

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

Fundamental Long Term Care, Inc.

Case No. 8:11-bk-22258-MGW

Chapter 7 Case

Debtor.

_____ /

Estate of Juanita Amelia Jackson, *et al.*

Plaintiffs,

v.

Adv. No.: 8-13-ap-00893-MGW

(Consolidated)

General Electric Capital Corporation, *et al.*

Defendants.

_____ /

**MOTION TO DETERMINE ABSENCE OF PRIVILEGE
AND TO COMPEL PRODUCTION**

Beth Ann Scharrer, as Chapter 7 Trustee, hereby moves this Court for an order determining the applicability of asserted privileges as to certain documents either produced to the Trustee during Rule 2004 discovery or turned over to the Trustee from the litigation files of counsel for Trans Health Management, Inc. (“THMI”), and to compel GTCR Fund VI, L.P., GTCR Partners VI, L.P., GTCR VI Executive Fund, L.P., GTCR Associates VI, GTCR Golder Rauner, LLC, THI Holdings, LLC, and Edgar D. Jannotta, Jr. (the “GTCR Defendants”), to produce all documents that may have been withheld from production (as privileged or otherwise), and in support states:

Background

Production from Law Firms

1. This Court’s Order Granting Motion for Rule 2004 Examination of and Production of Documents from Law Firms Representing the Debtor or THMI (Doc. 427) (“Rule

2004 Oder”) required certain law firms representing THMI to produce copies of any books and records (including litigation files) relating to the Debtor or THMI.

2. The Rule 2004 Order followed this Court’s Order and Memorandum Opinion on Trustee’s Motions for Show-Cause Orders (Doc. 409), wherein this Court ruled the Trustee “should have access to the books and records of the Debtor and its subsidiary (including any litigation files).” On March 19, 2013, this Court entered its Memorandum Opinion on Attorney Client Privilege and Work Product Issues (Doc. 716) (the “Privilege Order”), which required the production of, among other things, copies of the legal files (including attorney work product) of counsel for THMI in the negligence and wrongful death cases brought by the Wilkes Creditors against THI and/or THMI.

3. Three months later, the Court entered its Order on Trustee’s Third Motion to Compel (Doc. 919) (“June 17 Order”), wherein the Court rejected additional objections to production based upon, among other things, the common interest and joint defense privileges involving someone other than the Trustee and THMI.

4. The Trustee ultimately received THMI’s litigation files from the law firms that previously represented THMI (the “Law Firms”).¹ The documents received included copies of the Law Firms’ physical files, communications, and electrically stored documents. Among the documents within the files of Wisler Pearlstine were electronic files in the possession of and accessible the Wisler Pearlstine and Wilkins Tipton firms.² These documents were apparently provided to these firms in September 2012 for review in defending THI and THMI in the nursing home cases.

¹ The “Law Firms” include: Buckley & Fudge, P.A. n/k/a Fudge & McCarthur, P.A., Mancuso & Dias, P.A., Fowler White Boggs, P.A., Quintairos Prieto Wood & Boyer, P.A., The Rydberg Law Firm, P.A., Schutt, Schmidt & Noey, P.A., Tydings & Rosenberg, P.A., Wilkins Tipton, P.A., and Wisler Pearlstine, LLP.

² Attached as **Exhibits 1** is Wisler Pearlstine’s engagements agreement. The Wilkins Tipton firm represented THMI in each of the nursing home cases in Florida. A copy of the Wilkins Tipton engagement agreement for the *Townsend* case is attached as **Exhibit 2**.

Discovery in the Consolidated Adversary Proceedings

5. On November 6, 2013, GTCR Fund VI, L.P. served the Trustee with a Request to Produce.³ Among the documents requested be produced by the Trustee were “all documents (other than court-filed pleadings) received by or produced by [the Trustee] in Rule 2004 discovery in this bankruptcy case and/or any adversary proceeding filed in this bankruptcy case.”

6. In response, the Trustee agreed to produce (and did produce) the documents she received in Rule 2004 discovery, limited only by the claims of confidentiality and privileges asserted by Alan Grochal, as Receiver for Trans Healthcare, Inc. (“THI Receiver”), which prohibited the Trustee from producing certain documents to third parties.⁴ The parties have exchanged drafts of a stipulated protective order that will allow the Trustee to produce the documents the THI Receiver claimed as confidential to all parties in the consolidated adversary proceedings (the “Parties”).

