UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

Fundamental Long Term Care, Inc.

Debtor.
_____/

Case No. 8:11-bk-22258-MGW
Chapter 7 Case

Estate of Juanita Amelia Jackson, *et al.*

Plaintiffs,

v.

General Electric Capital Corporation, *et al.*

Defendants.
_____/

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

SUPPLEMENTAL MEMORANDUM RELATED TO WAIVER IN SUPPORT OF TRUSTEE'S MOTION TO DETERMINE ABSENCE OF PRIVILEGE AND TO COMPEL PRODUCTION

Beth Ann Scharrer, as Chapter 7 Trustee, submits in this Supplemental Memorandum in support of the Trustee's Motion to Determine Absence of Privilege and to Compel Production (Doc. 129), and states:

Introduction

On February 19, 2014, the Trustee filed her Motion to Determine Absence of Privilege and to Compel Production ("Motion to Compel") (Doc. 129). In the Motion to Compel, the Trustee sought to overrule a privilege claim asserted by the GTCR Defendants[1] with regard to certain documents that were prepared by the Kirkland & Ellis, LLP law firm (the "Kirkland Firm") on behalf of THI and THMI. In response, the GTCR Defendants filed their Motion for

[1] The "GTCR Defendants" are 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..

Return of Privileged Documents and Opposition to Trustee's Motion to Compel Production (Doc. 191) (the "Clawback Motion"). In the Clawback Motion, the GTCR Defendants asserted, *inter alia,* that certain documents were privileged as between the Kirkland Firm and its current clients, the GTCR Defendants, or between the Kirkland Firm and its *former* clients, Trans Healthcare, Inc. ("THI") and THI of Baltimore, Inc. ("THIB").[2]

The Court heard oral argument on the Motion to Compel and the Motion for Clawback on April 3, 2014, and took the matters raised therein under advisement. At the hearing, it became clear that the GTCR Defendants were arguing to preserve a privilege they asserted belonged to THI and not to the Kirkland Firm's other clients, including THMI. Following the hearing, the Trustee further investigated the THI Receiver, Alan Grochal's ("Receiver") prior production to the Probate Estates and their prior use of such documents. Also at the April 3 hearing, the Court set in place procedures for the Trustee to identify for production to third parties certain documents that the Receiver already produced to the Trustee, as confidential or privileged. Through that process, the Receiver consented to production of certain of the Clawback Documents, which brought to the forefront the issue of the Receiver's prior waiver of any privilege held by THI. The Kirkland Firm simply cannot assert a privilege on behalf of a former client who waived any arguable privilege.

As set forth herein, the GTCR Defendants asserted a privilege not between them and their attorneys, but instead between their attorneys—the Kirkland Firm—and their attorneys' former client—THI. Even if you ignore the Kirkland Firm's dual representation of THI and THMI and assume *arguendo* that the Kirkland Firm did not generally represent THMI, there can be no doubt the privilege can only be the client's to preserve, not the client's former attorney. THI (through the Receiver) repeatedly waived any privilege regarding the subject documents. This

[2] Doc. 191 at pgs. 5-9.

Memorandum outlines how THI previously disclosed the purportedly privileged documents, then failed to take reasonable steps to rectify any "inadvertent" disclosure, and then also consented to further disclosure in this bankruptcy case. For the reasons set forth herein, and in addition to the prior argument that any asserted privilege was held by THMI with THI, this Court should find a waiver of any privilege applicable to the items on the GTCR Defendants' the March 6, 2014 Amended Privilege Log (the "Clawback Documents"), and specifically Items 8, 9 and 22 on such log (specifically defined below as the "Kirkland Memoranda").[3]

Factual Background

A. THI First Waived Any Privilege By the Receiver's Production to the Nunziata Estate.

On April 1, 2011, the Nunziata Estate issued a subpoena *duces tecum* to Alan M. Grochal, as the Receiver for THI ("Receiver"), and to his counsel, Maria Ellena Chavez-Ruark ("Ruark"), requesting documents in connection with the disposition of assets of THI, and THI's former wholly owned subsidiary, THMI (the "April 2011 Subpoena"). Following denial of a Motion to Quash by a Maryland circuit court, the Receiver responded by producing 110,000 pages of documents between May 24, 2011 and July 22, 2011. No privilege log was produced with the production. The Clawback Documents were produced to the Nunziata Estate by the Receiver in response to the April 2011 Subpoena.

