement, and at argument, certain objectors suggested such challenges would not be forthcoming.

I will deal with any objections as they arise and when I have context. Such disputes should be brought to me promptly. These more traditional two-party disputes may be evaluated differently.

And that concludes my ruling on the debtors' motion for protective order.

The second motion in front of me last Tuesday was Century's motion, seeking discovery from Eric Green and his company, Resolutions, LLC. Debtors proposed Professor Green to be one of the three mediators. Ultimately, I did not

approve him in that role.

Debtors now propose Professor Green as the sole trustee of their survivor trust. In response, Century seeks discovery of his connections with others in the case to assess his impartiality and qualifications.

In response to Century's request, Professor Green produced certain documents, objected to the requests, and provided a privilege log. The log raises both, mediation privilege and attorney-client privilege.

I question whether mediation privilege is applicable to our situation, where private parties were not free to choose their own mediators, but rather, the selection was subject to approval of the Court. Further, most of the communications were made prior to the entry of the mediation order.

I need not decide that here. First, Professor Green, both, in his submission and through his counsel at argument, said he felt constrained to raise the mediation privilege, consistent with ABA standards of conduct for mediators, but that the decision was ultimately up to the Court. Second, no mediation party is asserting the mediation privilege to block production of the requested documents. Third, Century has modified its request to exclude communications between Professor Green and any appointed mediator, as well as any internal notes Professor Green may

have made, as well as Professor Green's communications with his staff.

Under these circumstances, I conclude that the documents, other than those in the excluded categories, must be produced. If those documents also contain communications that are protected by the attorney-client privilege, then those communications may be appropriately redacted.

And that concludes my ruling with respect to Century's motion seeking discovery from Professor Green.

Okay. Any questions?

(No verbal response)

THE COURT: When are we next in court?

(No verbal response)

THE COURT: I think the next day I have on my calendar is the 10th.

Mr. Abbott, does that seem right to you?

MR. ABBOTT: Your Honor, let me just pull out my calendar and take a quick peek. I think you might be correct.

(Pause)

MR. ABBOTT: Your Honor, the best I can tell, it is correct. I think that's one of the interim status conferences.

THE COURT: Okay. If there are discovery disputes that can be framed prior to the 10th, I will make time to hear them prior to the 10th.

So, I know it's been about a week since I ruled. My recollection, and what I said in my rulings to the best of my recollection, is that there were discovery responses that were received the day before the hearing. I am hoping that people have reviewed them and that if, in fact, there's going to be challenges, that people meet-and-confer.

And if, in fact, there are going to be challenges to any of the privileged communications, that they be raised as soon as possible. And I can hear them before the 10th.

So, I would like the parties to be thinking along those lines and I will make myself available to hear discovery disputes.

MR. ABBOTT: Thank you, Your Honor.

THE COURT: I'd, you know, rather not get them one little dispute at a time, but, actually, if that's the way they come in, that's fine; we'll handle them one at a time.

MR. ABBOTT: Thank you, Your Honor.

I misspoke. That's a regular omnibus hearing date, but I assume it doesn't change what the Court just explained.

THE COURT: Doesn't change.

And if, in fact, there are other disputes and they cannot be determined before then, they should be noticed for that date. I don't want these discovery disputes to linger.

Okay. I realize this was my party, but does anybody else have anything they would like to raise?

(No verbal response)

THE COURT: Then thank you, everyone.

We are adjourned.

COUNSEL: Thank you, Your Honor.

(Proceedings concluded at 11:34 a.m.)

CERTIFICATE

We certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/Mary Zajaczkowski October 25, 2021
Mary Zajaczkowski, CET**D-531

/s/William J. Garling October 25, 2021
William J. Garling, CE/T 543

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	CHAPTER 11
	:	(Jointly Administered)
TRIBUNE COMPANY, *et. al*[1]	:	
	:	Case No. 08-13141 (KJC)
Debtors	:	

MEMORANDUM AND ORDER[2]

BY: KEVIN J. CAREY, UNITED STATES BANKRUPTCY JUDGE

Currently before the Court is a discovery dispute among parties who are proponents of competing plans of reorganization. On January 14, 2011, the Noteholder Plan Proponents[3] filed a Motion to Compel Production of Documents and Information from the Debtor/Committee/ Lender Plan Proponents and Other Parties, or, Alternatively For an Order of Preclusion Respecting Certain Issues (the "Motion to Compel")(D.I. 7527). On January 19, 2011, the

[1]The chapter 11 case filed by Tribune Media Services, Inc. (Bky. Case No. 08-13236) is being jointly administered with the Tribune Company bankruptcy case and 109 additional affiliated debtors pursuant to the Order dated December 10, 2008 (main case docket no. 43)(collectively, the "Debtors" or "Tribune"). An additional Debtor, Tribune CNLBC, LLC (f/k/a Chicago National League Ball Club, LLC) commenced a chapter 11 case on October 12, 2009 as one of the steps necessary to complete a transaction involving the Chicago Cubs and certain related assets. In all, the Debtors now comprise 111 entities.

[2]This Memorandum constitutes the findings of fact and conclusions of law as required by Fed.R.Bankr.P. 7052. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and §157(a). This is a core proceeding pursuant to 28 U.S.C. 157(b)(1) and (b)(2)(A) and (L).

[3]The Noteholder Plan Proponents are those parties who are proponents of the Joint Plan of Reorganization for Tribune Company and Its Subsidiaries Proposed by Aurelius Capital Management, LP, on Behalf of Its Managed Entities ("Aurelius"), Deutsche Bank Trust Company Americas, in Its Capacity as Successor Indenture Trustee for Certain Series of Senior Notes ("Deutsche Bank"), Law Debenture Trust Company of New York, in Its Capacity as Successor Indenture Trustee for Certain Series of Senior Notes ("Law Debenture"), and Wilmington Trust Company, in Its Capacity as Successor Indenture Trustee for the PHONES Notes ("Wilmington Trust")(D.I. 7073)(the "Noteholder Plan").

Debtor/Committee/Lender Plan Proponents[4] filed an objection to the Motion to Compel (D.I. 7552). A hearing to consider the Motion to Compel was held on January 24, 2011.

BACKGROUND[5]

On December 8, 2008, Tribune Company and certain of its subsidiaries (the "Debtors") filed voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code (11 U.S.C. §101 *et seq.*). On April 12, 2010, the Debtors filed a proposed plan (the "April 2010 Plan") that sought to implement the terms of a settlement agreement regarding certain LBO-Related Causes of Action.[6] A confirmation hearing for the April 2010 Plan was scheduled for August 16, 2010.

By order dated April 20, 2010, the Bankruptcy Court entered an Agreed Order Directing the Appointment of an Examiner (the "Examiner Order"). On May 10, 2010, the Bankruptcy Court approved the U.S. Trustee's application appointing Kenneth N. Klee as examiner (the "Examiner"). On May 11, 2010, the Bankruptcy Court entered an order approving the

[4]The Debtor/Committee/Lender Plan Proponents are those parties who are proponents of the First Amended Joint Plan of Reorganization for Tribune Company and Its Subsidiaries Proposed by the Debtors, the Official Committee of Unsecured Creditors (the "Committee"), Oaktree Capital Management, L.P. ("Oaktree"), Angelo, Gordon & Co., L.P. ("Angelo Gordon"), and JPMorgan Chase Bank, N.A. ("JPMorgan") (D.I. 7136)(the "DCL Plan").

[5]Most of the Background is taken from the Joint Disclosure Statement (D.I. 7134), approved by order dated December 9, 2010 (D.I. 7126), as amended by order dated December 16, 2010 (D.I. 7215).

[6]The "LBO-Related Causes of Action" is defined in the DCL Plan as meaning "any and all claims, obligations, suits, judgments, damages, debts, rights, remedies, causes of action, avoidance powers or rights, liabilities of any nature whatsoever, and legal or equitable remedies against any Person arising from the leveraged buy-out of Tribune that occurred in 2007, including, without limitation, the purchase by Tribune of its common stock on or about June 4, 2007, the merger and related transactions involving Tribune on or about December 20, 2007, and any financing committed to, incurred or repaid in connection with any such transaction, regardless of whether such claims, causes of action, avoidance powers or rights, or legal or equitable remedies may be asserted pursuant to the Bankruptcy Code or any other applicable law.

Examiner's proposed work and expense plan and modifying the Examiner Order. The Examiner's principal duties were to:

(1) Evaluate the potential claims and causes of action held by the Debtors' estates that are asserted by the Parties (as defined in the Examiner Order) in connection with the leveraged buy-out of Tribune that occurred in 2007 [defined as the LBO-Related Causes of Action] which may be asserted against any entity which may bear liability, including without limitation, the Debtors, the Debtors' former and/or present management, former and/or present members of Tribune's board of directors, the Debtors' lenders and the Debtors' advisors, said potential claims and causes of action including, but not being limited to, claims for fraudulent conveyance, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and equitable subordination, and to evaluate the potential defenses asserted by the Parties to such potential claims and causes of action;

(2) evaluate whether Wilmington Trust Company violated the automatic stay under 11 U.S.C. §362 by its filing, on March 3, 2010, of its Complaint for Equitable Subordination and Disallowance of Claims, Damages, and Constructive Trust; and

(3) evaluate the assertions and defenses made by certain of the Parties in connection with the Motion of JP Morgan Chase Bank, N.A. for Sanctions Against Wilmington Trust Company for Improper Disclosure of Confidential Information in Violation of Court Order.

The Examiner conducted in-person meetings with the parties and invited the parties to share their views in writing on the issues to be considered by him. The Examiner was assisted, in addition to counsel, by a financial advisor who developed a financial analysis of issues presented, including issues concerning solvency, unreasonably small capital, the flow of funds, and matters pertaining to intercompany claims.

