

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

SHELDON LANGER; RONALD M.
YERMACK; LANCE R. GOLDBERG,

Plaintiffs,

v.

CME GROUP, INC.; BOARD OF TRADE
OF THE CITY OF CHICAGO,

Defendants.

No. 14 CH 00829

Judge Celia Gamrath

Calendar 6

ORDER

This matter is before the court on the motion of plaintiffs Sheldon Langer, Ronald M. Yermack, and Lance R. Goldberg to compel discovery from defendants CME Group Inc. and Board of Trade of the City of Chicago. After reading the briefs and considering oral arguments, the court GRANTS plaintiffs' motion to compel discovery of the two discrete documents at issue. The court DENIES the request to find a waiver of all communications pertaining to the same subject matter.

There are two documents in question that were shared with Salomon Smith Barney ("SSB"), an investment bank: (1) a chart with redacted information reflecting legal advice on tax and corporate governance consequences in the demutualization process; and (2) a legal memorandum prepared by the legal department analyzing securities regulation issues with the demutualization process. At issue is whether the sharing of these documents with SSB waived the attorney-client privilege and compels disclosure to plaintiffs. Because SSB is not a member of the control group, the privilege is waived.

Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103 (Ill. 1982), is the leading case governing the control group in Illinois. No reviewing court in Illinois has expanded the control group for purposes of attorney-client privilege to a non-employee investment bank like SSB. Defendants point the court to case law in Delaware and the U.S. Northern District Court of Illinois, but the court is not persuaded that these cases warrant judicial expansion of the control group here.

In *Caremark, Inc. v. Affiliated Computer Services, Inc.*, 192 F.R.D. 263 (N.D. Ill. 2000), the court expanded *Consolidation Coal* to meet modern realities in the very narrow situation

where KPMG, a professional service company, was brought in as a vital team member with express authority to solicit and receive legal advice in resolution of a crucial issue for the corporation. Under those facts, KPMG, as a non-employee agent with direct authority to solicit and communicate with lawyers on behalf of the corporate client, was deemed a member of the control group for purposes of attorney-client privilege.

The facts here are distinguishable. There is no evidence, engagement agreement, or deposition testimony supporting the notion that SSB served in the same agency role as KPMG. SSB's role was strictly advisory. SSB did not share the same rank or power as KPMG, which had express agency authority to seek out lawyers and communicate with lawyers on behalf of the corporate principal for the purpose of receiving legal advice. This is apparent from Mr. Oliff's deposition; in particular, the absence of any indication that the top management team would not have made a decision without SSB's input or that SSB's opinion in fact formed the basis for top management's final decision. But for the two documents at issue, there is no signal SSB was looped into privileged communications with attorneys or directed to interface with attorneys as an agent of the principal.

Plausibly, under Illinois law, a non-employee like SSB could fall into the control group in the narrow situation presented in *Caremark*. However, here defendants have not met the lofty burden to show SSB was in position to control the decision or was an agent cloaked with authority that would draw it into the control group. Rather, SSB's role is more akin to the situation described in *Archer Daniels Midland Co. v. Koppers Co.*, 138 Ill.App.3d 276 (1st Dist. 1985), where a person with specialized skills provides valuable information to the corporate decision makers, but is not within the control group.

As Mr. Oliff testified, SSB was retained "because they had previously done the demutualization of the Coffee, Cocoa and Sugar Exchange ... We wanted their input and advice in terms of the structure, the protections and the rights and what was necessary to become a demutualized corporation." SSB supplied valuable information and advice to the top management, but it was the top management who ultimately made the decision to demutualize. SSB was not the decision-maker. SSB was not an agent. There is no proof SSB had authority to engage counsel or communicate with lawyers on behalf of the corporation for the purpose of receiving legal advice. There is no testimony that top management would not have normally

made a decision without SSB's advice or opinion and that SSB's opinion in fact formed the basis of the final decision. This two-prong test is what *Consolidated Coal* requires.

Illinois is a state of broad discovery policies designed to uncover the truth in litigation. Privilege is the exception to the general duty to disclose and "ought to be strictly confined within the narrowest possible limits." *Consolidated Coal*, 89 Ill. 2d at 118, quoting Wigmore, Evidence. The burden rests with those claiming the privilege. Defendants have not met the threshold requirements to show SSB is a member of the corporate control group; thus, they cannot avail itself of the privilege. The court therefore GRANTS the motion to compel production of the two documents at issue.

However, the court DENIES plaintiffs' request to find waiver of all subject matter. Subject matter waiver does not apply to the extrajudicial disclosure of attorney-client communications not thereafter used by the client to gain an adversarial advantage in litigation. *Ctr. Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107 ¶ 62. The Illinois Supreme Court in *Center Partners* explained "if those same privileged communications are later reused in a judicial setting, the circumstances of the initial disclosure will not immunize the client against a claim of waiver." *Id.* at ¶ 65. No such use is before the court on the instant motion. Therefore, the disclosure of attorney-client privileged information contained in the two discrete documents does not waive the privilege as to all other non-disclosed communications.

CONCLUSION

IT IS ORDERED: Defendants shall produce an unredacted copy of the chart and legal memorandum within seven business days to plaintiffs.

Judge Celia G. Gamrath

ENTERED:

MAR 13 2017

Circuit Court - 2031

Judge Celia Gamrath, #2031
Circuit Court of Cook County, Illinois
County Department, Chancery Division