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

Debtor.
_____/

THE ESTATE OF JUANITA AMELIA JACKSON, by and through CATHY JACKSON-PLATTS, f/k/a CATHERINE WHATLEY, Personal Representative; The ESTATE OF ELVIRA NUNZIATA, by and through RICHARD NUNZIATA, Personal Representative; The ESTATE OF JOSEPH WEBB, but and through ROSE M. WEBB, Personal Representative; The ESTATE OF ARLENE ANNE TOWNSEND, by and through BRENDA S. SHATTUCK, Personal Representative; The ESTATE OF OPAL LEE SASSER, by and through WANDA KAY MUSSELWHITE, Personal Representative; and The ESTATE OF JAMES HENRY JONES, by and through FRANCINA SPIVERY-JONES, Administratrix.

Plaintiffs,

BETH ANN SCHARRER, as Chapter 7 Trustee, and TRANS HEALTH MANAGEMENT, INC.,

Intervening Plaintiffs,

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

v.

GENERAL ELECTRIC CAPITAL CORPORATION; FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; THI OF BALTIMORE, INC.; FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC; MURRAY FORMAN; LEONARD GRUNSTEIN; RUBIN SCHRON; VENTAS, INC.; VENTAS REALTY, LIMITED PARTNERSHIP; GTCR GOLDER RAUNER, LLC; GTCR FUND VI, L.P.; GTCR PARTNERS VI, L.P.; GTCR VI EXECUTIVE FUND, L.P.; GTCR ASSOCIATES VI; EDGAR D. JANNOTTA, JR.; AND THI HOLDINGS, LLC.

Defendants.
_____/

DEFENDANTS GTCR GOLDER RAUNER, LLC; GTCR FUND VI, L.P.; GTCR VI EXECUTIVE FUND, L.P.; GTCR ASSOCIATES VI; GTCR PARTNERS VI, L.P.; EDGAR D. JANNOTTA, JR.; AND THI HOLDINGS, LLC's
MOTION TO COMPEL RETURN OF PRIVILEGED DOCUMENTS AND OPPOSITION TO TRUSTEE'S MOTION TO COMPEL PRODUCTION

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GTCR Fund VI, L.P. ("GTCR Fund VI") is a longstanding corporate client of Kirkland & Ellis LLP ("Kirkland"). Beginning in 2005, Trans Healthcare, Inc. ("THI"), THI Holdings, LLC ("Holdings"), and THI of Baltimore, Inc. ("THIB") also retained Kirkland for advice and representation on certain transactional matters. THMI, on the other hand, was not a client of Kirkland's on these matters. In 2004, thirteen individuals and entities, including GTCR Fund VI, Holdings, THI, THMI, and others, retained Kirkland to represent them in lawsuits concerning alleged defaults by two Ohio-based THI subsidiaries on their payment obligations to two Ohio nursing-home landlords (the "Landlord Lawsuits"). The Trustee now invokes that limited representation of THMI, which ended in early 2006, as a purported basis for refusing to return inadvertently produced and facially privileged documents, many of which do not relate to the Landlord Litigation, and for demanding that Kirkland produce all documents "prepared during" Kirkland's representation of the thirteen defendants the in Landlord Lawsuits. The Trustee's positions are contrary to law and this Court's prior orders, and should be rejected.

First, through its motion, the Trustee seeks to retain inadvertently produced documents reflecting privileged communications between Kirkland and its clients, THI, THIB, Holdings, and GTCR Fund VI on matters in which Kirkland did not jointly represent THMI. Moreover, the Stock Purchase Agreement from the sale of THMI in connection with the March 2006 restructuring of THI provides that any legal advice Kirkland or other legal counsel may have provided THMI that related "in any way" to that transaction did not pass to THMI and the buyer in that sale. There is no basis for the Trustee to retain and use materials concerning legal advice that Kirkland provided to clients other than THMI, or that, by contract, did not pass with THMI in the stock sale. And the Trustee's claim that Movants waived any privileges with respect to these documents is demonstrably incorrect as a matter of fact and law.