On July 26, 2010, the Examiner filed a report containing the results of his investigation. By Order dated August 3, 2010, the Court ordered the unsealing of the Examiner's Report, with

exhibits and transcripts.[7] The Examiner did not reach definitive conclusions regarding the issues considered in the Report, but suggested a range of potential outcomes.[8] After the Examiner's Report was filed, the April 2010 Plan and the settlement it embodied were abandoned.

The Debtors' exclusive period within which to file a chapter 11 plan and solicit acceptances, as extended by court order, expired on August 8, 2010. After the Examiner's Report was filed and the settlement in the April 2010 Plan was abandoned, interested parties continued to negotiate, but failed to reach any consensus. Thereafter, the Debtors asked the Bankruptcy Court to appoint a mediator.

On September 1, 2010, I appointed my colleague, the Honorable Kevin Gross, as a mediator (the "Mediator") to conduct non-binding mediation concerning the terms of a plan of reorganization, including appropriate resolution of the LBO-Related Causes of Action (the "Mediation"). The parties to the Mediation included (i) the Debtors, (ii) the Creditors' Committee, (iii) Angelo Gordon, (iv) the Credit Agreement Lenders, (v) the Step One Credit Agreement Lenders, (vi) Wells Fargo Bank, N.A. (vii) Law Debenture Trust Company of New York ("Law Debenture"), (viii) Deutsche Bank Trust Company Americas, (ix) Centerbridge Credit Advisors, LLC, (x) Aurelius, (xi) EGI-TRB LLC, and (xii) Wilmington Trust Company (collectively, the "Mediation Parties"). On September 20, 2010, each of the Mediation Parties submitted to the Mediator a statement setting forth such Mediation Party's position respecting

[7]The Examiner's Report (volumes 1 through 4) were docketed as D.I.s 5247, 5248, 5249, and 5250. The exhibits were docketed as D.I.s 5437, 5438, 5439, 5441, 5442, 5444, 5445, 5447, 5449, 5451, 5453, 5454, 5455, 5456, 5458, 5461, 5462, 5464, 5466, 5467, 5468, 5469, and 5480.

[8]Specifically, the Examiner framed his conclusions about the merits of various claims using the following continuum: (1) highly likely, (2) reasonably likely, (3) somewhat likely, (4) equipoise, (5) somewhat unlikely, (6) reasonably unlikely, and (7) highly unlikely.

the structure and economic substance of an acceptable plan of reorganization.

The Mediation began on September 26, 2010, and the Mediation Parties continued settlement discussions on September 27, 2010. On September 28, 2010, the Mediator filed a report which, among other things, reported a settlement agreement between the Debtors, on the one hand, and Angelo Gordon and Oaktree, on the other. The Mediator continued settlement discussions with certain parties. On October 12, 2010, the Mediator filed the Mediator's Second Report which included the terms of an expanded settlement among the Debtors, the Committee, Oaktree, Angelo Gordon, and JP Morgan (the "October Term Sheet").

Pursuant to the deadlines set forth in the Bankruptcy Court's Order dated October 18, 2010 (D.I. 6022), four competing plans of reorganization were filed: (i) the Debtor/Committee/ Lender Plan, (ii) the Noteholder Plan, (iii) the Bridge Lender Plan[9], and (iv) the Step One Credit Lender Plan.[10] The Step One Credit Lender Plan was withdrawn on December 14, 2010 (D.I. 7190). Pursuant to the procedures set forth in the Order dated December 9, 2010 (D.I. 7126), as amended by Order dated December 16, 2010 (D.I. 7215), the three competing plans were distributed for solicitation and voting.

On December 20, 2010, the Bankruptcy Court entered the Discovery and Scheduling Order for Confirmation (the "Case Management Order" or "CMO"). The parties commenced discovery, which was quickly followed by a number of discovery disputes. Through various

[9]The Bridge Lender Plan is the Amended Joint Plan of Reorganization for Tribune Company and Its Subsidiaries Proposed by King Street Acquisition Company, L.L.C., King Street Capital, L.P., and Marathon Asset Management, L.P. (D.I. 7089)(as the same may be amended from time to time, the "Bridge Lender Plan").

[10]The Step One Lender Plan is the First Amended Plan of Reorganization for Tribune Company and Its Subsidiaries Proposed by Certain Holders of Step One Senior Loan Claims (D.I. 6683).

"meet and confer" conferences, the parties resolved many of these disputes. However, when they reached an impasse on certain discovery matters, the parties sent letters to the Court, as called for in the CMO. After a teleconference held on January 10, 2011, the Court directed the parties to file discovery motions on or before January 14, 2011, with replies due by January 19, 2011. Seven discovery motions were filed, and a hearing to consider them was held on January 24, 2011. The parties are continuing efforts to resolve some of the discovery issues, and some motions have been continued to February 8, 2011. Even so, new disputes continue to arise.

At the January 24, 2011 hearing, the Court heard argument regarding the Motion to Compel, and took the matter under advisement.

DISCUSSION

The Noteholder Plan Proponents (the "Noteholders") are seeking production of documents from the DCL Plan Proponents about the proposed settlement of the LBO-Related Causes of Action embodied in the DCL Plan. To test the arms-length nature and good faith of the settlement negotiations, the Noteholders are seeking documents and communications regarding the parties' discussions concerning the merits of the LBO-Related Causes of Action, specifically in connection with negotiations concerning the DCL Plan, the April 2010 Plan, and any other negotiations during the bankruptcy case.

The parties met and conferred in an attempt to limit the scope of the Noteholders' discovery requests and the objections thereto, but three main objections to discovery remain:

(1) objections to producing documents protected by a common interest privilege,

(2) objections to producing documents protected by the Mediation Order, Local Bankruptcy Rule 9019-5(d), and Fed.R.Evid. 408, and

(3) objections to producing documents for the period December 8, 2008 (the petition date) through December 15, 2009 (the date of the Document Depository Order).[11]

(1) Community of Interest (or Common Interest) Privilege[12]

The Noteholders argue that the common interest privilege cannot apply in connection with the settlement and DCL Plan because the parties have no common legal interests. The Debtors' and Committee's interests are in maximizing the estate, and the Lenders' interest is in paying as little as possible to resolve the LBO-related claims.

The DCL Plan Proponents argue in response that "parties to a settlement or proponents of a plan of reorganization share a common legal interest in gaining court approval of the plan and settlement pursuant to section 1129 of the Bankruptcy Code and Rule 9019 of the Federal Rules of Bankruptcy Procedure."

In *Leslie Controls*, Judge Sontchi discussed the common interest privilege as follows:

> The common interest doctrine "allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others." [*Teleglobe*, 493 F.3d at 364.] It expands the reach of the attorney-client privilege and the work product doctrine by providing that, under certain circumstances, the sharing of privileged communications with third parties does not constitute a waiver of the privilege. Thus, the doctrine is only applicable if an underlying privilege has been established. [*Louisiana Mun. Police Emp. Ret. Sys. v. Sealed Air Corp.*, 253 F.R.D. 300, 309 (D.N.J. 2008).]

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[11]The Document Depository Order (D.I. 2858) authorized the Debtors to establish and maintain a centralized document depository program to store certain documents produced to the Committee in connection with the Committee's investigation and analysis of the LBO-Related Causes of Action.

[12]In *Teleglobe*, the Court distinguished between "common interest" (i.e., when multiple clients hire the same counsel to represent them on a matter of common interest), and "community of interest" (i.e., when clients with separate attorneys share otherwise privileged information in order to coordinate their legal activities). *In re Teleglobe Commc'n Corp.*, 493 F.3d 345, 359 (3d Cir. 2007). While the matter before me falls into the "community of interest" category, the parties, here, as well as many courts, refer to the multiple attorney situation as "common interest" privilege.

> **The party invoking the protection of the common interest doctrine must establish: (1) the communication was made by separate parties in the course of a matter of common interest, (2) the communication was designed to further that effort, and (3) the privilege was not otherwise waived.** [*In re Mortg. & Realty Trust,* 212 B.R. 649, 653 (Bankr.C.D.Cal. 1997).]
> . . . .
>
> [T]he doctrine is not limited to communications among co-defendants to ongoing litigation. Indeed, "pending litigation is not necessary to invoke the common interest [doctrine][*Id.*] . . . Rather, the common interest doctrine "applies whenever the communication is made in order to facilitate the rendition of legal services to each of the clients involved in the conference." [*Id.*]
>
> The common interest of the parties must be "at least a substantially similar legal interest." [*Teleglobe*, 493 F.3d at 365]. Nonetheless, the parties need not be in complete accord:
>
> > The common interest privilege does not require a complete unity of interests among the participants. The privilege applies where the interests of the parties are not identical, and it applies even where the parties' interests are adverse in substantial respects. The privilege applies even where a lawsuit is foreseeable in the future between co-defendants. [*Mortg. & Realty Trust*, 212 B.R. at 653.]
>
> When the interests of the parties diverge to some extent the common interest doctrine applies "only insofar as their interests [are] in fact identical; communications relating to matters as to which they [hold] opposing interests . . . lose any privilege."[*In re Rivastigmine Patent Litig.*, 2005 WL 2319005, *4 (S.D.N.Y. Sept. 22, 2005).]

In re Leslie Controls, Inc., 437 B.R. 493, 496-98 (Bankr.D.Del. 2010)(emphasis added).

Even though the DCL Plan Proponents' interests are not completely in accord, they share the common legal interest of obtaining approval of their settlement and confirmation of the DCL Plan, thereby resolving the legal disputes between and among them. *See also Teleglobe*, 493 F.3d at 365-66 ("[I]t is sufficient to recognize that members of the community of interest must share at least a substantially similar legal interest. . . . In the community of interest context, . . . because the clients have separate attorneys, courts can afford to relax the degree to which

clients' interests must converge without worrying that their attorneys' ability to represent them zealously and single-mindedly will suffer."). Accordingly, the community of interest privilege can apply to parties whose interests are not totally in accord.