B. Use of Receiver's Production by the Jackson Estate

(i) In Support of Remand of Proceedings Supplement from Federal Court.

On May 13, 2011, the Jackson Estate commenced proceedings supplementary pursuant to Fla. Stat. § 56.29 against, among others, the GTCR Entities.[4] A month later, the GTCR Entities

[3] The Privilege Log is Exhibit N to the Clawback Motion.
[4] The "GTCR Entities" are GTCR Fund VI, L.P., GTCR Partners VI, L.P., GTCR VI Executive Fund, L.P., GTCR Associates VI, and GTCR Golder Rauner, LLC,

removed the state court impleader action to the District Court for the Middle District of Florida. *See Estate of Jackson v. GTCR Golder Rauner, LLC, et al.*, Case No. 8:11-cv-01351-SCB-TGW. Thereafter, the Jackson Estate filed a Motion to Remand (11-1351 Doc. 16), and the GTCR Entities filed an opposition (11-1351 Doc. 20).

On August 23, 2011, the Jackson Estate filed a Notice of Filing in support of its Motion to Remand (11-1351 Doc. 31), which attached as Exhibits H and I two memoranda—dated April 13, 2005 and August 3, 2005—previously produced to the Nunziata Estate by the Receiver (the "Kirkland Memoranda").[5] According to the papers filed by the GTCR Defendants, the Kirkland Memoranda were drafted by the Kirkland Firm on behalf of their clients, THI and GTCR Fund VI, L.P. The Kirkland Memoranda were sent by the Kirkland Firm to the individuals who were officers and directors of THI and THMI and employedby THMI.

On August 25, 2011, the GTCR Entities filed a Motion to Strike the Jackson Estate's Notice (11-1351 Doc. 33), claiming the Notice was a reply to their opposition to remand. The GTCR Entities further contended that "[t]he materials attached to plaintiff's submission are not new evidence; they date as far back as 1998 and, in some cases, have already been used in previous court filings." *Id* at pg. 2, n. 2. Nowhere within the Motion to Strike did the GTCR Entities contend that the Kirkland Memoranda were privileged. Instead, the GTCR Entities simply claimed the Kirkland Memoranda were" unrelated to this case." *Id* at pg. 5.

On September 14, 2011, more than four months after production began and three weeks after the Jackson Estate filed the Kirkland Memoranda, Ruark sent a letter to counsel for the Nunziata Estate asserting, for the first time, a privilege to certain documents that were previously produced. Surprisingly, however, instead of producing a privilege log that asserted the specific privilege being claimed and a description of the documents (i.e. sender, recipient, title,

[5] The Clawback Documents were previously produced to the Court The Trustee has not attached the Notice of Filing

description, Bates number, etc.), Ruark *attached additional copies* of the purportedly privileged documents to her September 14, 2011 letter, thereby again disclosing the contents of the purportedly privileged documents. A true and correct copy of Ruark's September 14, 2011 letter is attached as **Exhibit 1**, without the 226 pages of attachments.[6] Not surprisingly, the documents claimed to be privileged included the Kirkland Memoranda. Nevertheless, neither the Receiver nor the GTCR Entities took any action in the District Court to assert the confidentiality of the Kirkland Memoranda. To this day, the Jackson Estate's Notice, and all the exhibits thereto, remain publicly available on CM/ECF and have been for nearly three years.

(ii) In the November 2011 Deposition of Edgar Jannotta, Jr.