Second, the Trustee seeks to obtain documents from Kirkland's representation of thirteen clients, including THMI, in the Landlord Lawsuits that settled nearly eight years ago. The substance of those lawsuits has no relevance to the state-court nursing home negligence or wrongful death lawsuits with respect to which this Court previously granted the Trustee access to documents from a joint representation. The Trustee's broad request for documents concerning the Landlord Lawsuits is irreconcilable both with (i) the scope of the co-client exception, and (ii) THMI's agreement not to use documents provided to counsel in the Landlord Lawsuits for "any purpose other than the defense" of the Landlord Lawsuits. At bottom, the Trustee's request for access to all of Kirkland's materials concerning the Landlord Lawsuits is a burdensome fishing expedition involving documents in which Kirkland gave legal advice to THI, Holdings, and GTCR Fund VI, on issues for which THMI was not a joint client.

BACKGROUND

A. Kirkland's Client Engagements.

The Corporate Representations. In 2005, THI, Holdings, and THIB, engaged Kirkland to provide confidential legal advice on corporate matters, including THI's restructuring and the related sale of THMI stock to FLTCI. The retention agreements for each of these clients explained that Kirkland's representation was "solely" of THI, Holdings, or THIB, "and that no parent, ***subsidiary***, affiliate, or other related entity or person has the status of a client." (Ex. A, 4/4/05 Kirkland-THI Retention Agmt.; Ex. B, 4/4/05 Kirkland-THIB Retention Agmt.; Ex. C, 4/30/05 Kirkland-Holdings Retention Agmt. (emphasis added))

On March 28, 2006, as part of THI's restructuring, THI sold THMI's stock to FLTCI. The Stock Purchase Agreement ("SPA") stated "that the Seller"—*i.e.*, THI—"has retained Kirkland & Ellis … to act as its counsel in connection with the transactions" and "that none of the other parties has the status of a client of [Kirkland]." (Ex. D, SPA § 9D) Under the SPA,

THI controlled and retained any privilege, and ***THMI relinquished any privilege claims or rights that "relate in any way to the transactions contemplated by this Agreement***," stating "the attorney-client privilege and the expectation of client confidence belongs to the Seller [THI]" and "shall not pass to or be claimed by the Buyer [FLTCI] or THM[I]." (*Id.* (emphasis added))

The Ohio Landlord Lawsuits. In 2004 and 2005, over a dozen entities and individuals—including GTCR Fund VI, Holdings, and THMI—retained Kirkland to jointly represent them in lawsuits brought by landlords, receivers, and lenders arising from defaults by two THI subsidiaries, THI of Columbus, Inc. and THI of Cleveland, Inc.[1] (Ex. E, 5/16/05 Joint Rep. Agmt.) Through a Joint Defense Agreement ("JDA"), the parties agreed that they could disclose privileged materials to each other "to facilitate the defense of any Plaintiff's allegations in the Lawsuits," but that no privilege "shall be waived by reason of such disclosure." (Ex. F, 5/16/05 Am. JDA at § 1.1) The parties also agreed that such disclosure "shall not be used" for "any purpose ***other than defense of the Lawsuits***." (*Id.* at § 1.2 (emphasis added)) The Landlord Lawsuits were all resolved by voluntary dismissal or settlement in early 2006. THMI neither paid any money toward the settlement of the litigation, nor paid fees to Kirkland. Thus, the only permissible use of privileged materials disclosed to THMI in connection with the JDA expired with the resolution of those lawsuits over seven years ago.