The Third Circuit has held that parties engaged in a merger negotiation may share a common interest. *Teleglobe*, 493 F.3d at 364 (noting that the common interest doctrine applies in civil and criminal litigation, and even in purely transactional contexts)). *See also Sealed Air*, 253 F.R.D. at 310 (parties engaged in a transaction may anticipate future claims that they share an interest in defending against, which can form the basis of a common interest privilege). Common interests must be determined on a case by case basis. In *Leslie Controls*, Judge Sontchi held that parties who shared information regarding "preserving and maximizing insurance available to pay asbestos claims" during the plan negotiation process shared the common interest of maximizing the asset pool. *Leslie Controls*, 437 B.R. at 502. I am satisfied that, based upon the chronology of events which took place in connection with the mediation, a community of interests was established.

(A) Date the community of interest privilege began

The question of **when** a community of interest privilege arose remains. The DCL Plan Proponents argue that a common interest among the Debtors, Committee, and lenders arose on October 12, 2010, when the mediator filed the October Term Sheet. The Debtors, Oaktree and Angelo Gordon also assert that their common interest began as early as September 27, 2010, when they agreed to resolve the LBO-Related Causes of Action and became proponents of a joint plan, pursuant to the Mediator's filing of the first Term Sheet on that date.

The Noteholders argue that no common interest privilege could arise until November 23,

2010, when the DCL Plan was actually filed with the Court. The Noteholders argue that the Term Sheet filings do not establish the emergence of a common interest because the parties continued to negotiate and certain terms changed. For example, they argue that the October Term Sheet relied on a Distributable Enterprise Value ("DEV") of $6.1 billion, while the final DCL Plan refers to a DEV of $6.75 billion. The DCL Plan Proponents respond by stating that DEV was not a material negotiated term, and was changed (ironically, they say) to address objections of the Noteholders.

Once the DCL Plan Proponents agreed upon material terms of a settlement, it is reasonable to conclude that the parties might share privileged information in furtherance of their common interest of obtaining approval of the settlement through confirmation of the plan. I conclude that the date the Mediator's Term Sheets were filed - - October 12, 2010 for all DCL Plan Proponents, and September 27, 2010 for the Debtor/Oaktree/Angelo Gordon group - - constitute dates upon which the respective parties' community of interest privilege arose.[13]

(B) Dispute concerning specific documents covered by the community of interest privilege

The Noteholders and the DCL Plan Proponents also disagree about the scope of communications that are covered by the community of interest privilege. In particular, the Noteholders argue that "common interest communications" should include only communications

[13]Of course, this does not mean that every communication between the DCL Plan Proponents occurring after those dates is privileged. Any party asserting privilege first must demonstrate that the communication at issue is subject to an underlying attorney-client or work product privilege, and that sharing the communication with the common interest parties meets the three-part test adopted by Judge Sontchi in *Leslie Controls* from the *Mortg. & Realty Trust* decision: (i) the communication was made by separate parties in the course of a matter of common interest, (ii) the communication was designed to further that effort, and (iii) the privilege was not otherwise waived.

that were written or made by lawyers,[14] citing *Teleglobe* in support of this view:

> First, to be eligible for continued protection, the communication must be shared with the *attorney* of the member of the community of interest. *Cf. Ramada Inns, Inc. v. Dow Jones & Co.,* 523 A.2d 968, 972 (Del.Super.Ct. 1986)(emphasizing that the relevant Delaware evidentiary rule protects communications disclosed to an attorney). Sharing the communication directly with a member may destroy the privilege.

Teleglobe, 493 F.3d at 364 (emphasis in original). The DCL Plan Proponents point out that the *Teleglobe* Court itself notes that this language is dicta.[15]

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[14]The Noteholders' proposed definition of what might be protected "Common Interest Communications" is as follows:

> "Common Interest Communications" means oral, written or electronic communications, draft pleadings, briefs, plans, disclosure statements or correspondence exchanged between counsel and/or non-testifying financial advisors to two or more different parties within a Common Interest Relationship and not disclosed or provided to any Person outside the Common Interest Relationship provided, however, that qualifying communications shall not lose their status as Common Interest Communications merely because clients of such outside counsel received any such written or electronic communications, or listened to or were told of any such oral communications. Common Interest Communications do not include written, electronic or oral communications by persons other than outside counsel or non-testifying financial advisors for different parties, or written, electronic or oral communications internal to any one party or any one financial advisor.

Revised Proposed Common Interest Stipulation and Order (D.I. 7587).

[15]*See Teleglobe*, 493 F.3d at 363 n.18 stating that the issue before the court involved clients of the same attorneys, not clients with separate counsel, and therefore the community of interest analysis may seem "surplusage." However, because the lower court erroneously ruled that the parties before it were in a community of interest, the Third Circuit Court explained how the community of interest and co-client privilege differ. *Id.* This guidance is helpful.

The *Teleglobe* Court also considered the "plain text" of a Delaware rule of evidence in its community of interest analysis. Delaware Rule of Evidence 502(b)(3) recognizes that a client has a privilege to protect from disclosure confidential communications "made for the purpose of facilitating the rendition of professional legal services to the client 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." *See Rembrandt Tech. LP v. Harris Corp.,* 2009 Del.Super. LEXIS 46, *25 (Feb. 12, 2009), in which the Delaware Superior Court determined that "separately represented clients sharing a common legal interest may, at least in certain situations and under the close supervision of counsel, communicate directly with one another regarding that shared interest." *Id.* at *30. The *Rembrandt* Court further decided that "the privilege may be extended to communications among the community of interest if the communications relate to that common interest." *Id.* at *31.

The community of interest doctrine applies only if the underlying communication was subject to the attorney-client privilege or the work product doctrine. The attorney-client privilege "protects communications between attorneys and clients from compelled disclosure" and applies to a communication that satisfies the following elements: (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client. *Teleglobe*, 493 F.3d at 359 *citing* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §68 (2000). "Privileged persons" include the client, the attorney(s), and any of their agents that help facilitate attorney-client communications or the legal representation." *Id.* "When disclosure to a third party is necessary for the client to obtain informed legal advice, courts have recognized exceptions to the rule that disclosure waives the attorney-client privilege." *WebXchange, Inc. v. Dell Inc*., 264 F.R.D. 123, 126 (D.Del. 2010) *quoting Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1424 (3d Cir. 1991).

The Third Circuit has adopted a two-part test for ascertaining whether a document is protected by the work product doctrine: (1) the first inquiry is the "reasonable anticipation test," which requires that the court determine whether "litigation could reasonably have been anticipated" (2) the second inquiry is whether the document were prepared "primarily for the purpose of litigation (i.e., documents created in the ordinary course of business, even if useful in subsequent litigation, are not protected by the work product doctrine. *Sealed Air,* 253 F.R.D. at 306-07.

The DCL Plan Proponents argue that the Noteholders' proposal to limit "common interest communications" to those prepared by lawyers limits artificially the community of

interest privilege and would needlessly increase legal costs by requiring parties to funnel all communications through their attorneys. They contend that the appropriate inquiry is whether the subject matter of the communication at issue would be protected by the attorney-client or work product privilege but for its disclosure to a party with the common interest.[16] I agree. The Noteholders' proposal to limit common interest communications to attorney-prepared communications is too restrictive. The DCL Plan Proponents will have the opportunity to assert (and, ultimately demonstrate, if challenged) that requested communications fall within the community of interest privilege.

2. Whether the DCL Plan Proponents must either (i) waive protections of the Mediation Order and Local Rule 9019-5(d), or (ii) be precluded from introducing any evidence regarding the mediation, including the Mediator's endorsement of the settlement or arguing that the DCL Plan was the result of arm's length bargaining

The Noteholders assert that they are seeking documents and communications related to the Mediation to assess (and challenge) the alleged arms-length nature of the settlement negotiations for the LBO-Related Causes of Action, and the degree to which the Debtors and Committee acted in good faith as estate fiduciaries to maximize recoveries for non-LBO lenders.

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[16]The DCL Plan Proponents propose the following language for the definition of "Common Interest Communications" in the proposed Common Interest Stipulation:

> "Common Interest Communications" means oral, written or electronic communications, draft pleadings, briefs, plans, disclosure statements or other correspondence exchanged solely between parties within a Common Interest Relationship that, if only exchanged between or among a single party, its counsel and/or advisors, would have been protected from discovery by any applicable attorney-client privileges or work product protections.

DCL Plan Proponents Objection, D.I. 7552, Ex.3.

The Noteholders argue that the DCL Plan Proponents put such discovery "in issue" by arguing that the proposed settlement is fair because it is the product of a mediation conducted by a judge.[17] In other words, the Noteholders argue, it is not fair to allow the DCL Plan Proponents to use the Mediation Order as a sword and a shield. *See Westinghouse,* 951 F.2d at 1426 n.12 ("If a partial waiver does disadvantage the disclosing party's adversary by, for example, allowing the disclosing party to present a one-sided story to the court, the privilege will be waived as to all communications on the same subject .").

The DCL Plan Proponents respond that they have offered to waive part of the protections of the Mediation Order[18] by proposing that only the following documents or communications be protected from discovery:

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[17]I suppose it is conceivable that *who* conducted a mediation may, under some presently unknowable circumstances, be relevant to a determination of whether a settlement should be approved. I have the deepest respect for my colleague, who willingly undertook this challenging mediation, but I am aware of nothing in the record before me which informs me that this factor should be accorded any special weight. Whether a settlement should be approved or a plan confirmed must rest upon the application of standards articulated in the Bankruptcy Code and by controlling decisional law.