7. The Trustee also served her own discovery on the GTCR Defendants.⁵ In response, among other objections, the GTCR Defendants asserted certain boilerplate objections, including every “privilege or protection from discovery or disclosure” that could possibly apply.⁶ The boilerplate objections make it difficult to determine whether the GTCR Defendants have complied at all with responding to the Trustee’s Request for Production. What is clear, however, is that the GTCR Defendants did not produce a privilege log. Indeed, no Party produced a privilege log in response to the Trustee’s discovery requests in this consolidated proceeding.

³ A true and correct copy of GTCR’s First Request to Produce is attached as **Exhibit 3**.

⁴ The relevant privileges and confidentiality is set forth in detail in the Court’s Protective Order Concerning Production of Confidential and Proprietary Information (Doc. 601) and Memorandum Opinion on Attorney-Client Privilege and Work Product Issues (Doc. 716).

⁵ A true and correct copy of the Trustee’s Request to Produce is attached as **Exhibit 4**.

⁶ A true and correct copy of the GTCR Defendants’ Response to the Trustee’s Request to Produce is attached as **Exhibit 5**.

GTCR Defendants' Clawback Request to the Probate Estates and Privilege Assertion

8. As set forth in the Motion to Seal Amended Complaint (Doc. 80), on or about December 26, 2013, counsel for the GTCR Entities informed counsel for the Probate Estates that documents produced by the THI Receiver to the Estate of Jackson and Estate of Nunziata in May 2011 through July 2011 were subject to an attorney/client privilege or were protected from production by the work product doctrine. The documents produced by the THI Receiver to the Probate Estates included documents shared between Kirkland & Ellis, LLP (the "Kirkland Firm"), the GTCR Entities, THI, THMI, THI Holdings, LLC, and affiliates and subsidiaries.

9. On January 17, 2014, the GTCR Defendants provided a "Privilege Log Regarding Documents Subject to a Clawback Request," which listed 21 documents that the GTCR Defendants claimed were privileged and should not have been produced to the Estates (the "Clawback Documents").⁷

10. Independent of any production of documents by the THI Receiver to the Probate Estates, however, the Trustee received copies of many of the Clawback Documents as part of THMI's litigation files turned over by Wisler Pearlstine.⁸ Pursuant to this Court's prior turnover orders, the Trustee was entitled to Wisler Pearlstine's legal files, subject only to the prohibition of sharing any truly privileged communications or work product related to the defense of THI and THMI in the nursing home cases.

11. On February 3 & 5, 2014, the Trustee took the deposition of Sean Nolan, the current senior vice president of Fundamental Administrative Services, LLC ("FAS"). Mr. Nolan held the same position from 2003 to 2006 at THMI, doing essentially the same work. Mr. Nolan testified that he had no knowledge of ever working for any company other than THMI while

⁷ A true and correct copy of the Clawback Request is attached as **Exhibit 6**.

⁸ The Trustee received Document Nos. 2-9, 14, 16-19, and 21. Document Nos. 1, 10-13, 15 and 20 have not been produced to the Trustee by any party.

acting as THMI's senior vice president from 2003 to 2006, after which time he transitioned to THI of Baltimore Management, LLC ("THIBM"), and then to FAS.

12. Mr. Nolan was one of a number of recipients of an April 13, 2005 "Litigation Planning Memorandum" (the "April 2005 Memorandum") written by lawyers from the Kirkland Firm. The Plaintiffs attempted to question Mr. Nolan regarding the contents of the April 2005 Memorandum. Counsel for the GTCR Defendants, however, objected to the use of the April 2005 Memorandum, asserting it was privileged and subject to the Clawback Request.

13. On February 5, 2014, this Court conducted a telephonic discovery conference, wherein it was decided (in part because Mr. Nolan had no recollection of the April 2005 Memorandum) that the privilege issues would be raised in a written submission, and the document itself would remain sealed pending the Court's evaluation of the privilege claim.

14. Following the discovery conference, the Kirkland Firm produced to the Trustee engagement agreements and a joint defense agreement that show it acted as counsel for both the GTCR Defendants and a number of the THI entities, including THMI. The Kirkland Firm has not produced any document that shows a termination of its relationship with THMI.

15. The April 2005 Memorandum raises the following issues that have broad applicability to most, if not all, of the Clawback Documents (as well as other documents that may have been withheld by the GTCR Defendants):⁹

- (i) First, a number of the Clawback Documents were provided to THMI's counsel in relation to defending the nursing home cases. Pursuant to this Court's Privilege Order, the Trustee is entitled to such documents to aid her in defending THMI and investigating potential causes of action.

⁹ Upon information and believe, the Probate Estates have other issues affecting the validity of any privilege assertion by the GTCR Defendants, including waiver, among other things. Issues related to the prior production to the Estates are not raised herein.

