United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Transmittal Sheet for Opinions for Posting

Will this opinion be published? No

Bankruptcy Caption: In re Concepts America, Inc.

Bankruptcy Number: 14 B 34232

Adversary Caption: Audette v. Goldman

Adversary Number: 16 A 691

Date of Issuance: March 16, 2021

Judge: David D. Cleary

Appearance of Counsel:

Attorney for R. Kymn Harp and Robbins, Salomon & Patt, Ltd.: Patricia M. Noonan, Jennifer S. Stegmaier, Wilson, Elser, Moskowitz, Edeman & Dicker LLP, 55 West Monroe Street, Suite 3800, Chicago, Illinois

Special Counsel for Trustee, Brian Audette: Matthew E. McClintock, Daniel C. Curth, Amrit Kapai, Goldstein & McClintock LLLP, 111 W Washington Street, Suite 1221, Chicago, Illinois

Attorney for Trustee, Brian Audette: Brian L. Shaw, Christina M. Sanfelippo, Cozen O'Connor, 123 North Wacker Drive, Suite 1800, Chicago, Illinois

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	
	)	Case No. 14 B 34232
CONCEPTS AMERICA, INC.,	)	
	)	
Debtor.	)	Chapter 7
_____	)	
	)	
BRIAN AUDETTE, not individually but as Chapter 7 Trustee,	)	
	)	
	)	Adv. No 16 A 691
Plaintiff,	)	
	)	
v.	)	
	)	Judge David D. Cleary
TED KASEMIR, et al.	)	
	)	
Defendants.	)	

ORDER DENYING DEFENDANTS R. KYMN HARP'S AND ROBBINS, SALOMON & PATT, LTD'S MOTION TO COMPEL THE TRUSTEE'S AND GOLDSTEIN & MCCLINTOCK LLLP'S PRODUCTION OF ASSERTED PRIVILEGED DOCUMENTS (EOD 579)

This matter comes before the court on the Motion of Defendants R. Kymn Harp and Robbins, Salomon & Patt to Compel the Trustee's and Goldstein & McClintock LLLP's Production of Asserted Privileged Documents ("Motion to Compel"). Defendants R. Kymn Harp and Robbins, Salomon & Patt (collectively, "Defendants" or "Harp/RSP") seek to compel production of documents that Brian Audette, not individually but as chapter 7 trustee of Concepts America, Inc. ("Plaintiff" or "Trustee"), identified as privileged in response to discovery requests. Defendants filed a memorandum in support of the Motion to Compel ("Memo in Support"). Trustee filed an objection to the Motion to Compel. Having reviewed the papers filed and heard the arguments of the parties in open court, the court will deny the Motion to Compel.

BACKGROUND

On August 17, 2020, Defendants filed a motion to dismiss this adversary proceeding as a sanction. After briefing and argument from the parties, the court entered a pretrial order describing several issues that would be tried at an evidentiary hearing. *See* EOD 548.

In open court on December 9, 2021, the court set written and oral discovery deadlines and an evidentiary hearing date of April 14, 2021. The discovery deadlines have since been extended by 35 days, and the evidentiary hearing rescheduled to May 19, 2021.

On December 18, 2020, Defendants issued interrogatories and a request for production of documents.

At the beginning of February, the Trustee produced documents in response to the request. About two weeks later, the Trustee served Defendants with a privilege log listing documents that the Trustee withheld from his production. Harp/RSP seeks to compel production of the documents on this log, arguing that any claimed privilege has been waived under the at-issue doctrine.

DISCUSSION

Defendants' motion seeks to compel production of allegedly privileged documents on the grounds that Plaintiff placed these documents "at issue" and waived any claimed privilege.

Before addressing whether at-issue waiver applies, normally the first question is whether attorney-client and/or work product privilege attached to the documents in the first place. *See Weinberg v. William Blair & Co., LLC*, 12 CV 9846, 2014 WL 2699714, at *1 (N.D. Ill. June 13, 2014) ("As an initial matter, the court must determine whether attorney-client privilege attaches to the documents in question before addressing whether at-issue waiver applies.").