[18]The Mediation Order provides that:

> 7. All: (a) discussions among the Mediation Parties relating to the Mediation, including discussions with or in the presence of the Mediator, (b) Mediation Statements, Ownership Statements and any other documents or information provided to the Mediator or the Mediation parties in the course of the Mediation, (c) correspondence, draft resolutions, offers, and counteroffers produced for or as a result of the Mediation, and (d) communications between the Mediator and the Examiner or the Examiner's Professionals are strictly confidential and shall not be admissible for any purpose in any judicial or administrative proceeding, and no person or party participating in the Mediation, including counsel for any Mediation Party or any other party, shall in any way disclose to any non-party or to any court, including without limitation in any pleading or other submission to any court, any such discussion, Mediation Statement, Ownership Statement, other document or information, correspondence, resolution, offer or counteroffer which may be made or provided in connection with the Mediation. Except with the express consent of the affected Mediation party, the Mediator shall not share with any Mediation Party any other Mediation Party's Mediation Statement or Ownership Statement.

D.I. 5591, ¶7.

1. written or oral communications between a "Mediation Party" and Judge Gross;

2. written or oral communications between or among Mediation Parties concerning the Mediation to the extent such communications were exchanged on any Mediation Day (i.e., a day when Judge Gross convened a Mediation Session between two or more Mediation Parties)

3. written or oral communications reflecting the substance of any discussion between or among Mediation Parties on a Mediation Day or documenting any offers or counter-offers exchanged or agreements reached on a Mediation Day; and

4. written or oral communications between Judge Gross and the Examiner or the Examiner's professionals concerning the Mediation

The DCL Plan Proponents argue that this proposal provides adequate discovery to the Noteholders to assess whether the settlement was at arms-length, while preserving the confidentiality of the Mediation because it permits discovery of (i) communications relating to negotiation and abandonment of the April Plan, (ii) communications prior to the mediation, and (iii) most communications between the Mediation Parties that occurred outside the presence of the Mediator on a day that is not a Mediation Day. It also allows discovery into the Mediation *process*, but protects the *substance* of the Mediation discussions.

In *Dent v. Westinghouse*, 2010 WL 56054 (E.D.Pa. Jan. 4, 2010), Magistrate Judge Hey discussed the "crossroads" of Fed.R.Civ.P. 26 (which allows discovery of relevant information, even if that information is not admissible at trial, as long as it appears reasonably calculated to lead to admissible evidence) and Fed.R.Evid. 408 (providing that information regarding settlements and negotiations is inadmissible if offered to prove liability for, or invalidity of, the amount of a claim). The *Dent* Court joined judges in this circuit who require a party requesting discovery about a settlement to make a particularized showing that the evidence related to settlement is relevant and calculated to lead to the discovery of admissible evidence. *Id.* at *1.

There is a strong policy in promoting full and frank discussions during a mediation.

Courts have recognized that confidentiality is essential to the mediation process:

> Absent the mediation privilege, parties and their counsel would be reluctant to lay their cards on the table so that a neutral assessment of the relative strengths and weaknesses of their opposing positions could be made. Assuming they would even agree to participate in the mediation process absent confidentiality, participants would necessarily "feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute." The effectiveness of mediation would be destroyed, thereby threatening the well established public needs of encouraging settlement and reducing court dockets.

Sheldone v. Pennsylvania Turnpike Comm'n, 104 F.Supp.2d 511, 514 (W.D.Pa. 2000) (citations omitted) *quoting Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608, 928, 930 (2d Cir. 1979). This policy is also reflected in Local Delaware Bankruptcy Rule 9019-5(d).[19]

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[19]Local Bankruptcy Rule 9019-5(d) provides, in pertinent part:

(d) Confidentiality of Mediation Proceedings.

(i) Protection of Information Disclosed at Mediation. The mediator and the participants in mediation are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the parties or by witnesses in the course of the mediation. No person may rely on or introduce as evidence in any arbitral, judicial or other proceeding, evidence pertaining to any aspect of the mediation effort, including but not limited to: (A) views expressed or suggestions made by a party with respect to a possible settlement of the dispute; (B) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; (C) proposals made or views expressed by the mediator; (D) statement or admissions made by a party in the course of the mediation; and (E) documents prepared for the purpose of, in the course of, or pursuant to the mediation. In addition, without limiting the foregoing, Rule 408 of the Federal Rules of Evidence, any applicable federal or state statute, rule, common law or judicial precedent relating to the privileged nature of settlement discussions, mediations or other alternative dispute resolution procedures shall apply. Information otherwise discoverable or admissible in evidence does not become exempt from discovery, or inadmissible in evidence merely by being used by a party in the mediation.

. . . .

(iv) Preservation of Privileges. The disclosure by a party of privileged information to the mediator does not waive or otherwise adversely affect the privileged nature of the information.

The Noteholders agree, as they must, that discussions with the Mediator are confidential, but complain that barring discovery of communications between Mediation Parties on a Mediation Day might protect discussions by Mediation Parties who are not actively participating in the Mediation that day, which would be discoverable if held on a non-Mediation Day. The DCL Plan Proponents' proposal to limit the protected Mediation communications generally strikes an appropriate balance between allowing discovery of potentially relevant information and protecting the confidentiality of the mediation.

This chapter 11 case is complex, involving a large, national media company, administration of which has been full of acrimony among the various constituents. The central disputes surround challenges to an $8 billion prepetition leveraged buyout. This particular mediation involved twelve parties consisting of multiple interests owed collectively billions of dollars of debt, falling into different tranches among the various Debtors. In balancing these vastly competing interests, I conclude that the DCL Plan Proponents' proposal is reasonable, but further conclude that it is appropriate to adjust it slightly and protect those "written or oral communication between or among Mediation Parties concerning the Mediation to the extent such communications were exchanged on any Mediation Day" (*see* #2 of the DCL Plan Proponents proposal, *supra*), but only if the communications are between Mediation Parties who were present at the Mediation or were participating in the Mediation off-site. The protections afforded by the Mediation Order, Fed.R.Evid. 408, and Local Rule 9019-5 will otherwise remain.

3. Whether the reasonable "start date" for discovery requests is the Petition Date (December 8, 2008) or the date of the Document Depository Order (December 15, 2009)?

The Noteholders believe that they should be able to reach back to the petition date to discover information relevant to their opposition to confirmation of the DCL Plan. The Noteholders offer examples of hypothetical emails that may have occurred between parties prior to December 15, 2009, but would not be produced just because of the proposed "random" start date.[20] The Noteholders argue that it is possible that in the immediate wake of Tribune's business failure, key persons involved in the transactions might have assessed what went wrong or engaged in some degree of finger-pointing. Further, the Committee's investigation began in Spring 2009, months before the proposed December 15, 2009 start date. Because approval of the LBO settlement is part of plan confirmation, the Noteholders claim they are entitled to discovery of all potential settlement discussions during the chapter 11 case.

The DCL Plan Proponents argue that December 15, 2009 is a reasonable and logical discovery start date because most of the events relevant to the negotiation and settlement of the LBO-Related Causes of Action occurred *after* the Court entered the Document Depository Order. The DCL Plan Proponents argue that this date is even earlier than what might also be considered a reasonable discovery start date of September 2010 - - which is when negotiations for the current DCL Plan began after the Examiner's Report and the Mediation. They also argue

[20]On December 15, 2009, the Court entered the Document Depository Order (D.I. 2858) which authorized the Debtors to establish and maintain a centralized document depository related to the LBO-Related causes of action and provided that written and oral communications between "Negotiating Parties" regarding the leveraged ESOP Transactions "shall be deemed confidential" and may not be used or disclosed except in connection with settlement discussions and may not be introduced at any trial or hearing. Following entry of that order, the Debtors and a number of parties participated in negotiations which resulted in a proposed settlement embodied in the April 2010 Plan.

that using December 15, 2009 will help to limit the costs of an already massive document production. Finally, the DCL parties argue, persuasively, that discovery regarding the merits of the LBO-Related Claims is "well trodden ground" that has been investigated by and comprehensively addressed by the Examiner.

"Discovery of relevant, nonprivileged . . . [information] is limited if the party from whom discovery is sought establishes that it is unreasonably cumulative or duplicative or that the burden or expense of the proposed discovery outweighs its likely benefit. *See* Fed.R.Civ.P. 26(b)(2)(B)." *Helmert v. Butterball, LLC*, 2010 WL 2179180, *3 (E.D.Ark. 2010).

On balance, the proposed discovery start date of December 15, 2009 will allow discovery regarding LBO settlements, while limiting the burden and expense of completing discovery within the time frame provided by the CMO. The Noteholders have not demonstrated that an earlier discovery start date is likely to yield admissible, relevant information needed to litigate approval of the proposed settlement and plan confirmation.

EPILOGUE

Lest this decision be read too broadly, I add a cautionary note: A determination involving whether a community of interest privilege applies is an intensely fact-and-circumstance-driven exercise. The balancing of tensions which arise during the search for truth may, depending upon the particular circumstances involved, fall either way. Guided by Circuit precedent, other persuasive decisional law, applicable local rule, and orders governing mediation, I have decided that the matter before me involves circumstances warranting a determination that a community of interest privilege may be invoked by co-proponents of a plan. This is not to say that parties who are co-proponents of a plan or parties who reach settlements arising from mediation are

always entitled to assert this privilege. Neither should it be said that the privilege can never be invoked unless the circumstances involve the proposal of a joint plan or a settlement resulting from mediation.