- (ii) Second, the Kirkland Firm was counsel for THMI, at the very least with regard to litigation filed against THMI. To the extent the Kirkland Firm jointly represented THMI and other related entities, the Kirkland Firm cannot withhold documents related to that joint representation from THMI.
- (iii) Third, to the extent the Kirkland Firm did *not* generally represent THMI, a number of other of the Clawback Documents were provided to THMI's officers and directors. Any privilege that might attach to such documents was waived when the documents were provided to a party outside the Kirkland Firm's attorney/client relationship with the GTCR Defendants.

BASIS FOR RELIEF

A. Documents in THMI's Litigation Files Cannot be Immunized from Discovery.

16. This Court has ruled on multiple occasions that the Trustee is entitled to the legal files of THMI's lawyers in order to investigate and prosecute causes of action on behalf of the Debtor and THMI. Until July 2013, Wisler Pearlstine was counsel for THMI and THI in the *Jones* case. Wilkins Tipton was counsel to THMI in the Florida nursing home cases. In September 2012, a large group of documents was turned over to Wisler Pearlstine and Wilkins Tipton in connection with their representation of THMI. According to deposition testimony and information within Wisler Pearlstine's files, a database was created to hold the documents in the following manner: (i) Maria Ruark and Alan Grochal reviewed documents stored at Iron Mountain to determine what documents were potentially related to the pending litigation THI and THMI; (ii) Mr. Grochal then provided a subset of documents (approximately 60 boxes) to the Proskauer Rose law firm so that the documents could be uploaded into a Relativity program maintained by Proskauer Rose; and (iii) Wisler Pearlstine and Wilkins Tipton (and potentially others) then received the documents in connection with their representation of THMI.

17. The GTCR Defendants cannot be permitted to immunize documents from discovery that were already given to THMI's lawyers for use in their representation of THMI.

B. As counsel for THMI, the Kirkland Firm cannot refuse to produce documents to THMI.

18. The Kirkland Firm was counsel for THMI in at least 2005 and 2006. This representation related to at least lawsuits brought by Aegis Services, Inc., Capital Source Finance, LLC, THI of Cleveland, Inc., and MJW Leasing, LLC against THMI, THI Holdings, GTCR Fund VI, LP, THI, and related entities.¹⁰ According to the Clawback Request, Document Nos. 1, 2, 3, 8, 9, and 11 all relate to the Kirkland Firm's representation of THMI.

19. The April 2005 Memorandum that the GTCR Defendants claim is privileged is expressly related to the "Aegis/Columbus and MJW/Cleveland Litigation." As this Court has already found, THMI's attorneys cannot withhold documents from their own client.

20. Based upon the lack of any document showing the Kirkland Firm's withdrawal of representation of THMI, it appears Document Nos. 14-21 were similarly prepared during the Kirkland Firm's joint representation of THMI. Indeed, these documents all appear to relate to restructuring that was the subject of the April 2005 Memorandum.

21. Additionally, the GTCR Defendants' position regarding privileges appears to be conflicting. On the one hand, the GTCR Defendants have demanded that privileged documents be returned to them because such documents were inadvertently produced. Yet, on the other hand, the GTCR Defendants have not produced a privilege log in discovery, and therefore should not be withholding any documents based upon an unclaimed privilege.

¹⁰ Attorneys from the Kirkland Firm—including James Stempel and Gabor Balassa, who now represent the GTCR Defendants adverse to THMI in this proceeding—were even present at meetings of the THMI Board of Directors to discuss the status of the litigation and other issues, including the likelihood (at least at the time in 2005) that THI was going to file bankruptcy.

C. Any attorney/client privilege that may have attached to Clawback Documents was waived as a result of disclosure to third parties.

22. To the extent the Kirkland Firm claims it did not generally represent THMI (for example, during the 2006 bust out), then documents in the Clawback Request cannot be cloaked with an attorney/client privilege when it was the Kirkland Firm who waived the privilege by providing the documents to THMI's officers and directors. For example, Document Nos. 10, 12, 13, were sent to Toni Jean Lisa, THMI's vice president and general counsel at the time. Document No. 10 (which has not been produced to the Trustee) expressly relates to THMI and was sent to both Ms. Lisa and Matthew Box, THMI's Chief Executive Officer. It is difficult to imagine how the Kirkland Firm can demand the return of (or claim a privilege to) a document that was apparently prepared on behalf of THMI and sent to THMI.

23. Similarly, to the extent the GTCR Defendants claim that Document Nos. 5, 6, and 7 are privileged, the Kirkland Firm bears the burden that it had an attorney/client relationship with THI of Baltimore, Inc. Otherwise, THI of Baltimore, Inc. appears to be another party outside the Kirkland Firm's attorney/client relationship with THI and the GTCR Defendants.