.

Although Defendants recite the standard for asserting attorney-client and work product privilege, they do not argue that privilege never attached to the documents. Instead, they proceed directly to the argument that the Trustee waived these privileges under the "at issue" doctrine. Therefore, for purposes of this decision, the court will assume that the documents on the log are privileged and consider only whether there was a waiver.

The court next turns to the question of whether it should evaluate the applicability of at-issue waiver under Illinois law or federal law. The Federal Rules of Evidence apply in cases under the Bankruptcy Code. Fed. R. Bankr. P. 9017.

> The common law--as interpreted by United States courts in the light of reason and experience--governs a claim of privilege unless any of the following provides otherwise:
> • the United States Constitution;
> • a federal statute; or
> • rules prescribed by the Supreme Court.
> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

FRE 501. This rule "provides that, except where state law provides the governing rule in civil proceedings, control of a debtor's privileges is governed by federal common law." *In re American Metrocomm Corp.*, 274 B.R. 641, 653 (Bankr. D. Del. 2002).

Defendants seek to compel production of documents in order to prosecute their motion to dismiss. The basis for the motion to dismiss is that a violation of an Illinois Rule of Professional Conduct occurred. Defendants ask the court to use its inherent authority to dismiss the adversary proceeding as a sanction for the violation. They assert that since the issue is whether a violation of an Illinois Rule of Professional Conduct occurred, the matter is decided under state law.[1] Plaintiff does not argue differently.

[1] Defendants urge the court to make this decision based on state law, relying on *Pyramid Controls, Inc. v. Siemens Indus. Automations, Inc.*, 176 F.R.D. 269 (N.D. Ill. 1997) and cases from Illinois state courts. But even if state law applied, *Pyramid Controls* "applied a highly criticized version of the 'at issue' waiver test." *Reid v. Neighborhood*

The ultimate issue, however, is whether the court should use its inherent authority to sanction Plaintiff if it finds a violation of the Rule. This is a decision made under federal law. *See Salmeron v. Enterprise Recovery Systems, Inc.*, 579 F.3d 787, 793 (7th Cir. 2009). *See, e.g., Marion S. Mishkin Law Office v. Lopalo*, 767 F.3d 144, 148 (2d Cir. 2014) ("We hold that when a district court appoints liaison counsel, that appointment flows from the district court's inherent authority to manage its own docket and is thus governed by federal, not state, law."). Since federal law supplies the rule of decision, federal common law governs the claim of attorney-client privilege.[2]

Assistance Corp. of America, No. 11 C 8683, 2012 WL 5995752, at *5 (N.D. Ill. Nov. 30, 2012). That version, articulated in *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975),

> is criticized for focusing on the opposing party's need for the privileged information despite the Supreme Court's emphasis on the role of certainty in encouraging the full and frank communication between attorneys and their clients. Further, the *Hearn* approach does not target the type of unfairness that is distinguishable from the unavoidable unfairness generated by every assertion of privilege, and its application cannot be limited. According to the Third Circuit, cases like *Hearn* that have allowed the opposing party discovery of confidential attorney-client communications in order to test the client's contentions are of dubious validity. *Rhone–Poulenc Rorer Inc. v. Home Indemnity Co.*, 32 F.3d 851, 864 (3d Cir.1994). The *Rhone* court explained:
>
> > "While the opinions dress up their analysis with a checklist of factors, they appear to rest on a conclusion that the information sought is relevant and should in fairness be disclosed. Relevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue." *Rhone–Poulenc Rorer*, 32 F.3d at 864.