Then, on November 18, 2011, the Jackson Estate conducted the deposition of Edgar Jannotta, Jr. ("Jannotta"). During Jannotta's deposition, counsel for the Jackson Estate marked and used the Kirkland Memoranda as exhibits. In response, counsel for GTCR Fund VI, L.P. asserted for the first time that the Kirkland Memoranda were privileged. Counsel for the Jackson Estate responded that the privilege had been waived, but as a compromise, sealed the documents and reserved the right to ask questions about them at a later time. Still, no steps were ever taken to remove the subject documents from public record or to have privilege determined.

(iii) In Opposition to the GTCR Entities' Motion to Dismiss the Impleader Action

Three days later, on November 21, 2011, the Jackson Estate submitted an Affidavit of Brad Rush, its expert witness, in support of the Jackson Estate's opposition to the GTCR Entities' Motion to Dismiss the impleader action. In the affidavit, Rush stated that he had reviewed documents produced in response to discovery and specifically identified each document, including the Kirkland Memoranda. On November 22, 2011, the trial court

[6] While normally the Trustee would append the documents referenced throughout this Memorandum as exhibits, the nature of the privilege claim precludes such submission. But, as described herein, the Kirkland Memoranda are otherwise readily available on the District Court's CM/ECF system.

conducted a hearing on the GTCR Entities' Motion to Dismiss the impleader action, but the GTCR Entities did not object to the use or disclosure of the Kirkland Memoranda.

It was not until December 15, 2011, three months after the Jackson Estate first filed the two Kirkland Memoranda in the District Court, when counsel for the GTCR Entities sent the Jackson Estate's counsel a letter asserting that the GTCR Entities claimed a privilege on the Kirkland Memoranda and other documents twice produced by the Receiver. Another five months later, on May 8, 2012, the GTCR Entities filed a Motion to Compel the return of the purportedly privileged documents.[7] By that time, however, the proceedings supplementary were stayed because the GTCR Entities appealed the trial court's Order Denying their Motion to Dismiss the impleader action. As a result, the trial court declined to set the GTCR Entities' Motion to Compel for hearing. In the meantime, the GTCR Entities took no action to remove the assertedly privileged documents from public view.

But the stay was lifted as to the GTCR Entities on January 1, 2013 after the Second District Court of Appeal affirmed the trial court's order. The GTCR Entities then filed a second Motion to Dismiss the impleader action, and a hearing was conducted on February 4, 2013. Similar to the hearing in November of 2011, the GTCR Entities did not address the Kirkland Memoranda, any privilege, or any removal of such documents from public view. On March 15, 2013, the trial court once again denied the GTCR Entities' Motion to Dismiss. The GTCR Entities' May 8, 2012 Motion to Compel was never set for hearing in the *Jackson* state court. To this day, the Kirkland Memoranda remain publicly available in the court file for the *Jackson* case as exhibits to Mr. Rush's affidavit.

[7] The Motion to Compel was accompanied by an affidavit of Ruark, wherein she admitted that it was counsel for the GTCR Entities who had first claimed a privilege to the Kirkland Memoranda.

(iv) In This Adversary Proceeding

Next, on December 19, 2013, the Plaintiffs filed an Amended Complaint in this proceeding (Doc. 72). Despite the above, on December 26, 2013, the Kirkland Firm demanded the Plaintiffs request that the Amended Complaint be withdrawn or placed under seal because certain paragraphs referred to the Kirkland Memoranda. In an abundance of caution, Plaintiffs moved to seal the Amended Complaint and for leave to file a redacted version (Doc. 80). However, the Plaintiffs directly disputed that the Kirkland Memoranda were privileged, and filed the motion with a reservation to fully adjudicate the privilege issue. (Doc. 80, ¶¶ 4, 8).

C. Discovery in the Bankruptcy Case and Receiver's Consent to Disclosure to Third Parties.

Independent from the production by THMI's lawyers, the Trustee received the Kirkland Memoranda both from counsel's own review of the records of the *Jackson* impleader action and directly from Tydings & Rosenberg, LLP (the "Tydings Firm") as part of Rule 2004 discovery, and in compliance with this Court's discovery orders.