ORDER

Upon consideration of the Motion to Compel and the objection thereto, and for the reasons set forth above, it is hereby ORDERED that the Motion to Compel is GRANTED, in part, and DENIED, in part, as follows:

(A) The DCL Plan Proponents may assert a community of interest privilege for privileged communications that were shared among the community of interest parties in furtherance of their common interest beginning on October 12, 2010 for all DCL Plan Proponents, and September 27, 2010 for the Debtor/Oaktree/Angelo Gordon group;

(B) The following are protected from discovery:

(i) written or oral communications between a "Mediation Party" and Judge Gross;

(ii) written or oral communications between or among Mediation Parties concerning the Mediation to the extent such communications were exchanged by Mediation Parties who were present at the Mediation or were participating in the Mediation off-site on any Mediation Day (i.e., a day when Judge Gross convened a Mediation Session between two or more Mediation Parties);

(iii) written or oral communications reflecting the substance of any discussion between or among Mediation Parties who were present at the Mediation or participating in the Mediation off-site on a Mediation Day, or documenting any offers or counter-offers exchanged or agreements reached on a Mediation Day; and

(iv) written or oral communications between Judge Gross and the Examiner or the Examiner's professionals concerning the Mediation;

(C) The Noteholder Plan Proponents may seek discovery of information for the period of time beginning December 15, 2009; and

(D) All other relief requested in the Motion to Compel is **DENIED**.

BY THE COURT:

KEVIN J. CAREY
UNITED STATES BANKRUPTCY JUDGE

Dated: February 3, 2011

cc: Norman L. Pernick, Esquire[21]

[21]Counsel shall serve copies of this Memorandum and Order on all interested parties and file a Certificate of Service with the Court.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	CHAPTER 11
OLD BPSUSH INC., *et al.*,[1]	:	Case No. 16-12373 (KJC)
Debtors	:	(RE: D.I. 1843)

OPINION[2]

Theseus Strategy Group LLC, as trustee (the "Liquidation Trustee") of the Old PSG Wind Down Liquidation Trust (the "Trust") filed a motion pursuant to Bankruptcy Code § 542 (the "Motion") for entry of an order: (i) compelling Richards Kibbe & Orbe LLP ("RKO") and AlixPartners, LLP ("AlixPartners") to turn over certain documents, records, and information related to the investigation conducted by RKO and Alix Partners on behalf of the Debtors' former audit committee (the "Audit Committee"); and (ii) finding that all rights, titles, and interests in any privilege or immunity applicable to the documents, records, and information (collectively, the "Privileges") that remain in effect are controlled exclusively by the Liquidation Trustee.[3] RKO

[1] The debtors in these chapter 11 cases are Old BPSUSH Inc. (f/k/a BPS US Holdings Inc.), Old BH Inc. (f/k/a Bauer Hockey, Inc.), Old EBS Inc. (f/k/a Easton Baseball/Softball Inc.), Old BHR Inc. (f/k/a Bauer Hockey Retail Inc.), Old BPSU Inc. (f/k/a Bauer Performance Sports Uniforms Inc.), Old PLG Inc. (f/k/a Performance Lacrosse Group Inc.), Old BPSCI Inc. (f/k/a BPS Diamond Sports Inc.), Old PSGI Inc. (f/k/a PSG Innovation Inc.), Old BHR Wind-down Corp. (f/k/a Bauer Hockey Retail Corp.), Old EBS Wind-down Corp. (f/k/a Easton Baseball/Softball Corp.), Old PSGI Wind-down Corp. (f/k/a PSG Innovation Corp.), Old BPSDS Wind-down Corp. (f/k/a BPS Diamond Sports Corp.), Old BPSU Wind-down Corp. (f/k/a Bauer Performance Sports Uniforms Corp.), Old PLG Wind-down Corp. (f/k/a Performance Lacrosse Group Corp.), and Old PSG Wind-down Ltd. (f/k/a Performance Sports Group Ltd and also representing the estates of the Debtors formerly known as KBAU Holdings Canada, Inc., Bauer Hockey Corp. and BPS Canada Intermediate Corp., respectively) (the "Debtors").

[2] This Court has jurisdiction to decide this Motion pursuant to 28 U.S.C. §§ 157(b)(2), 1334(b). This is a core proceeding as defined in 28 U.S.C. §§ 157(b)(2)(E) and (O).

[3] D.I. 1843.

and AlixPartners object to the relief requested in the Motion, disputing that the Privileges transferred to the Liquidation Trustee, and arguing that RKO, as independent counsel to the Audit Committee, is duty-bound to maintain the confidentiality of any privileged documents.

For the reasons set forth herein, the Motion will be granted, in part, and denied, in part.

FACTS

The relevant facts generally are not in dispute.

On August 9, 2016, the Audit Committee for Performance Sports Group Ltd engaged RKO as independent counsel in connection with an internal investigation relating to certain issues raised by the Debtors' external auditor, KPMG LLP ("KPMG"), concerning whether the Debtors' senior financial management could be relied upon with respect to financial reporting and certifications (the "Investigation").[4] RKO thereafter retained AlixPartners to provide forensic accounting and consulting services to RKO.

In connection with the Investigation, RKO and AlixPartners (i) collected approximately 4.5 million unique documents; (ii) reviewed approximately 122,000 unique documents; (iii) collected approximately 6.6 terabytes of data; (iv) conducted document collection interviews of at least nine former employees (including the president, CFO, controller, finance director, and internal audit manager); (v) conducted live witness interviews of at least five former employees (including CFO, controller, finance director, and internal audit manager); (vi) performed various

[4] Debtor Performance Sports Group Ltd ("PSG" or the "Company") was a designer, developer and manufacturer of sports-related equipment and related apparel. It was incorporated under British Columbia Business Corporations Act on December 2, 2010. From June 25, 2014 to November 18, 2016, its common shares were listed on the New York Stock Exchange ("NYSE"), as well as the Toronto Stock Exchange. Pursuant to Section 10A(m) of the Securities Exchange Act, as amended by the Section 301 of the Sarbanes-Oxley Act of 2002 and Exchange Act Rule 10A-3, the Company, as an issuer on the NYSE, was required to appoint an audit committee of independent directors that, among other things, "shall have the authority to engage independent counsel and other advisers, as it determines necessary to carry out its duties." Sec. Exch. Act of 1934 §10A(m)(5), 15 U.S.C. §78j-1(m)(5).

analytics (including general ledger analytics, transaction sampling, and testing); and (vii) engaged in regular communication with the Audit Committee related to the investigation (collectively, the "Investigation Records").

On October 31, 2016, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Each of the Debtors also filed for protection from their creditors under Canada's *Companies' Creditors Arrangement Act* ("CCAA") in the Ontario Superior Court of Justice (Commercial List). According to the Debtors, a significant cause of the bankruptcy filing was their inability to file timely the fiscal year 2016 annual report and audited financial statements, which ultimately resulted in a default under the Debtors' secured debt facilities.[5] In May 2016, certain of the Debtors' shareholders commenced a class action securities law suit against the Debtors alleging, among other things, that the Debtors made false or misleading statements and engaged in accounting manipulations.[6]

After approximately seven months of conducting the Investigation, in March 2017, RKO and AlixPartners made a presentation to the Audit Committee and the Securities Exchange Commission (the "SEC"). The Debtors paid approximately $6.3 million to RKO and AlixPartners for work performed in connection with the Investigation.

On December 20, 2017, this Court entered its *Findings of Fact, Conclusions of Law, and Order Confirming First Amended Joint Chapter 11 Plan of Liquidation of Old BPSUSH Inc. and Its Affiliated Debtors* (D.I. 1566) (the "Confirmation Order"), confirmed the *First Amended Joint Chapter 11 Plan of Liquidation of Old BPSUSH Inc. and Its Affiliated Debtors* (D.I. 1473) (the

[5] Declaration of Brian J. Fox in Support of Debtors' Chapter 11 Petitions and First-Day Motions, dated October 31, 2016, ¶¶ 8-9 (D.I. 15).

[6] *Id.* at ¶ 8.

"Plan"), and approved the formation of the Trust and the Old PSG Wind Down Liquidation Trust Agreement (D.I. 1532) (the "Liquidation Trust Agreement").

On December 21, 2017 (the "Effective Date"), the Trust was established and all of the Debtors' assets (including the Debtors' "Retained Causes of Action") were vested jointly in the Reorganized Debtors and the Liquidation Trust.[7] The Liquidation Trustee was appointed Litigation Representative for both the Reorganized Debtors and the Liquidation Trust.[8] On the Effective Date, all then-current members of the Debtors' Board were deemed to have resigned and were replaced by the new Board of Directors.[9] Former members of the Audit Committee had already resigned in March and August of 2017.

The Plan defined the "Retained Causes of Action" to include all of the Debtors' causes of action as of the Effective Date of the Plan, including, but not limited to, "any and all causes of action against any party relating to or arising from the Debtors' failure to file their Annual Report for the fiscal year ended May 31, 2016 or alleged irregularities in the Debtors' sales practices."[10]

After the Effective Date, the Liquidation Trustee requested access to RKO/AlixPartners' Investigation Records. RKO claims it has provided the Liquidation Trustee with "all non-privileged factual information" requested by the Liquidation Trustee, and that the remaining materials sought by the Trustee are subject to the work product privilege. [11]

The Liquidation Trustee argues that the Privileges automatically vested jointly in the Reorganized Debtors and the Liquidation Trust on the Effective Date, and the Liquidation Trustee, in its capacity as Litigation Representative, was vested with exclusive powers and authority to

[7] Confirm. Order ¶18, Plan Art. V.B.3.a.; and Liquidation Trust Agr. § 1.3.
[8] Confirm. Order ¶ 17; Plan, Art. V.E.2 and 12; and Liquidation Trust Agr. § 4.1.
[9] Plan Art. V.D.
[10] Plan Art. I.A.164.
[11] RKO letter brief (D.I. 1864).

assert or waive any such Privileges.[12] In response, RKO argues that the Audit Committee was organized as an independent body, created and governed by a separate charter, with the right and power to engage independent counsel with separate attorney-client privileges and other protections, and, therefore, the Privileges did not transfer to the Liquidation Trustee upon confirmation.

DISCUSSION

(1) The Liquidating Trustee can pursue this action under Bankruptcy Code § 542

The Liquidating Trustee argues that RKO should turnover the Investigation Records pursuant to Bankruptcy Code § 542(e), which provides that "[s]ubject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee."[13] RKO argues that the Liquidation Trustee may not seek relief under Bankruptcy Code § 542 post-confirmation.