B. The Trustee's Lack of Interest In 2012.

In February 2012, the Trustee's counsel, Allan Watkins, contacted certain law firms about their past representation of THMI. Kirkland notified Mr. Watkins that it had materials that

[1] Those two THI subsidiaries entered receiverships in Ohio in 2004. The landlords (Aegis, Inc. and MJW Leasing, LLC) and the receiver for THI of Columbus selected by Aegis sued THI, THMI, Holdings, and GTCR Fund VI seeking indemnification and civil damages. *See Aegis Servs, Inc. v. THI of Columbus, Inc., Franklin Cty, Ohio*, 04 CVH 11-11949; *Aegis Servs., Inc. v. Trans Healthcare, Inc.*, S.D. Ohio C2-04-1175; *Capital Source Fin. LLC v. THI of Columbus, Inc. et al.*, Franklin Cty, Ohio, 04 CVH 11-12294; *Capital Source Fin., LLC, v. THI of Cleveland, Inc., et al.*, Cuyahoga Cty, Ohio, CV 04-548192.

concerned the Landlord Lawsuits, but that those materials presented privilege issues with respect to other Kirkland clients. Kirkland explained the nature of the lawsuits and identified the other clients and the types of documents it possessed. (Ex. G, 3/19/12 J. Stempel Ltr. to A. Watkins) Kirkland offered to discuss making certain of these materials available for review after an appropriate protective order was entered. (*Id.* at 2–3) After learning the nature of the representation, Mr. Watkins did not pursue a review of the documents. Thus, the Trustee and Kirkland did not reach the point of discussing the substance of an order that would protect the materials from disclosure in litigation, nor determined what subset of Kirkland's files Mr. Watkins could view at Kirkland's offices while maintaining the privileges of the other clients.

From the Movants' perspective, the Trustee would have had to agree that the materials could not be used in any proceeding against the clients Kirkland represented in the Landlord Lawsuits nor could they be disclosed outside Mr. Watkins' firm. At the time, as part of a negotiated resolution, Kirkland would have agreed to allow Mr. Watkins to view (i) communications with opposing counsel, including those concerning settlement; (ii) privileged drafts, as well as filed versions, of pleadings that were prepared and filed for THMI; (iii) analytical or other memoranda, if any, addressed to THMI, concerning THMI's defense in the Landlord Lawsuits; and (iv) documents, if any, produced by Kirkland's clients to plaintiffs in the Landlord Lawsuits. What the Trustee seeks here is many orders of magnitude broader in terms of substance and lacks the necessary prohibitions against use against Kirkland clients or disclosure to others.

C. The Privilege Disputes.

In 2011, the THI Receiver inadvertently produced certain privileged documents to Wilkes & McHugh in certain nursing home negligence lawsuits. These documents did not relate to the defense of those negligence lawsuits, and most had nothing to do with the Landlord Lawsuits

either. Movants asserted privilege claims over these documents (*see*, e.g., Ex. H, 1/17/14 Priv. Log), as did the THI Receiver.[2] The Estates' lawyers agreed to return their copies of the documents, and the Estates and the Trustee redacted passages from the public version of their complaint that had quoted from some of those documents. (Dkt. 80-1 ¶ 220) Despite notice that these documents were subject to a privilege claim, the Trustee nonetheless attempted to use one of those documents during fact-witness depositions.[3] (Ex. I, 2/5/14 Nolan Dep. (Confid'l) at 25:16–30:14; Ex. J, 2/28/14 Jannotta Dep. Tr. at 498:24–504:17) The Trustee should be compelled to return or destroy the documents, as Wilkes & McHugh represented it was doing.

Further, on February 17, 2014—nearly two years after Mr. Watkins did not elect to pursue a viewing of a portion of the Landlord Lawsuit files—the Trustee asked Kirkland to "turnover all files related to the Kirkland Firm's representation of THMI, including all correspondence (written or electronic), all work product (including draft and final pleadings, memoranda, and legal research), all typewritten or handwritten notes, telephonic communications, bills, and payments for fees and costs." (Ex. L, 2/17/14 Berman Ltr. at 3) Although Movants answered that they would be responding to this request (Ex. M, 2/19/14 Balassa Ltr. at 2), the Trustee did not wait, but proceeded with filing a motion to compel.

ARGUMENT

I. The Trustee Must Return Privileged Materials Unrelated To The Landlord Lawsuits.

A. Most Clawed-Back Documents Do Not Concern the Landlord Lawsuits.

Neither the Trustee nor THMI has a right to keep or disclose facially privileged

[2] *See* Ex. K, 5/7/12 Aff. of M. Chavez-Ruark.