As part of the procedures to allow the Trustee to produce the documents received from the law firms representing THMI, and following the April 3, 2014 hearing, the Trustee identified documents produced by the Receiver and THMI's lawyers as appropriate for production. The Privilege Memoranda and other of the Clawback Documents were identified as:

- THMI 092533-092548 (No. 5 on the Log);
- THMI 091873-091884, THMI 092816-092827, and THMI 099687-099698 (No. 6 on the Log);
- THMI 091885-091892, THMI 092828-092835, and THMI 099699-099706 (No. 9 on the Log-the first of the Kirkland Memoranda); and
- THMI 092164-092179, THMI 093107-093122, THMI 093476-093491, THMI 099978-099993, and THMI 100347-100362 (No. 22 on the Log—the second of the Kirkland Memoranda).

Pursuant to this Court's procedure for the Receiver to identify and preclude production of any potentially privileged materials to third parties, the Receiver consented to production of these documents to third parties, stating that "[p]rovided the documents are free of attorney notes or any such notes are completely redacted, Receiver has no objection to production." (Doc. 374 at pg. 8). No privilege log was prepared by the Receiver for these documents and, to the extent any privilege ever existed and was not previously waived, the Receiver waived it once again.

Memorandum of Law

I. Any Privilege for the Kirkland Memoranda is THI's, not the Kirkland Firm's.

The attorney-client privilege "belongs solely to the client," and the client may waive it. *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1417 (11th Cir. 1994) opinion modified on reh'g, 30 F.3d 1347 (11th Cir. 1994); *see also Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) ("[T]he privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets.").[8] The privilege at issue here, according to the GTCR Defendants, is between the Kirkland Firm and THI.

The Kirkland Memoranda are directed to THI and, according to the Kirkland Firm (now representing only the GTCR Defendants), were sent to individuals who were unquestionably full time employees of THMI and also officers and directors of both THI and THMI ("THI/THMI Management Team"). According to the Kirkland Firm, the memoranda were prepared in the course and scope of their representation of THI, and the memoranda themselves are expressly dealing with THI issues (along with THMI, as previously argued). Indeed, of the 24 documents included on the GTCR Defendants' March 6, 2014 Amended Privilege Log, twenty 20 are within the scope of the Kirkland Firm's representation, and the THI/THMI Management Team were a

[8] Fla. Stat. §90.502(2) provides that "A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications . . ." (emphasis added).

direct recipients. Yet, the Receiver has not come before this Court to claim the attorney-client privilege. Instead, it is the GTCR Defendants' counsel who has attempted to claim the privilege. The Kirkland Firm's shifting representation by and between THI, THMI and the GTCR Defendants may be reflective of liability for failure to observe corporate formalities, but the same approach cannot bestow a privilege on the GTCR Defendants for communications the Kirkland Firm has asserted were sent to the THI/THMI Management Team.

Additionally, another three documents were directed at THI of Baltimore, Inc., another of the Kirkland Firm's former clients. The Trustee is unaware of any assertion of privilege by THIB to the documents produced in the *Nunziata* case. As set forth herein, THI has waived the privilege, and the Kirkland Firm, now solely representing the GTCR Defendants, cannot reclaim the privilege for their own self-serving purposes and to benefit their current clients.

II. THI has waived any purported privilege to the Kirkland Memoranda, and to the documents produced to the Probate Estates, which privilege cannot be reinvoked by the GTCR Defendants.

Pursuant to Florida law, a "person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person . . . voluntarily discloses . . . or consents to disclosure of, any significant part of the matter or communication." FLA. STAT. §90.507. This is exactly what has occurred here. In response to a subpoena in the *Nunziata* case, the Receiver produced 110,000 pages of documents to the Nunziata Estate. Among those documents were the Kirkland Memoranda and the other Clawback Documents the GTCR Defendants now claim are privileged. The Receiver's voluntary disclosure to the Nunziata Estate waived any purported privilege.