Lama v. Preskill, 818 N.E.2d 443, 452 (Ill. App. Ct. 2004) (Bowman, J., dissenting) (citations omitted). *See also Kroll v. Cozen O'Connor*, No. 19 C 3919, 2020 WL 3077556, at *8 (N.D. Ill. June 10, 2020) ("The Illinois Supreme Court's reversal of the Appellate Court decision in *Fischel & Kahn* supports our conclusion that the Illinois Supreme Court is charting a course farther away from *Pyramid Controls*[.]"); *American Nat. Bank and Trust Co. of Chicago v. Allmerica Financial Life Ins. and Annuity Co.*, No. 02 C 5251, 2005 WL 6249757, at *2 (N.D. Ill. July 14, 2005) ("[W]e believe the Illinois Supreme Court, when presented with this specific question, would follow the reasoning of the Third Circuit in *Rhone-Poulenc*[.]").

[2] The work product doctrine is a rule of federal law, so federal law is always applied to questions regarding the work product privilege. Fed. R. Civ. P. 26(b)(3)(A), made applicable by Fed. R. Bankr. P. 7026. *See American Senior Communities, L.L.C. v. Burkhart*, No. 1:17-cv-03273-TWP-DML, 2019 WL 6170064, at *3 n.5 (Nov. 19, 2019) ("For a case in federal court, whether documents are protected as work product is always governed by federal law, no matter whether state substantive law supplies the rule of decision for some claims.").

The seminal federal case on application of the at-issue doctrine is *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851 (3d Cir. 1994). "The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication." *Id.* at 863.

Although the standard for applying the at-issue doctrine has not been addressed directly by the Seventh Circuit,

> in *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1175 n.1 (7th Cir. 1995), the Seventh Circuit cited the standard adopted by the Third Circuit in *Rhone-Poulenc*. As a result, district courts within this circuit have applied the *Rhone-Poulenc* standard. *See, e.g., DR Distributors, LLC v. 21 Century Smoking, Inc.*, 2015 WL 5123652 (N.D. Ill. 2015); *Novak v. State Parkway Condo. Ass'n*, 2017 WL 1086767 (N.D. Ill. 2017); *Capital Tax Corp.*, 2011 WL 1399258; *Silverman*, 2010 WL 2697599; *Bosch v. Ball-Kell*, 2007 WL 601721 (C.D. Ill. 2007); *Schofield v. U.S. Steel Corp.*, 2005 WL 3159165 (N.D. Ind. 2005); *Chamberlain Group v. Interlogix, Inc.*, 2002 WL 467153 (N.D. Ill. 2002); *Beneficial Franchise Co.*, 205 F.R.D. at 216.
>
> Accordingly, at issue waiver occurs when a party "affirmatively put[s] at issue the specific communication, document, or information to which the privilege attaches." *Dexia Credit Local v. Rogan*, 231 F.R.D. 268, 275 (N.D. Ill. 2004). Put another way, attorney-client privilege is generally waived when a client asserts claims or defenses that put his attorney's advice at issue in the litigation. *Garcia*, 58 F.3d at 1175, n.1.

Cage v. Harper, No. 17-CV-7621, 2019 WL 6911967, at *1–2 (N.D. Ill. Dec. 19, 2019). *See also Remus v. Sheahan*, No. 05 C 1495, 2006 WL 1460006, at *2 (N.D. Ill. May 23, 2006) ("District courts in the Seventh Circuit have often followed the waiver rule set forth in *Rhone-Poulenc*, which is similar or identical to the Seventh Circuit's application of Indiana law in *Lorenz* [*v. Valley Forge Ins. Co.*, 815 F.2d 1095 (7th Cir. 1987)]."

Harp/RSP's argument that "[a]pplication of the privileged protections would deny Defendants access to information vital to its claims" is not sufficient to prevail on this motion. Memo in Support, at 9. Application of the attorney-client and work product privileges nearly always denies the opposing party of information it would dearly like to have. The question

instead is whether the Trustee asserted a claim or defense and is attempting to prove that claim or defense by using privileged communications. The court concludes that he is not.