[3] The GTCR entities supplied a privilege log on January 17, 2014, and an amended privilege log on March 6, 2014 that included three other documents that GTCR had previously notified the Estates were privileged, including one that the Estates previously put under seal at Jannotta's November 2011 deposition. Excerpts from this document were redacted from the complaint. (Dkt. 80-1 ¶ 220)

documents relating to Kirkland's corporate advice to non-THMI clients unrelated to the Landlord Lawsuits. As THI Holdings, THI, and THIB's retention agreements make clear, Kirkland was retained "solely" to represent THI, Holdings, or THIB on these matters, and "no parent, ***subsidiary***, affiliate, or other related entity or person has the status of a client." (Exs. A, B, & C (emphasis added)) The same conclusion is apparent from the face of the documents at issue. For example:

- March 2, 2005 legal memorandum from Kirkland related to ***THI's*** efforts to refinance a credit facility. The memo refers to "[o]ur client, Trans Healthcare, Inc." and does not mention THMI anywhere, and has nothing to do with the Landlord Lawsuits in Ohio.

- March 30, 2005 legal memorandum from Kirkland to ***THIB*** and ***GTCR Fund VI***, analyzing the lease agreement between ABE Briarwood and THIB. This has nothing to do with the Landlord Lawsuits in Ohio.

- October 5, 2006 email (six months after the sale of THMI to FLTCI) from Kirkland attorney Adam Levine to board members and/or officers of Pathway Health Management, Inc., Atlantic Health Holdings, LLC, THI, and Holdings (all Kirkland clients).

- September 2006 emails (five months after the sale of THMI to FLTCI) from Kirkland attorney Adam Levine to the board of managers of Holdings, providing advice in connection with potential litigation with Holdings unrelated to the Landlord Lawsuits that had been fully resolved six months earlier.

- November 2007 "Contingency Planning Binder" prepared by Kirkland for THI, outlining the steps and legal requirements for a possible bankruptcy filing by THI—more than a year after THMI had been sold to FLTCI and after the Landlord Lawsuits had been resolved.

Separately and independently, the SPA precludes the Trustee from accessing privileged documents relating to the March 2006 restructuring in which THI sold its THMI stock. Under the terms of the SPA, if THMI received any legal advice from Kirkland or Arent Fox "that relate[d] in any way" to that transaction, the privilege did not pass to THMI when the sale transaction closed. (Ex. D, 3/28/06 SPA at 14) Accordingly, any privilege THMI had with

respect to THI's restructuring passed to THI and could no longer be exercised by THMI as of March 28, 2006.[4]

Even though GTCR Fund VI and the THI Receiver have asserted privilege claims over these documents and requested their return (*see* Exs. H & N, 1/17/14 & 3/6/14 Priv. Logs), the Trustee—in contrast to Wilkes & McHugh—has refused to return them, in violation of Fed. R. Civ. P. 26(b)(5), which requires that, after notice of a privilege claim, "a party ***must promptly return, sequester, or destroy*** the specified information," and "***must not use or disclose*** the information until the claim is resolved" (emphasis added).

B. The Trustee's Waiver Claims Are Unfounded.

1. Disclosure To Officers of THI or Holdings Who Were Employed By THMI Did Not Waive The Privilege.

The Trustee's contention that privileges with respect to the clawed-back documents were waived because the THI and Holdings officers who received them were employed with THMI (*see* Dkt. 129 at ¶¶ 11, 22) is groundless. Well-settled law requires that privilege determinations be made by reference to the capacity in which an officer, director, or agent was acting when he or she received or made the communication.