Bankruptcy Code § 1123(b)(3) provides that a plan may provide for "(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or (B) the retention and enforcement by the debtor, by the trustee or *by a representative of the estate appointed for such*

[12] Paragraph 21 of the Confirmation Order provides:
On the Effective Date, all of the Debtors' respective rights, titles and interests in any Privileges in respect of any Retained Causes of Action shall automatically vest jointly in the Liquidation Trust and the Reorganized Debtors pursuant to and in accordance with the Plan, and the Liquidation Trustee, as trustee for the Liquidation Trust and in its capacity as the Litigation Representative for the Reorganized Parent Debtors, shall have the sole power and authority to assert or waive such Privileges (subject only to the consent of the Liquidation Trust Advisory Board to the extent required under Section 3.5(b) of the Liquidation Trust Agreement) as further provided in the Plan and the Liquidation Trust Agreement.

[13] 11 U.S.C. § 542(e).

purpose, of any such claim or interest." [14] Here, the Plan provides for the retention of § 542 claims as part of the Retained Causes of Action,[15] and the Plan and Confirmation Order provide that all Retained Causes of Action vested jointly in the Reorganized Debtors and the Liquidation Trust as of the Effective Date.[16] The Plan further provides that:

> [F]rom and after the Effective Date, the Liquidation Trustee, as the Litigation Representative on behalf of the Liquidation Trust and the Reorganized Debtors, shall have the right to institute, prosecute, abandon, settle, compromise, or otherwise liquidate any Retained Causes of Action, in accordance with the terms of this Plan and/or Liquidation Trust Agreement, as applicable, and without further order of the Bankruptcy Court, in any court or other tribunal . . . .[17]

When, as in this case, section 542 claims are expressly preserved in a confirmed plan, such claims may be pursued post-confirmation by the estate representative appointed for such purpose.[18]

(2) The Liquidation Trustee is the successor to the Privileges of the former Audit Committee

RKO asserts that it has cooperated as fully as possible with the Liquidation Trustee's turnover request by providing the Liquidation Trustee with all of the non-privileged factual information that RKO and AlixPartners uncovered in their investigation on behalf of the Audit Committee. The Liquidation Trustee, however, claims that confirmation of the Plan vested him with the authority to control all Privileges of the Audit Committee and, therefore, he asks that the

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[14] 11 U.S.C. § 1123(b)(3) (emphasis added).

[15] The Plan defines "Avoidance Actions" as "any avoidance or equitable subordination or recovery action under sections . . . 542 through 551 . . . of the Bankruptcy Code." (Plan, Art. I.A.7.) Avoidance Actions, in turn, are included in the definition of "Causes of Action." (Plan, Art. I.A.27). And Causes of Action are included in the definition of "Retained Causes of Action." (Plan, Art. I.A.164).

[16] Plan, Art. X.E.; Confirm. Order, ¶ 18.

[17] Plan, Art. X.E.1.

[18] *Int'l Asset Recovery Corp. v. Thomson McKinnon Sec., Inc.*, 335 B.R. 520, 525 (S.D.N.Y. 2005) (citing *In re Ice Cream Liquidation*, 319 B.R. 324, 333 (Bankr. D. Conn. 2005).

entire Investigation Record - - including privileged documents - - be turned over. The transcript of the confirmation hearing shows that the parties discussed this issue as follows:

> Paragraph 21 [of the proposed confirmation order] currently provides that all of the debtors' respective rights, titles, and interests in any Privileges, related to the retained causes of action . . . are being vested in the liquidation trust and the reorganized debtor - - debtors.
>
> The equity committee requested language, additional language in the confirmation order that, for avoidance of doubt, would expressly include both the board's - - the debtors' board of directors and audit committee rights in any Privileges and we had a discussion about that.
>
> Your Honor, the word "Privileges" is a defined term in the plan; it's in Section 5(e)(11) of the plan and it means, any privilege or immunity of the, emphasis, debtors' estates. It's confined to the debtors' estates.
>
> So the plan language is clear that the debtors are transferring all the privileges that the debtors have the ability to transfer; conversely, the debtors obviously cannot transfer privileges that belong to other - - director, committee, or otherwise.
>
> So, you know, we convinced the equity committee that it was appropriate to leave to another day, any issues that might arise, if at all, with respect to issues of what was or was not vested in the trust. But it is quite clear and we state quite clearly on the record that the debtors are transferring any privileges that the debtors' estates have at this point in time. And we ultimately concluded that we didn't need to tinker with the language, but wanted to reflect that discourse on the record.[19]

The parties left this issue open for another day, and it appears that day has arrived.

In *Commodity Futures Trading Commission v. Weintraub*, the United States Supreme Court held that the "trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications."[20] The Supreme Court recognized that "a corporation must act through its agents," and "for solvent corporations, the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors."[21] "The managers, of course, must exercise

[19] Tr. 12/20/2017 at 14:11 – 15:13 (D.I. 1591).

[20] *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 358, 105 S. Ct. 1986, 85 L.Ed.2d 372 (1985).

[21] *Id.* at 348.

the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals."[22]

The *Weintraub* Court also noted (and the parties agreed) that "when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well." Once a bankruptcy case is filed, "[t]he actor whose duties most closely resemble those of management should control the privilege in bankruptcy, unless such a result interferes with policies underlying the bankruptcy laws."[23] Postpetition, "[t]he powers and duties of a bankruptcy trustee are extensive," while, "[i]n contrast, the powers of the debtor's directors are severely limited."[24] The Court determined that the trustee's control of the corporate debtor's attorney-client privilege would be consistent with the policies of the bankruptcy laws, noting:

> In seeking to maximize the value of the estate, the trustee must investigate the conduct of prior management to uncover and assert causes of action against the debtors' officers and directors. It would be extremely difficult to conduct this inquiry if the former management were allowed to control the corporation's attorney-client privilege and therefore to control access to the corporation's legal files. To the extent that management had wrongfully diverted or appropriated corporate assets, it could use the privilege as a shield against the trustee's efforts to identify those assets. The Code's goal of uncovering insider fraud would be substantially defeated if the debtor's directors were to retain the one management power that might effectively thwart an investigation into their own conduct.[25]

RKO distinguishes the present situation - - involving an independent Audit Committee - - from the facts in *Weintraub*. RKO notes that the Debtors' board of directors granted certain powers to the Audit Committee, including the authority to engage independent counsel, and, therefore, asserts that the Debtor, PSG, was never RKO's client. RKO relies on *BCE West, L.P.*, a decision

[22] *Id.* at 349.
[23] *Id.* at 351-52.
[24] *Id.* at 352.
[25] *Weintraub,* 471 U.S. at 353-54 (citations omitted).

by the United States District Court for the Southern District of New York (the "SDNY Court"), which observed that "[i]t is counterintuitive to think that while the Board permitted the Special Committee to retain its own counsel, the Special Committee would not have the benefit of the attorney-client privilege inherent in that relationship or that the Board of Directors or management, instead of the Special Committee, would have control of such privilege."[26] The *BCE West* Court then decided:

> Because the Special Committee is a separate and distinct group from the Board of Directors, with separate legal representation, the privilege afforded it is not the privilege of the corporation, but rather, is the privilege of the Special Committee. Accordingly, the Plan Trustee cannot waive it.[27]

The Liquidation Trustee, however, argues that a 2015 decision by the SDNY Court, considering the same issue, declined to follow *BCE West*. In *China Medical*, the bankruptcy court recognized a Cayman Islands liquidation proceeding as a foreign main proceeding pursuant to chapter 15 of the Bankruptcy Code.[28] The foreign representative sought production of documents related to an internal investigation conducted preliquidation by the attorneys for the foreign debtor's audit committee.[29] The attorneys largely complied with the document request, but refused to turn over privileged documents. The bankruptcy court ruled that the privileges owned by the audit committee did not devolve to the liquidator.[30] On appeal, the SDNY Court affirmed the bankruptcy court's choice of law analysis determining that United States law controlled; but reversed on the privilege issue, deciding that the foreign representative/liquidator owned the committee's privileges, regardless of the committee's prebankruptcy independence.[31]

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[26] *In re BCE West, L.P.*, No. M-8-85, 2000 WL 1239117, *2 (S.D.N.Y. Aug. 31, 2000).

[27] *Id.* at *3.

[28] *Krys v. Paul, Weiss, Rifkind, Wharton & Garrison, LLP (In re China Med. Tech., Inc.)*, 539 B.R. 643, 646 (S.D.N.Y. 2015).

[29] *Id.*

[30] *Id.*

[31] *Id.* at 653, 658.

The *China Medical* Court noted that *Weintraub* did not squarely address this issue, but determined that many considerations in *Weintraub* apply. The court disagreed that an independent audit committee's status was analogous to that of an individual, deciding, instead, that the committee was established by the debtor's board of directors "and, thus, [was] a critical component of [the debtor's] management infrastructure."[32] The *China Medical* Court also dismissed the argument that transferring privileges would have a chilling effect on attorney-client communications, relying on the *Weintraub* Court's analysis that "the chilling effect is no greater here than in the case of a solvent corporation, where individual officers and directors always run the risk that successor management might waive the corporation's attorney-client privilege."[33] Further, once "any miscreants have left the company in bankruptcy . . . corporate management is deposed in favor of the trustee, and there is no longer a need to insulate committee-counsel communications from managerial intrusion. Without a legitimate fear of managerial intrusion or retaliation in bankruptcy, Appellee's assertions as to a potential chilling effect ring hollow."[34] The court further observed:

> [T]he Court can see no reason why the turnover of attorney-client communications to a trustee or liquidator in bankruptcy would impede the monitoring and oversight functions of a truly independent audit committee. . . . If anything, the prebankruptcy interests of an audit committee are aligned with the interests of a trustee or liquidator in bankruptcy.[35]

I agree with the *China Medical* Court's reasoning that it is appropriate to extend the Supreme Court's analysis in *Weintraub* and recognize that the trustee appointed as the representative of a corporate debtor controls the privileges belonging to the independent committee established by the corporate debtor. Therefore, in the present case, I conclude that upon

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[32] *Id.* at 655.
[33] *China Med.*, 539 B.R. at 656.
[34] *Id.*
[35] *Id.* at 657.

confirmation, the Plan transferred control of the former Audit Committee's Privileges to the Liquidation Trustee.

