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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:

94TH AND SHEA, L.L.C,

Debtor.

Chapter 11

Case No. 10-bk-37387

MEMORANDUM DECISION

This matter comes before the Court on a discovery dispute that has arisen between the Debtor and JPMCC 2007-CIBC19 Shea Boulevard, LLC (“JPMCC”). The parties filed simultaneous briefs on December 9, 2011 as to the issues presented. The Court reviewed the Debtor’s “Statement of Position and Request for Resolution of Discovery Dispute” and JPMCC’s “Brief Regarding Compliance with Discovery Requests and Privilege Issues.” The dispute between the parties focuses on whether certain emails exchanged between Steven Goodhue, Mary Lineback, various other individuals and Debtor’s experts may be classified as work product of an attorney. JPMCC requests that the Court compel the Debtor to disclose any and all communications between its testifying experts, and any drafts of reports prepared by non-specially trained experts. The Debtor requests that the Court affirm its decision to withhold the emails on the basis that said emails are protected work-product of an attorney. After reviewing the relevant pleadings, and applicable legal authority the Court concludes that the Debtor must release certain documents for the reasons set forth.

A. FED R. CIV. P. 26 AND THE 2010 AMENDMENTS THERETO

The Federal Rule governing expert witness disclosures was amended on December 1, 2010. By order dated April 28, 2010, the Supreme Court of the United States

1 adopted certain amendments to the Federal Rules of Civil Procedure. The amendments took
2 effect on December 1, 2010. Order ¶¶ 1–2 (U.S. Apr. 28, 2010) (amending Fed.R.Civ.P. 26).
3 Three main issues were addressed:: (1) Rule 26(a)(2)(B)(ii) was revised to narrow part of the
4 scope of an expert's written report; (2) A new subparagraph was inserted at Rule 26(a)(2)(C) to
5 require certain expert disclosures where no written report is mandated by Rule 26(a)(2)(B); (3)
6 New subparagraphs were inserted at Rule 26(b)(4)(B) and (C) to expressly protect as work
7 product draft reports and certain communications between the expert and counsel, respectively.
8 See Fed.R.Civ.P. 26 advisory committee's note (2010 amendments); Civix-DDI, LLC v.
9 Metropolitan Regional Information Systems, Inc. 273 F.R.D. 651 (E. D.Va. 2011).

10 Rule 26(a)(2)(B)(ii) was amended so that testifying experts must now reveal in
11 their reports only the “facts or data” they considered in forming their opinion. Even though the
12 revision of Rule 26(a)(2)(B)(ii) to allow disclosure of “facts or data” excludes theories or mental
13 impressions of counsel, the phrase “facts or data” should still be “interpreted broadly to require
14 disclosure of any material considered by the expert, from whatever source, that contains factual
15 ingredients.” Sara Lee Corp v. Kraft Foods Inc., 273 F.R.D. 416, 419 (N.D. Ill 2011); Chevron
16 Corp v. Shefftz, 754 F. Supp. 2d 254 (D. Mass. 2010). The disclosure obligation extends to any
17 facts or data ‘considered’ by the expert in forming the opinions to be expressed, not only those
18 relied upon by the expert.” Chevron Corp v. Shefftz, 754 F. Supp. 2d 254 (D. Mass. 2010).; See
19 also Fed.R.Civ.P. 26 advisory committee's note (2010 amendments).

20 Rule 26(a)(2)(C) was inserted to require non-retained experts to disclose the
21 subject matter of their testimony and a summary of facts and opinions to which they would
22 testify. Fed R. Civ. P. 26(a)(2)(C). These witnesses are not required to provide a full Rule
23 26(a)(2)(B) report as previously required.

24 Rule 26(b)(4)(B) was added to provide work product protection to drafts of
25 testifying experts’s disclosures, be it retained experts reports or summary reports for non-
26 retained experts. Rule 26(b)(4)(C) was included to provide work product protection for
27 communications between a party’s attorney and testifying retained expert witnesses. There are
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1 three exceptions to the amendments that require certain communications still be produced: (1)
2 communications that relate to compensation for the expert's study or testimony; (2)
3 communications that identify facts or data that the party's attorney provided and the expert
4 considered; and (3) communications that identify assumptions that the party's attorney provided
5 and that the expert relied upon in forming opinions. Moreover, facts or opinions known "by an
6 expert who was retained or specially employed by another party in anticipation of litigation or to
7 prepare for trial and who is not expected to be called as a witness at trial" may not ordinarily be
8 discovered. Fed R. Civ. P. 26(b)(4)(D). This type of information may only be disclosed upon a
9 showing of "exceptional circumstances under which it is impracticable for [a] party to obtain
10 facts or opinions on the same subject by other means." Fed R. Civ. P. 26(b)(4)(D)(ii).

11 To qualify for work-product protection, documents must: (1) be "prepared in
12 anticipation of litigation or for trial" and (2) be prepared "by or for another party or by or for that
13 other party's representative." U.S. v. Richey, 632 F.3d 559 (9th Cir. 2011) citing In re Grand
14 Jury Subpoena, Mark Torf/Torf Envtl. Mgmt. (Torf), 357 F.3d 900, 907 (2004). The doctrine
15 protects attorney's work from falling into the hands of an adversary. In re Chevron Corp. 633
16 F.3d 153 (3rd Cir. 2011). The privilege protects documents or compilation of materials prepared
17 by agents of the attorney in preparation for litigation. Richey at 567 citing United States v.
18 Nobles, 422 U.S.225 (1975).

19 B. DEBTOR MUST PRODUCE ENGAGEMENT AGREEMENTS

20 As a preliminary matter, the Court directs the Debtor to produce the engagement
21 agreements between itself and its experts. If the Debtor does not have written agreements, the
22 Debtor must disclose the terms and conditions of the oral agreements with these experts. This
23 disclosure would focus on whether the expert was retained to testify at trial, was retained as a
24 consulting expert, and the compensation to be paid.