As the Third Circuit explained, "[f]or purposes of the disclosure rule, a disclosure occurs when the parent shares an otherwise confidential attorney-parent communication with an officer, director, or agent of a subsidiary ***in that capacity***." *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 372 (3d Cir. 2007) (emphasis in original). Recognizing "corporate officers' and directors' ability to sit on multiple boards by 'changing hats,'" the Third Circuit held that "it

[4] If the Court believes there is an issue about whether Kirkland represented THI, Holdings, or THMI with respect to any of these disputed documents that "cannot be resolved on the present submissions," the Court could order an *in camera* review of the 24 clawed-back documents, so the Court's privilege determination could be made on a document-by-document basis. *See Official Comm. of Asbestos Claimants of G-I Holdings, Inc. v. Heyman*, 359 B.R. 452, 453 (S.D.N.Y. 2007) (requiring an "*in camera* review" of documents, where an attorney represented both a parent and subsidiary on different issues, to determine which party held the privilege on contested documents).

does not break confidence to share an attorney-parent communication with an officer of the parent in her capacity as an officer of the parent, even though she is also a director or officer of a subsidiary." *Id.*; *see also In re Fuqua Indus., Inc. Shareholders Litig.*, 1999 WL 959182, at *2 (Del. Ch. Sept. 17, 1999); *In re Fin. Corp. of Am.*, 119 B.R. 728, 737 (Bankr. C.D. Cal. 1990). Thus, the Trustee's position that THMI owns the privilege with respect to privileged communications addressed to THI or Holdings because the recipients of pre-March 28, 2006 communications "work[ed] for" THMI (Dkt. 129 ¶ 11), ignores that these recipients were also officers of THI and Holdings. (Ex. O, Nolan Dep. at 282:12–16 ("Q: You're listed on the appointment of officers as the senior vice president of finance and chief accounting officer for THI Holdings, LLC. Do you see that? A: I see that listed there, yes."); Ex. P, Nolan Dep. Ex. 4 (Resignation of S. Nolan) at 2; Ex. Q, Nolan Dep. Ex. 9 (Holdings Board consent) at 1; Ex. R, Nolan Dep. Ex. 17 (THI Board consent) at 7) Because THI and Holdings (and THIB) were Kirkland's clients in these corporate and restructuring matters, attorney-client communications to these entities are privileged, regardless of whether THI and Holdings' officers were also employed by THMI.

2. The THI Receiver's Compelled Production of Privileged Documents On A Confidential Basis Did Not Waive Movants' Privilege.

The Trustee also relies on the fact that the THI Receiver apparently produced confidentially 13 of the clawed-back documents to the Trustee pursuant to the Court's June 17, 2013 Order. In particular, the Trustee refers to a purported uploading of a massive quantity of THI documents to an electronic storage system established by a law firm (Proskauer Rose), pursuant to a joint-defense and a litigation-funding arrangement entered into as part of a January 2012 Settlement Agreement (Ex. S, 1/5/12 Settlement Agreement), and the subsequent production of certain of the privileged, clawed-back documents to the Trustee by a law firm that

represented THI and THMI in the wrongful death litigation (Wisler Pearlstein) and had access to the uploaded files. (*See* Dkt. 129 at ¶¶ 3–4, 10)

The Receiver's attorneys initially withheld the 13 privileged documents from production, but then inadvertently produced them, along with a massive quantity of other documents that were stored electronically, after being compelled to produce files from the law firms' joint representation of THI and THMI in nursing home wrongful death lawsuits. (Dkt. 129 at ¶¶ 2–4; Dkt. 716 at 40–41) That production was in error. The clawed-back documents, on their face, and as described on the privilege log, do ***not*** in any way concern THMI's defense of the nursing home cases. (Exs. H & N, 1/17/14 & 3/6/14 Priv. Logs) Thus, under the Court's March 2013 Order, the Trustee had no right to receive them (Dkt. 716 at 40–41), and they should not have been produced.