(3) The work product doctrine cannot be asserted against a client, and the entire Investigation Records must be turned over, subject to the Internal Documents exception.

Deciding that the Liquidation Trustee controls the Audit Committee's Privileges, however, does not fully resolve this matter. RKO asserts that it has not turned over Investigation Records that are subject to protection under the work product doctrine, not the attorney-client privilege. The *China Medical* Court decided that *counsel* could assert the work product doctrine, and the liquidator could not "waive the protection unilaterally."[36]

The work product doctrine is governed by Fed. R. Civ. P. 26(b)(3) and 'shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case.'"[37] Rule 26(b)(3)(A) provides:

> Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if: (i) they are otherwise discoverable under Rule 26(b)(1); and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. [38]

"There is no question that both the client and the attorney have an interest in work-product material, . . . [t]hus as a general rule, even if the client does not invoke work-product protection,

[36] *Id.* at 658. The *China Medical* Court remanded the case to the bankruptcy court for further proceedings.

[37] *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 661-62 (3d Cir. 2003) (quoting *United States v. Nobles*, 422 U.S. 225, 238 & n. 11, 95 S. Ct. 2160, 45 L.E.2d 141 (1975)).

[38] Fed. R. Civ. P. 26(b)(3)(A)

the attorney may do so."[39] "Nonetheless, it is clear that when the interests of the client and the attorney clash . . . it is the client's interest that will prevail."[40]

The Supreme Court described the essential nature of the work product doctrine, in part, as follows: "[i]n performing his various duties, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion *by opposing parties and their counsel*."[41] Thus, "the work product rule . . . may not be invoked by an attorney to withhold from a client or former client work-product created in representing that client."[42]

The Liquidation Trustee asserts that, for the same reasons he now controls the Audit Committee Privileges, he has stepped into the shoes of RKO's former client, and RKO cannot assert the work product doctrine against him. I agree that - - consistent with the reasoning stated above based on *Weintraub* and *China Medical*, including discussion about the aligned goals of the Audit Committee and the Liquidation Trustee, as well as the policies underlying the Bankruptcy Code - - upon confirmation, the Liquidation Trustee now has stepped into the shoes of the Audit Committee as RKO's former client.

What remains, then, is to determine whether RKO must turn over *all* of the Investigation Record to the Litigation Trustee. RKO relies upon *Sage Realty Corp.* to assert that it may withhold items that are "firm documents intended for internal law office review and use."[43]

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[39] *Polin v. Wisehart & Koch*, No. 00-CIV-9624, 2002 WL 1033807, *2 (S.D.N.Y. May 22, 2002) (citations omitted).

[40] *Id.*

[41] *Cendant*, 343 F.3d at 662 (quoting *Hickman v. Taylor*, 329 U.S. 495, 510-11, 67 S. Ct. 385, 91 L.Ed.451 (1947) (emphasis added)).

[42] *Polin*, 2002 WL 1033807, *1 (citing *Martin v. Valley Nat'l Bank of Arizona*, 140 F.R.D. 291, 320-21 (S.D.N.Y. 1991).

[43] *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, L.L.P.*, 91 N.Y.2d 30, 37-38, 689 N.E.2d 879 (N.Y. 1997).

The Court of Chancery of Delaware has observed that there is a split in authority regarding an attorney's duty to release files to a client or former client.[44] The majority of jurisdictions follow the "entire file" approach, which means that "[o]n request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse."[45] Narrow exceptions are recognized for "(i) situations when compliance would violate the lawyer's duty to another, (ii) cases of extreme necessity, such as where the disclosure is likely to cause serious harm to the client, and (iii) certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case."[46]

The minority of jurisdictions follow the "end product" approach, which "distinguishes between the lawyer's external work product, which the client has a right to obtain, and the lawyer's internal work product, which the client does not have any right to receive."[47]

The Delaware Court of Chancery determined that the "cases applying the entire-file approach are more persuasive and consistent with other aspects of Delaware law governing the attorney-client relationship."[48] The *TradingScreen* Court ordered the law firm to produce its entire litigation file to the former client. This result is in accord with *Sage Realty*, which concluded that the lower court erred in restricting the former client's access to end product documents.[49] The *Sage Realty* Court determined that "[b]arring a substantial showing by [the law firm] of good cause to refuse client access, petitioners should be entitled to inspect and copy work product

[44] *TCV VI, L.P. v. TradingScreen, Inc.*, C.A. No. 10164-VCL, 2018 WL 1907212 (Del. Ch. 2018).
[45] *Id.* at *4 - *5 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 46(2) (Am. Law. Inst. 2000)).
[46] *Id.* at *5 (quoting Restatement § 46 cmt. c) (internal quotation marks omitted).
[47] *Id.* at *5.
[48] *Id.* at *6.
[49] *Sage Realty*, 91 N.Y.2d at 37.

materials," since the client paid for those materials during the course of the firm's representation.[50] The *Sage Realty* Court also recognized an exception for "firm documents intended for internal law office review and use."[51] The *Sage Court* explained:

> The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved. This might include, for example, documents containing a firm attorney's general or other assessment of the client, or tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation. Such documents presumably are unlikely to be of any significant usefulness to the client or to a successor attorney.[52]

In the Objection to the Liquidation Trustee's Motion, RKO asserted that the following Investigation Records were privileged and withheld: (i) attorney notes of employee interviews, (ii) internal analytics or work papers by AlixPartners, and (iii) communications/emails with individual Audit Committee members. After the first hearing on the Motion, at the Court's direction, the parties met and exchanged information about the employee interviews.[53] At this point, the categories of information that have not been turned over to the Liquidation Trustee include the following: (i) draft factual memoranda, (ii) draft legal memoranda, (iii) communications with the individual Audit Committee members, and (iv) documents characterized as counsel's mental impressions.[54]

In accordance with *TradingScreen* and *Sage Realty*, I conclude that RKO must produce the entirety of the Investigation Records to the Litigation Trustee, except for those items that are firm

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[50] *Id.*

[51] *Id.* The *Sage Realty* Court also recognized that the attorneys "should not be required to disclose documents which might violate a duty of nondisclosure owed to a third party, or otherwise imposed by law." *Id.*

[52] *Id.* 91 N.Y.2d at 37-38 (citations omitted).

[53] Tr. 3/6/2019 at 3:15 – 4:1, 6:12 – 6:21 (D.I. 1863).

[54] *Id.* at 4:2 – 4:8.

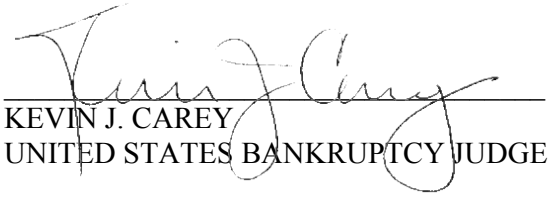
documents intended for internal law office review and use. Only the documents characterized as counsel's mental impressions fall within that category. The draft factual memoranda and draft legal memoranda must be turned over as part of the entire file, even if those documents were circulated only within the firm. Moreover, the communications between counsel and the individual Audit Committee members also do not fall within the internal document exception and must be turned over to the Litigation Trustee.[55]

CONCLUSION

For the reasons set forth above, I conclude that (i) control of the Audit Committee's Privileges transferred to the Liquidation Trustee upon confirmation of the Plan, (ii) RKO may not assert protection of the work product doctrine against the Litigation Trustee, and (iii) RKO must turn over the entirety of the Investigation Records to the Litigation Trustee, except internal firm documents. Accordingly, RKO need not turn over documents consisting of counsel's mental impressions that are intended only for internal review, but RKO must turn over draft factual memoranda, draft legal memoranda, and communications between RKO and the individual Audit Committee members.

An appropriate order follows.

BY THE COURT:



KEVIN J. CAREY
UNITED STATES BANKRUPTCY JUDGE

[55] *In re Bevill, Bresler & Schulman Asset Mgt. Corp.*, 805 F.2d 120, 125 (3d Cir. 1986) (Deciding that corporate officers do not have an attorney-client privilege with regard to communications made in their role as corporate officials).