Nevertheless, more than four months after production began and three weeks after the Jackson Estate filed the two Kirkland Memoranda in the District Court, Ruark belatedly claimed

that certain documents were either attorney-client privileged or work product (Exhibit 1). Compounding the Receiver's waiver, however, Ruark's letter again disclosed the documents purportedly subject to a privilege.

In determining whether the attorney-client privilege has been waived by inadvertent disclosure, Florida courts apply the "relevant circumstances" test, which consider five factors: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosures; and (5) whether the overriding interests of justice would be served by relieving a party of its error. *Lightbourne v. McCollum*, 969 So.2d 326, 333, n.6 (Fla. 2007).

Rule 502 of the Federal Rules of Evidence similarly provides that disclosure does *not* operate as a waiver *if* (1) the disclosure was inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Rule 26(b)(5)(B). There is no substantive difference between Rule 502 and the "relevant circumstances" test. *Preferred Care Partners Holding Corp. v. Humana, Inc.*, 258 F.R.D. 684, 690 (S.D. Fla. 2009). "[T]he relevant circumstances test and the Rule 502 test both direct the Court to consider the two most salient factors in the context of this case—namely, the reasonableness of the precautions taken to prevent the disclosure as well as the reasonableness of the steps taken to rectify the error." *Id.*

When the party asserting privilege has not asserted that reasonable precautions were put in place to prevent the disclosure, or that there is any justification for the delay in taking measures to rectify the purported disclosures, any privilege that might have existed will be found to have been waived. *Lightbourne*, 969 So.2d at 333; *Humana*, 258 F.R.D. at 700. In

Lightbourne, the Florida Supreme Court determined that the State's inadvertent disclosure of documents resulted in the waiver of any purported privilege to those documents. *Lightbourne*, 969 So.2d at 332-34. While the Florida Supreme Court acknowledged that "[a]fter producing the memoranda, the State belatedly filed a motion for protective order," "[n]othing in the record support[ed] the State's contention that reasonable precautions were taken to prevent the release of the memoranda or that the interests of justice would be served by suppressing [the] documents." *Id*.

Similarly, in *Humana*, the court found that any privilege that might have existed had been waived by the inadvertent disclosure. *Humana*, 258 F.R.D. at 699-700. The court noted that the a "three-week lag" "is inconsistent with [the] claim that [the document] is a protected, confidential communication." *Id*. If three weeks was inconsistent in *Humana,* certainly the two- to four-month delay here shows that there is no basis to reinvoke a privilege.

As in *Lightbourne* and *Humana*, any privilege was waived in light of the Receiver's production and subsequent failure to take any reasonable precautions to prevent disclosure of the Clawback Documents (both in the first instance via production and then a second time via Ruark's September 14, 2011 letter), and unreasonable delay in taking measures to rectify the disclosure. Indeed, other than sending the September 14, 2011 letter (not coincidentally only after the Jackson Estate had used the Kirkland Memoranda against the GTCR Entities in the impleader action), the Receiver took *no other steps* to rectify the disclosure. Indeed, even the Kirkland Firm took little steps to rectify (on behalf of the GTCR Defendants rather than on behalf of the holder of the privilege, THI) what it also claimed was an inadvertent disclosure.

Other than sending the December 15, 2011 letter, the Kirkland Firm waited nine months to file a motion in the *Jackson* case. Indeed, since its former client (the actual holder of the

privilege) had already waived the privilege, the Kirkland Firm could not—and cannot—attempt to reclaim the privilege. *See Hamilton v. Hamilton Steel Corp.,* 409 So.2d 1111, 1114 (4th DCA 1982) ("It is black letter law that once the privilege is waived, and the horse out of the barn, it cannot be reinvoked"); *see also Draus v. Healthtrust, Inc.-The Hosp. Co.*, 172 F.R.D. 384, 389 (S.D. Ind. 1997) ("The disclosure . . . is a bell that has already been rung. The court cannot unring it by ordering that copies be returned to defendants.").