Further, Movants did not receive a copy or notification of the document productions by the Receiver's counsel to the Trustee. Given that Movants had no involvement in the Receiver's expedited review and production of electronically stored documents, and the Movants made timely claw-back requests of those documents to the Trustee, there can be no waiver with respect to the clawed-back documents. *See* Fed. R. Civ. P. 502(b) (no waiver if "(1) the disclosure is 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"); *see also* Fed. R. Civ. P. 26(b)(5)(B) Adv. Cmmt. Note ("When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed.").[5]

[5] That many of the documents are protected from disclosure not only under the attorney-client communication privilege, but also by the attorney work product doctrine, further counsels against compelled disclosure. *See Pruco*

II. The Trustee Cannot Use Kirkland's Representation In The Landlord Lawsuits To Retain And Access Privileged Documents.

Documents concerning the Landlord Lawsuits present different issues because, in most of those lawsuits, Kirkland represented THMI, along with twelve other defendants. But Kirkland's representation of THMI, among others, does not provide the Trustee general access to privileged communications with, and work product relating to, Kirkland's other clients in those lawsuits, let alone a right to use for litigation purposes or to otherwise disclose those materials.

A. The Trustee's Request For Access Is Irreconcilable With The "Co-Client" Privilege Exception And The Court's Prior Privilege Rulings.

Contrary to the Trustee's suggestion (*see* Dkt. 129 at ¶¶ 1–3), the Court's rulings regarding THMI's privileges do not support the Trustee's position here. On March 19, 2013, the Court issued an Opinion evaluating the parameters of the Trustee's rights under the co-client exception to attorney-client and work product privileges, to access litigation files in the context of a ***joint representation***. (Dkt. 716); *In re FLTCI*, 489 B.R. 451, *reconsideration denied*, 493 B.R. 620 (Bankr. M.D. Fla. 2013). But neither that opinion, nor the scope of the co-client exception, authorizes the access the Trustee seeks here.

First, focusing on the SPA requirement that THI "make its books and records relating to the wrongful death cases available to THMI" (Dkt. 716 at 21), the Court found that THMI (and, by extension, the Trustee) could invoke the co-client exception to access privileged THI "communications or litigation files ***relating to the defense of the wrongful death cases***," in which the Trustee had taken responsibility for providing THMI's defense. (*Id*. at 3 (emphasis in original)) The Court held that, while the exception applied to wrongful-death-cases, "[t]he same

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Life Ins. Co. v. Brasner, 2012 WL 3001570, at *1 (S.D. Fla. June 28, 2012) ("Work product protection, however, is not automatically waived by disclosure to a third party." '"[D]isclosure of a document to third persons does not waive the work-product immunity unless it has substantially increased the opportunities for potential adversaries to obtain the information.'") (*quoting* 8 Charles A. Wright Arthur R. Miller & Richard L. Marcus, *Federal Prac. & Procedure* § 2024 at 368 (2d ed. 1994)).

is ***not true*** for communications between THI (or the Receiver) and counsel for THI and THMI ***regarding matters unrelated to the defense of the wrongful death cases***." (*Id*. at 25 (emphasis added)) Here, the documents the Trustee seeks have nothing to do with the wrongful death cases that the Trustee has assumed responsibility to defend.

Second, in determining whether the Trustee should be allowed to access the documents related to the wrongful death cases, this Court relied on the fact that THI was ***contractually required*** to provide them to THMI. Here, by contrast, there was no comparable agreement that THMI could have access to other defendants' privileged communications regarding the defense of the Landlord Lawsuits. To the contrary, the contract that is relevant here—the Joint Defense Agreement that established the relationship among the thirteen defendants that Kirkland represented in the Landlord Lawsuits—provides that information disclosed pursuant to that joint defense "shall not be used" for "any purpose ***other than defense of the Lawsuits***." (Ex. F, Am. JDA at § 1.2 (emphasis added)) THMI thus "had no contractual basis for expecting access to other information—and certainly no contractual basis for access to private communications between [THI or Movants] and [their] lawyer," so the co-client exception does not apply. *See Sky Valley Ltd. P'ship v. ATX Sky Valley, Ltd.*, 150 F.R.D. 648, 663 (N.D. Cal. 1993) (declining to apply joint-client exception where there was no contractual right to access the information).