Various legal issues arose when Defendants filed their motion to dismiss as a sanction. To respond to these issues, the Trustee's counsel filed declarations. In these declarations, various attorneys made averments of fact under oath. In their Memo in Support, Defendants assert that these declarations and/or arguments made in open court evidence waiver of the attorney-client and work product privilege under the at-issue doctrine. Defendants highlighted specific instances that evidence waiver:

Highlighted by Defendants	**Court's conclusion**
At the hearing on August 19, 2020, G&M (Daniel Curth) argued G&M did not know that WEMED's privileged documents were included in the Relativity database because an unaware young associate at G&M (Eric Garavaglia) conducted the document review—"We didn't find a Redweld labeled privileged documents that we knew were privileged and still looked at." [Doc 543, p. 17, citing Ex. 7, pp. 7, 18-19.]	Curth's argument did not rely on any privileged communication, but instead on Garavaglia's actions. Garavaglia filed a declaration regarding his actions at EOD 526.
At the hearing on September 2, 2020, G&M (Matthew McClintock) admitted he viewed WEMED privileged documents but did not review the content of the documents, merely "looking at what is the topic, clicking it as potentially relevant." [Adv. Dkt 543, p. 18, citing Ex. 8, pp. 23-24.] McClintock filed a sworn Declaration with the Court on September 9, 2020 [Adv. Dkt. 525] assert[ing] that WEMED did not inadvertently produce the WEMED privileged documents the Trustee was given access to on January 9, 2020, rather he asserted the defense that both G&M and WEMED were aware that the documents in the Relativity Database included WEMED privileged documents –"This was the inevitable result of the fact that Responsive Documents were obtained through broad email searches, and the searches were conducted almost two	McClintock's statement in open court concerns his actions. He did not put a specific communication or document at issue. Similarly, McClintock's statement in his declaration about what the attorneys knew does not put a specific communication or document at issue. Evidence regarding counsel's knowledge is available through their declarations. Even if the broader interpretation of at-issue waiver applied, one of the issues raised by Defendants' invocation of Rule 4.4 is whether documents or information were transmitted inadvertently. Plaintiff did not inject this issue into the case.

years after the Adversary Proceeding was filed." [Adv. Dkt. 525, pars. 6-11.]	
McClintock's September 9, 2020 Declaration attests that, when he was reviewing documents on the Relativity database, he did see privileged WEMED documents and would have tagged documents as relevant, but he would not have conducted a privilege analysis. [Adv. Dkt. 525, par. 21.] McClintock attests he gave instructions to associate Garavaglia that he "limit his review to the issue of relevance, and not to worry about trying to make a privilege analysis**" [Adv. Dkt. 525, par. 12-13.]	Again, McClintock's attestations concern his actions. He stated facts regarding his review of documents and his instructions to Eric Garavaglia. He put no communications directly at issue.
McClintock's September 9, 2020 Declaration attests "I did not, however, download or print any of the responsive Documents I reviewed. I also did not share or send copies of any of the Responsive Documents to anyone else." [Adv. Dkt. 525, par. 18.]	In this declaration, McClintock states that he did not download any document or send copies. McClintock amended this declaration on February 16, 2021, stating that "I did identify a number of other documents that it appears I had downloaded from the database (contrary to my initial recollection)." Defendants can examine McClintock and ask him about these conflicting statements.
McClintock's September 9, 2020 Declaration attests that he on occasion sent Eric Garavaglia notes to add to an outline he was creating, attesting that none of those emails discussed WEMED privileged documents. [Adv. Dkt. 525, par. 19.]	McClintock states a fact in his declaration – none of his emails discussed privileged documents. He does not rely on privileged communications in support of this statement; in fact, his declaration indicates that there are *no* relevant privileged communications.
Eric Garavaglia's sworn Declaration filed with the Court on September 9, 2020 attests, "I am not sure whether any of the notes in the Summary Document would have related to documents that RSP is now asserting are privileged." Sometime after Defendants filed their Motion to Dismiss on August 17, 2020, "I deleted the entire Summary Document, after discussing the issue with Mr. McClintock." [Adv. Dkt. 526, par. 13.]	Defendants admit in the Memo in Support that they cannot determine whether any communications relate to deletion of the Summary Document. Memo in Support, at 5. Therefore, no privileged communications have been put at issue.