Dated June 20, 2019

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	CHAPTER 11
OLD BPSUSH INC., *et al.*,[1]	:	Case No. 16-12373 (KJC)
Debtors	:	(RE: D.I. 1843, 1876)

ORDER

AND NOW, on this 20th day of June, 2019, upon consideration of the Motion of Old PSG Wind Down Liquidation Trustee, as Litigation Representative for Debtors and Liquidation Trust, For Entry of an Order: (I) Compelling Turnover of Investigation Records Pursuant to Bankruptcy Code Section 542; and (II) Finding that All Privileges Applicable to Investigation Records Remain in Full Force and Effect and are Controlled Exclusively By Liquidation Trustee (the "Motion"), and the objection thereto, and after a hearing on notice, and for the reasons in the foregoing Opinion, it is ORDERED that:

The Motion is GRANTED, in part, and DENIED, in part, as follows:

(1) In accordance with the Confirmation Order, Plan and the Liquidation Trust Agreement, the Investigation Privileges shall be deemed to have vested in the Liquidation Trust and the

[1] The debtors in these chapter 11 cases are Old BPSUSH Inc. (f/k/a BPS US Holdings Inc.), Old BH Inc. (f/k/a Bauer Hockey, Inc.), Old EBS Inc. (f/k/a Easton Baseball/Softball Inc.), Old BHR Inc. (f/k/a Bauer Hockey Retail Inc.), Old BPSU Inc. (f/k/a Bauer Performance Sports Uniforms Inc.), Old PLG Inc. (f/k/a Performance Lacrosse Group Inc.), Old BPSCI Inc. (f/k/a BPS Diamond Sports Inc.), Old PSGI Inc. (f/k/a PSG Innovation Inc.), Old BHR Wind-down Corp. (f/k/a Bauer Hockey Retail Corp.), Old EBS Wind-down Corp. (f/k/a Easton Baseball/Softball Corp.), Old PSGI Wind-down Corp. (f/k/a PSG Innovation Corp.), Old BPSDS Wind-down Corp. (f/k/a BPS Diamond Sports Corp.), Old BPSU Wind-down Corp. (f/k/a Bauer Performance Sports Uniforms Corp.), Old PLG Wind-down Corp. (f/k/a Performance Lacrosse Group Corp.), and Old PSG Wind-down Ltd. (f/k/a Performance Sports Group Ltd and also representing the estates of the Debtors formerly known as KBAU Holdings Canada, Inc., Bauer Hockey Corp. and BPS Canada Intermediate Corp., respectively) (the "Debtors").

Debtors on the Effective Date of the Plan, and the Liquidation Trustee, in his capacity as Litigation Representative for the Liquidation Trust and the Debtors, shall have the power and authority to assert or waive any Investigation Privilege.

(2) Richards Kibbe & Orbe LLP ("RKO") shall promptly turn over the entirety of the Investigation Records to the Litigation Trustee, except for firm documents that are intended only for internal review, to the Liquidation Trustee by delivering any remaining Investigation Records to the attention of Robert J. Stark, Esquire and Andrew M. Carty, Esquire, Brown Rudnick LLP, 7 Times Square, 47th Floor, New York, NY 10036. Based upon the representations made by counsel at the hearing on the Motion, the following remaining Investigation Records should be turned over promptly to the Litigation Trustee (i) draft factual memoranda, (ii) draft legal memoranda, and (iii) communications between RKO and the individual Audit Committee Members. RKO need not turn over documents consisting of counsel's mental impressions that are intended only for internal review.

(3) To the extent that RKO or AlixPartners withhold any Investigation Records from production for any reason, RKO and AlixPartners shall provide the Liquidation Trustee with a log of all such withheld documents, which log shall identify each document so withheld and the purported basis for withholding the document. The Liquidation Trustee shall have the right to seek disclosure of any document withheld from production by RKO or AlixPartners, including by requesting that the Court conduct an *in camera* review of such document to determine whether such document should be produced.

(4) The Court shall retain jurisdiction to resolve any disputes arising from or related to this Order, and to interpret, implement and enforce the provisions of this Order.

BY THE COURT:

KEVIN J. CAREY
UNITED STATES BANKRUPTCY JUDGE

cc: Garvin F. McDaniel, Esquire[2]

[2] Counsel shall serve copies of this Order and accompanying Opinion on all interested parties and file a Certificate of Service with the Court.

Faculty

Philip D. Anker is co-chair of WilmerHale's Bankruptcy and Financial Restructuring Practice Group in New York and has more than 20 years of experience in insolvency practice. He has represented debtors, chapter 11 trustees, trustees of post-confirmation trusts, creditors' committees, secured creditors, debtor-in-possession lenders, unsecured creditors, equityholders, investors and purchasers of companies and assets in bankruptcy. Mr. Anker also has substantial experience in out-of-court workouts and has played a leading role in some of the largest, most prominent bankruptcy-related litigation matters in recent years, including actions arising out of the *Adelphia*, *Enron*, *Global Crossing*, *Lyondell*, *Tribune* and *Refco* chapter 11 cases, as well as several consumer bankruptcy class actions. He has been listed in *The Best Lawyers in America* in the areas of Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law from 2005-14, as well as in the 2010-13 editions of *Benchmark Litigation*. Mr. Anker received his Bachelor's degree *magna cum laude* in 1978 from the University of Pennsylvania and his J.D. in 1982 from George Washington University Law School.

Hon. Kevin J. Carey is senior counsel in Hogan Lovells US LLP's Business Restructuring and Insolvency practice in Philadelphia and is a retired bankruptcy judge. He also is ABI's President-Elect. Judge Carey was first appointed to the U.S. Bankruptcy Court for the Eastern District of Pennsylvania in 2001, then in 2005 began service on the U.S. Bankruptcy Court for the District of Delaware (serving as chief judge from 2008-11). He is a past global chairman of the Turnaround Management Association and is an honorary member of the Turnaround, Restructuring and Distressed Investing Hall of Fame and a Distinguished Fellow of the Association of Insolvency & Restructuring Advisors. Judge Carey is a Fellow of the American College of Bankruptcy and a member of the International Insolvency Institute. He also is a contributing author to *Collier on Bankruptcy* and a member of the National Conference of Bankruptcy Judges. Judge Carey began his legal career in 1979 clerking for Bankruptcy Judge Thomas M. Twardowski, then served as clerk of court of the U.S. Bankruptcy Court for the Eastern District of Pennsylvania. He received his B.A. in 1976 from Pennsylvania State University and his J.D. in 1979 from Villanova University School of Law.

Kathryn A. Coleman is a partner in Hughes Hubbard & Reed LLP's New York office and has handled a wide range of restructuring and other high-stakes matters in her more than 30 years in practice, including representing U.S. and non-U.S. companies in chapter 11 cases, dealing with "bet-the-company" litigation claims, representing acquirers in chapter 11 sale transactions, representing DIP lenders, and handling cross-border insolvency matters, out-of-court restructurings and distressed investments. Her clients include individuals and companies defending trade secret theft and RICO lawsuits, publicly traded and privately held companies restructuring their financial affairs, traditional and nontraditional secured lenders, unsecured creditors (both official committees and significant creditors for their own account), equityholders, potential acquirers, equity sponsors, and financial and strategic buyers. Ms. Coleman is a trusted advisor to the inner management circles of her clients, with expertise in advising management and boards of directors on corporate governance, fiduciary duty and D&O insurance matters. She has advised clients on, and litigated at the trial and appellate levels, plan confirmations, prepackaged plans, credit bidding, exclusivity, debtor-in-possession financings, valuation, adequate protection of security interests, the ability to collaterally attack orders of the bankruptcy court, and cash-collateral usage. She also has experience

litigating venue, remand, removal and stay issues, and has represented recovery trustees dealing with myriad post-confirmation issues and litigation. Ms. Coleman is a Fellow of the American College of Bankruptcy and served two terms on ABI's Board of Directors, for which she co-chairs its annual Complex Financial Restructuring Program. She was recently named a *Law360* Bankruptcy MVP and a Notable Woman in Law by *Crain's New York Business*. Ms. Coleman frequently speaks on bankruptcy law and distressed investing, participating in programs sponsored by the Practising Law Institute, ABI, the Turnaround Management Association, AIRA, the M&A Advisor, the New York City Bar Association and the American Bar Association. She also serves on the Steering Committee of the NYC Bankruptcy Assistance Project. Ms. Coleman graduated *magna cum laude* from Pomona College and received her J.D. from Boalt Hall School of Law (U.C. Berkeley), subsequently clerking for Hon. C. Martin Pence, U.S. District Judge for the District of Hawaii.

Hon. Barbara J. Houser is a retired U.S. Bankruptcy Judge for the Northern District of Texas in Dallas, now serving on recall status, and she is ABI's Immediate Past President. She previously was with Locke, Purnell, Boren, Laney & Neely in Dallas and became a shareholder there in 1985. In 1988, she joined Sheinfeld, Maley & Kay, P.C. as the shareholder-in-charge of the Dallas office and remained there until she was sworn in as a U.S. Bankruptcy Judge in 2000. While at Sheinfeld, Judge Houser led the firm's representation of clients in a variety of significant national chapter 11 cases. She lectures and publishes frequently, is a past chairman of the Dallas Bar Association's Committee on Bankruptcy and Corporate Reorganization, is a member of the Dallas, Texas and American Bar Associations, and is a Fellow of the Texas and American Bar Foundations. Judge Houser served as a contributing author to *Collier on Bankruptcy* for many years and taught creditors' rights as a visiting professor at the SMU Dedman School of Law. She was elected a Fellow of the American College of Bankruptcy in 1994, and in 1996, she was elected a conferee of the National Bankruptcy Conference. In 1998, the National Law Journal named Judge Houser as one of the 50 most influential women lawyers in America. After becoming a bankruptcy judge, she joined the National Conference of Bankruptcy Judges and served as its president from 2009-10. Judge Houser has received a variety of awards and honors since taking the bench, the Distinguished Alumni Award for Judicial Service from the SMU Dedman School of Law in February 2011, ABI's Judge William Norton Jr. Judicial Excellence Award in October 2014, and the Distinguished Service Award from the Alliance of Bankruptcy Inns of the American Inns of Court in October 2016. She also received the Distinguished Service Award from the American College of Bankruptcy in October 2021. Judge Houser has served the judiciary in a number of capacities during her 21 years on the bench, including as a member of the Judicial Conference Committee on the Administration of the Bankruptcy System for seven years, as a member of the faculty that the Federal Judicial Center selected to teach new bankruptcy judges for many years, and as a member of the board of directors of the Federal Judicial Center, which is chaired by Chief Justice John Roberts. In June 2017, she was appointed to serve as the leader of a five-federal-judge mediation team tasked with settling all of the issues in dispute in connection with the historic insolvency filings by the Commonwealth of Puerto Rico and certain related instrumentalities under Title III of PROMESA. Judge Houser received her undergraduate degree with high distinction from the University of Nebraska and her J.D. from Southern Methodist University Law School, where she was editor of its law review.