Third, the subject of the joint representation—the Ohio Landlord Lawsuits that settled seven years ago—is not the subject of this adversary proceeding. As the *Sky Valley* court explained, one of the "principal purposes of the joint client exception to the privilege" is to "prevent unjustifiable inequality in access to information necessary to resolve fairly disputes that arise between parties who were in the past joint clients ***when the disputes relate to matters that were involved in the joint representation***." *Sky Valley*, 150 F.R.D. at 653 (emphasis added).

There is no dispute here about whether THI or THMI should be liable to Ohio landlords, further underscoring the impropriety of the Trustee's demand.

Fourth, neither the Court's March 19, 2013 order concerning a joint representation, nor the co-defendants in the Landlord Lawsuits contemplated that one of them could unilaterally elect to use privileged documents adversely to the others, as the Trustee now seeks to do against GTCR Fund VI, Holdings, and THI. To the contrary, the Court held that the Trustee "cannot disclose to any third parties (specifically the plaintiffs in the wrongful death cases) any communications they receive under the co-client exception." (Dkt. 716 at 3) Similarly, in the contract here, THMI agreed that "any communications" "will be ***privileged as to any third parties*** to the fullest extent permitted by law." (Ex. E, 5/16/05 Joint Rep. Agmt. at 4 (emphasis added); *see also* Ex. F, Am. JDA at § 1.1 (agreeing "no claim of work product, attorney-client privilege, privileged materials prepared for trial or in anticipation of litigation, or other privilege shall be waived by reason of such disclosure" with co-defendants)) Thus, the Trustee could not make use of the documents at issue in depositions or otherwise, given the bar on disclosure. *In re Madison Mgmt. Gr., Inc.*, 212 B.R. 894, 896 (Bankr. N.D. Ill. 1997) (barring Trustee from disclosing joint representation documents to third parties).

B. The Trustee's Reliance On Other Court Privilege Rulings Is Misplaced.

The Trustee fares no better in its attempt to invoke other privilege rulings from this Court in support of its broad request. As an initial matter, in October 2012, the Court ruled that, to the extent THMI has an attorney-client privilege, that privilege is controlled by the Trustee. (Dkt. 409 at 23–24) Contrary to the Trustee's suggestion (Dkt. 129 at ¶ 2), nothing in that order expanded the Trustee's access to privileged documents beyond THMI's rights and obligations.

The Trustee's reliance on the June 17, 2013 Order (*id.* at ¶ 3) is likewise unavailing. That Order—a supplement to the March 2013 Order—addressed the Trustee's request to produce

documents concerning THMI's representation in the nursing home wrongful death cases. (Dkt. 919 at 2) The June 17, 2013 Order in no way revisited or called into question the Court's evaluation of the complex competing privilege considerations that arise in the context of an attorney's representation of multiple parties in litigation.[6] As discussed, the contractual relationship here and the Court's March 2013 order do not support, but contradict, the Trustee's demand for broad access to, and use of Kirkland's representation of more than a dozen clients in Ohio landlord litigation that concluded in 2006.

C. Materials Outside The Scope of The Joint Representation Are Privileged.

Further, under no circumstances would the Trustee be entitled to access documents, or portions of documents, outside the scope of THMI's defense in the Landlord Lawsuits. "[C]ommunications outside the scope of the joint representation or common interest remain privileged." *Teleglobe Commc'ns.*, 493 F.3d at 345 (collecting cases); *see also In re Pearlman*, 381 B.R. 903, 910 (Bankr. M.D. Fla. 2007) ("A joint client privilege" applies only to communications that "***relate to the subject matter of the joint representation***.") (emphasis added). These limitations are significant in three respects.