McClintock's September 9, 2020 Declaration attests that on June 18, 2020 Eric Garavaglia emailed him two documents that he later learned were attachments to a privileged WEMED email between Patricia Noonan and her client Kymn Harp, but attests "I have no knowledge of what the allegedly privileged document is or says." [Adv. Dkt. 525, par. 20.]	McClintock is not putting any of his privileged communications at issue when he states that he does not know what Noonan's and Harp's email says. In fact, his statement indicates that Garavaglia sent *attachments*, not Noonan's email.
McClintock's September 9, 2020 Declaration attests that after Defendants filed the Motion to Dismiss on August 17, 2020, he searched his computer and reviewed his emails and "found no other Responsive Documents or references to Responsive Documents from that database that I sent to or received from anyone." [Adv. Dkt. 525, par 24.] In the same Declaration, in support of his positions, McClintock[] attached his email communications with WEMED in the period January 9, 2020 to January 13, 2020 (the time period of the discussions for the APO and accessing the database). [Adv. Dkt. 525, Exhibit A.] On February 16, 2021, Matthew McClintock filed yet another sworn Declaration with the Court directed to 10 pages of privileged WEMED documents G&M bate-stamped and produced to WEMED on February 2, 2021 (discussed above). As to these documents, McClintock attests that "it appears I had downloaded from the database (contrary to my initial recollection). I did my best not to substantively review these documents**" [Doc 576, par. 5.]	McClintock stated in September that he did not send documents to anyone. McClintock amended this declaration on February 16, 2021, stating that "I did identify a number of other documents that it appears I had downloaded from the database (contrary to my initial recollection)." Defendants can examine McClintock and ask him about these conflicting declarations, but he did not put privileged communications at issue in making these statements.

None of the instances highlighted by Defendants involved the advice of counsel. Nor did any of the arguments or averments made by Plaintiff and his counsel put specific privileged documents directly at issue. It seems that Defendants do not believe the statements in the declarations and wish to impeach the declarants based on the contemporaneous emails for which the Trustee has claimed privilege. Perhaps Defendants seek a smoking gun among these emails. That is not a basis for finding an at-issue waiver.

Defendants have other methods for obtaining information about the events that Trustee's counsel described in their arguments and declarations. McClintock and Garavaglia already committed their recollections to paper in sworn statements. Defendants can issue requests to admit or interrogatories, or depose McClintock and Garavaglia, or call them as witnesses at the evidentiary hearing. *See also Meskunas v. Auerbach*, 17 Civ. 9129 (VB) (JCM), 2020 WL 7768486, at *6 (S.D.N.Y. Dec. 30, 2020) ("[A]t issue waiver is inappropriate here, since Plaintiffs have not placed the subject matter . . . at issue in a way that unfairly utilizes the attorney-client privilege. *Moreover, this information can be obtained through other means, such as Plaintiffs' depositions*.") (citations omitted) (emphasis added).

Finally, Defendants also filed a "Supplemental Brief" to the Memo in Support, at EOD 594. Although it is titled as a brief, Defendants requested the court to compel the Trustee and G&M to provide: the dates that documents were destroyed; an updated privilege log for communications related to any such destruction; and an updated privilege log that includes documents dated after August 28, 2021. Defendants also request production of any newly listed privileged documents on the grounds that at-issue waiver applies to these new documents.

As the court stated on March 3, 2021, the requests set forth in the supplement require a separate motion. To that end, Defendants filed a second motion to compel on March 11, 2021, at EOD 614 (the "Second Motion to Compel"). In paragraph 8 of the Second Motion to Compel, Defendants acknowledge the court's requirement that a new motion to compel is required to address the requests in the supplement.

To be clear, this order does not address any of the issues raised in the supplement. To the extent the Second Motion to Compel raises the same or similar issues, those will be heard and resolved as appropriate.

For the reasons stated above, **IT IS HEREBY ORDERED THAT** the Motion to Compel is **DENIED**.

ENTERED:

Date: March 16, 2021

_____

DAVID D. CLEARY
United States Bankruptcy Judge