25 C. COMMUNICATIONS INVOLVING EXPERT NOT RETAINED AS 26 WITNESS OR TO ASSIST IN PREPARATION FOR TRIAL ARE NOT PRIVILEGED

27 Debtor's attempt to withhold information involving Trifecta Management Group
28 ("Trifecta") has no legal basis. Trifecta was apparently engaged to provide business advice to

1 Renegade Canteen, a tenant of the Debtor's and a third party, to provide reports regarding
2 improving the profitability of the business. Trifecta was not an expert retained by the Debtor for
3 trial preparation. To the extent Trifecta provided consulting work to improve the operations of
4 Renegade Canteen, such information is not privileged. Courts must consider the totality of the
5 circumstances and determine whether a "document was created because of anticipated litigation,
6 and would not have been created in substantially similar form but for the prospect of litigation."
7 U.S. v. Richey, 632 F.3d 559 (9th Cir. 2011) quoting United States v. Adlman, 134 F.3d 1194
8 (2nd Cir. 1998). Documents created in the ordinary course of business, even if they prove useful
9 in subsequent litigation, are not protected by the work product doctrine. United States v.
10 Rockwell Intl'l, 897 F.2d 1255 (3d Cir. 1990). Therefore, any information that falls under this
11 category should be released.

12 D. COMMUNICATIONS INVOLVING MARY LINEBECK

13 At issue are communications by Mary Linebeck, an individual employed as
14 controller by the Debtor pursuant to a "controller fee contract." The Court authorized the
15 continued employment in said capacity at an hourly rate of \$50 with a maximum compensation
16 of \$4,000 a month.¹ The Debtor has failed to provide a sufficient legal basis why
17 communications from Ms. Linebeck are protected. It is the Court's understanding that Ms.
18 Linebeck is essentially a contract employee of the Debtor. Ms. Linebeck is not an attorney, nor
19 is she an agent for Debtor's counsel.

20 Routine communication between corporate officers or employees transacting
21 business of a company do not attain privileged status solely because counsel is "copied in" on
22 correspondence. In re G-I Holdings, Inc., 218 F.R.D. 428 (D. N. J. 2003). A communication is
23 not privileged merely because it was sent or received between an attorney or client. Coleman v.
24 Schwarzenegger, 2008 WL 2468492 (E.D. Cal 2008); HSH Nordbank AG New York Branch v.
25 Swerdlow, 259 F.R.D. 64 (S.D.N.Y 2009). Furthermore, a privilege is waived when the party
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27 ¹ See December 1, 2010 Minute Entry, Docket Entry No. 19. See also Docket Entry No.
28 32, Agreed Order Authorizing Debtor's Interim Use of Cash Collateral.

1 attempting to assert the privilege has voluntarily disclosed the information to a party not covered
 2 by the privilege. Coleman v. Schwarzenegger, 2008 WL 2468492 (E.D. Cal 2008) citing Weil v.
 3 Investment/Indicators, Research Mgmt., Inc. 647 F.2d 18 (9th Cir. 1981).

4 Based upon the foregoing, the Court concludes that the following documents, as
 5 noted in the privilege log will be released:

BATES NUMBER	DATE	DESCRIPTION
LVGI000555	10/19/2011	Email to John Rucker from Mary Lineback re Draft Appraisal
TMG000014- TMG000020	Various	Preliminary draft of Trifecta Management Group's expert report and communications relating thereto between Steve Goodhue and Bruce Nussbaum
TMG000021	Various	Communications regarding revisions to a preliminary draft of Trifecta Management Group's expert report between Anthony Penn, Mike Long, Michael Auger, Ron Lam, Jil Mather, Bruce Nussbaum.
TMG000022- TMG000023	Various	Communications regarding revisionsto a preliminary draft of Trifecta Management Group's expert report between Steve Goodhue and BruceNussbaum.
TMG000024- TMG000027	Various	Correspondence between Attorney Wesley Ray, Jayne Pursiano, Bruce Nussbaum, Anthony Penn, Tamera Wells, Steve Goodhue, John Rosso and Mar Lineback.
SCG001394-SCG001489	Various	Exhibit to a preliminary draft of Sierra Consulting Group expert report and communication relating thereto between Attorneys Wesley Ray, Jack Hebert, Ted Burr, Lynne Bouvea, Mary Lineback.
SCG000856-SCG000858	11/01/2011	Exhibit to a preliminary draft of Sierra Consulting Group expert report and communication relating thereto between Ted Bur and Lynne Bouvea.
SCG002122-SCG002926	Various	Correspondence between Attorney Wesley Ray, Ted Bur, Lynne Bouvea and/or Mary Lineback
SCG002927-SCG002953	10/25/2011	Preliminary draft of Sierra Consulting Group expert report and communication relating thereto Mary Lineback and Lynne Bouvea.
CPI-DGV000152-CPI-DGV000157	Various	Preliminary draft of Commercial Properties expert report and communications relating thereto.
CPI -EB000056-CPI - EB000057	Various	Preliminary draft of Commercial Properties expert report and communications relating thereto between Eric Butler, David Verwer and Mary Lineback.

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CPI- EB000070-CPI -EB000073	10/26/2011	Communications regarding revisions to a preliminary draft of Commercial Properties' expert report between Eric Butler and Mary Lineback.
CPI- EB00007 4-CBI -EB00007 5	Various	Communications regarding revisions to a preliminary draft of Commercial Properties' expert report between Eric Butler and Mary Lineback.

SO ORDERED.

SIGNED AND DATED ABOVE