And, other than the mere filing of a motion in *Jackson* by the GTCR Entities, neither the Receiver nor the GTCR Defendants have taken action to remove the Kirkland Memoranda from the public records. To this day, the Jackson Estate's August 23, 2011 Notice, and all the exhibits thereto (including the Kirkland Memoranda), remain publicly available on CM/ECF. This inaction is certainly inconsistent with any assertion that the documents should be confidential.

The Receiver's waiver was compounded by *consent* to production of the Kirkland Memoranda by the Trustee to third parties.[9] The Trustee received the Kirkland Memoranda both from her counsel's review of the records of the *Jackson* proceedings supplementary and directly from the Tydings Firm in discovery. The Tydings Firm produced the documents as part of full copies of the *Jackson* pleadings. Then, when the Trustee proposed production of those pleadings to third parties, the Receiver affirmatively consented. This too was a waiver pursuant to Fla. Stat. §90.507 and other applicable law.

III. Public Policy Does Not Support a Privilege in This Instance.

The burden to sustain a claim of privilege "is heavy because privileges are not lightly created nor expansively construed, for they are in derogation of the search for the truth." *Bridgewater v. Carnival Corp.*, 286 F.R.D. 636, 639 (S.D. Fla. 2011). A privilege must be strictly

[9] In addition, the Trustee previously argued that the Receiver waived the privilege by delivering the documents to the Proskauer Rose law firm, a stranger to the attorney-client relationship between THI and the Kirkland Firm.

construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Id.*

Even if the Receiver had maintained the confidentiality of the Clawback Documents and made some timely effort to rectify the public disclosure of the Kirkland Memoranda, the attorney-client privilege is not absolute. *In re Fundamental,* 489 B.R. 451, 477 (Bankr. M.D. Fla. 2013). A privilege must give way when it would impede the search for truth because the truth is "far more acute in bankruptcy than the concern for attorney-client communications." *Id.* "As between the social policies competing for supremacy, the choice is clear. Disclosure should be made if we are to maintain confidence in the bar and in the administration of justice." *Id. citing Burden v. Church of Scientology of California,* 526 F.Supp. 44, 45 (M.D.Fla. 1981).

Here, the Kirkland Memoranda and the Clawback Documents expressly relate to the Plaintiffs' claims for breach of fiduciary duty, aiding and abetting fiduciary duty, fraudulent transfers, and successor liability, as well as the Plaintiffs' allegations that any applicable statute of limitations is tolled as a result of the parties' concealment of the 2005 bust out scheme.

The Receiver—the holder of the privilege—has waived the privilege. The GTCR Defendants are attempting to rehabilitate the Receiver's privilege only to protect themselves against documents that will be used against them at trial—not to protect against disclosure of confidential communications to encourage "full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *See Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). Similarly, the purpose of the work product doctrine—to shield attorney work product from disclosure to protect the adversary process—is also not present here because the Clawback Documents are

purportedly work product generated in a previous case. *See Fundamental,* 487 B.R. at 475-76. This Court, therefore, should not relieve any party from the effect of the Receiver's waiver. *See Eigenheim Bank v. Halpern,* 598 F. Supp. 988, 991-92 (S.D.N.Y. 1984) ("Given the need to *limit* the scope of the privilege, this Court will not countenance defendants' attempt to affirmatively use their carelessness to recover a privilege once lost.").

Conclusion

For the foregoing reasons, the Trustee respectfully request that this Court enter an Order finding (i) any privilege that may have applied to the Kirkland Memoranda was waived by the Receiver; (ii) any privilege that may have applied to the Clawback Documents was waived by the Receiver; and (iii) public policy favors disclosure in this case.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 20, 2014, the foregoing was furnished via CM/ECF service to all counsel of record, including:

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