First, Kirkland represented THI on a variety of issues unrelated to the Landlord Lawsuits. Thus, in many of the same communications in which Kirkland provided legal advice ***to THI*** about the Landlord Litigation, Kirkland also provided advice about other issues. For instance, an April 13, 2005 memorandum from Kirkland ***addressed to THI and GTCR Fund VI*** discussed both (i) the conduct of the Landlord Lawsuits ***and*** (ii) a potential THI bankruptcy filing. There is no basis for the Trustee to access portions of documents addressed to THI that did not concern

[6] While the possibility of "additional objections to production based upon, among other things, the common interest and joint defense privileges" were raised in connection with that motion (Dkt. 129 at ¶ 3), the Court noted that no such objections had been made, even though entities "that may be impacted by that ruling have routinely appeared at the discovery hearings in this case and have had an opportunity to raise any objections." (Dkt. 919 at 6) Unlike here, that motion ostensibly concerned documents related to nursing home wrongful death lawsuits.

THI's defense of the Landlord Lawsuits, but concerned other issues on which Kirkland was providing legal advice to THI.

Second, THMI would have no right to materials received from other clients that were not shared with THMI and for which there was no expectation they would be shared with THMI. For instance, Kirkland cast a broad net in collecting materials by running search terms before conducting attorney review—the vast majority of which had nothing at all to do with the Landlord Lawsuits. Indeed, Kirkland collected from the GTCR Entities entire email databases for certain custodians in which Kirkland would have had to run search terms before reviewing the documents, because the databases primarily contained communications (including privileged communications) that had ***nothing to do with GTCR's investment in THI, much less the Landlord Lawsuits***. Of course, THMI would never have had the right to access these or other materials that Kirkland collected from the GTCR Entities, especially those that did not concern the Landlord Lawsuits.

III. Producing Landlord Lawsuit Documents Would Be Unduly Burdensome.

The overwhelming burden of locating and producing portions of Landlord Lawsuit documents that concern claims against THMI counsels against compelled disclosure, given that the Trustee could not use those documents in these adversary proceedings. (Ex. F, Am. JDA at § 1.2) Kirkland has located scores of bankers' boxes and has an undetermined quantity of emails and electronic documents from its past representations of THI that could include references to the Landlord Lawsuits, along with other subjects on which there was no joint representation of THMI.

To determine which documents concerned the Landlord Lawsuits and make judgments about privilege issues, would require an assessment of whether the documents concerned legal advice to THMI in the Landlord Lawsuits (or even related to the Landlord Lawsuits), and would

require redaction to remove legal advice to THI on other matters. Movants should not have to bear the staggering expense of now combing through volumes of files to make determinations as to the status of documents (i) concerning long-past resolved landlord disputes where serious privilege issues are present, (ii) that are irrelevant, and (iii) in any event, could not be used in this adversary proceeding.

IV. The Motion To Compel Responses To Other Document Requests Should Be Denied.

Finally, the Court should reject the Trustee's motion to compel additional responses to its requests for production. (*See* Dkt. 129 at ¶¶ 26–29) *First*, contrary to the Trustee's claim, Movants are not withholding documents relating to "claims or defenses" (RFP Nos. 1 & 2) based on the pending motions to dismiss. Movants objected because, as no defendant has yet answered the complaints, Movants did not know every "defense" that other parties might conceivably assert. *Second*, the Trustee's contention that Movants have refused to produce communications "related to the defense or liability of THI or THMI in the Nursing Home Cases" (RFP No. 4) is in error. Movants have searched their documents and found none related to the defense of THI or THMI in the wrongful death actions underlying this litigation. To the extent the Trustee seeks documents related to any other subject, those would go beyond the scope of the Court's March 19, 2013 and June 17, 2013 orders, for the reasons discussed above. *Third*, the fact that similar objections are raised in response to multiple, similarly objectionable requests does not make an objection "boilerplate" or otherwise improper under the Federal Rules of Civil Procedure.

CONCLUSION

For each of the foregoing reasons, Movants respectfully request that the Court issue an order (i) compelling the Trustee to return or destroy and refrain from using any of the documents described on the January 17, 2014 and March 6, 2014 privilege logs that Movants have requested back; and (ii) denying the Trustee's motion to compel production.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 13, 2014, the foregoing was filed electronically with the Clerk of the United States Bankruptcy Court for the Middle District of Florida by using the CM/ECF system, which will provide electronic notification to counsel of record.

/s/ Jeffrey W. Warren
ATTORNEY