24. Another interesting layer to this analysis is presented by the THI Receiver's delivery of these allegedly privileged documents to Proskauer Rose. Proskauer Rose is also a stranger to the attorney/client relationship between THI, THMI and the GTCR Defendants. Supposedly, the Proskauer Rose firm only represents Fundamental Long Term Care Holdings, LLC ("FLTCH") and its principals, Murray Forman and Leonard Grunstein. Any privilege that may have existed between the Kirkland Firm and its client(s) was waived in September 2012 when the documents were provided to Proskauer Rose. This is especially so given the unambiguous adversity between FLTCH and the Trustee and THMI.

25. The Trustee expects the GTCR Defendants to claim their Joint Defense Agreement with FLTCH (executed in April 2012) preserved any privilege. But THMI was a

party to that Joint Defense Agreement, and if such documents were shared pursuant to it, then THMI is entitled to such documents in accordance with this Court's prior orders.

D. GTCR Defendants must be compelled to fully respond to the Trustee's Request for Production.

26. Separate from the above privilege issues and obligation for the Kirkland Firm to turnover all files related to its representation of THMI, the GTCR Defendants must be compelled to fully comply with their discovery obligations in this proceeding. *See* Exhibits 4 and 5.

27. Generally, although the GTCR Defendants produced approximately 47,000 pages of documents in December 2013 and January 2014, it is difficult to determine whether the GTCR Defendants have complied at all with responding to the Trustee's Request for Production as a result of the numerous boilerplate objections that are unhelpful and fail to comply with both the Federal Rules of Civil Procedure and the Middle District's Handbook on Civil Discovery. *See, e.g., Martin v. Zale Delaware, Inc.*, 2008 WL 5255555, at *1 (M.D. Fla. 2008); *Travelers Indem. Co. of Conn. v. Philips Med. Sys.*, 2008 WL 4534259 (S.D. Fla. 2008); *Consumer Elec. Assoc. v. Compras and Buys Magazine, Inc.*, 2008 WL 4327253, at *2 (S.D. Fla. Sept. 18, 2008).

28. Specifically, in response to the Trustee's Request Nos. 1 and 2,¹¹ the GTCR Defendants stated that they were only producing "documents sufficient to support the allegations by Plaintiffs in their Complaint for Declaratory and Injunctive Relief filed in Adv. Proc. 13-00928." Request Nos. 1 and 2, however, also seek documents related to the claims and defenses in Adv. Proc. 13-893, 13-929, and 13-958. The GTCR Defendants are apparently refusing to produce documents other than those that relate to their own pleading because they filed a motion to dismiss. The Trustee is not aware of any exception to the discovery rules that would allow the

¹¹ Request No. 1 generally requests documents relating to any claims or defenses in the consolidated adversary proceedings. Request No. 2 generally requests communications among the signatories to the April 2012 Joint Defense Agreement related to any claims or defenses in the consolidated adversary proceedings.

GTCR Defendants to withhold relevant documents simply because they have sought to dismiss the Complaint. The GTCR Defendants should be compelled to produce responsive documents.

29. Finally, the GTCR Defendants objected to Request No. 4 on various grounds,¹² but did not state that they were actually producing any responsive documents. This Court's Memorandum Opinion on Attorney-Client Privilege and Work Product Issues (Bankr. Doc. 716) discusses the Trustee's entitlement to correspondence by and between the parties listed in Request No. 4 related to the defense or liability of THI or THMI in the Nursing Home Cases. The GTCR Defendants' refusal to produce such documents is contrary to the Bankruptcy Court's ruling, and is therefore inappropriate. The GTCR Defendants should be compelled to produce responsive documents.

WHEREFORE, the Trustee hereby requests the Court enter an Order (i) determining the absence of any privilege to preclude production from the GTCR Defendants, including but not limited to (a) the Kirkland Firm cannot withhold documents which were prepared during its joint representation of THMI, and (b) disclosure to third parties resulted in the waiver of any applicable privilege; and (ii) granting such other relief this Court deems necessary and proper.

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¹² Request No. 4 generally requests communications among the parties to the April 2012 Joint Defense Agreement related to defense or liability in the underlying nursing home cases.

CERTIFICATE OF GOOD FAITH CONFERENCE

On February 12 and 17, 2014, counsel for the Trustee conferred with counsel for the GTCR Defendants regarding the issues raised herein, but the parties could not reach a resolution.

/s/ Seth P. Traub

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 19, 2014, the foregoing was furnished via CM/ECF service to all counsel of record, including:

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