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

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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, by 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.

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DEFENDANT GTCR ENTITIES, EDGAR D. JANNOTTA, JR., AND THI HOLDINGS, LLC's RESPONSE TO TRUSTEE'S SUPPLEMENTAL MEMORANDUM ON WAIVER

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INTRODUCTION

The Trustee's supplemental privilege memorandum (Dkt. 576) marks the latest flawed attempt to breach GTCR Fund VI, L.P.'s ("**Fund VI**") attorney-client privilege and core attorney work product. The Trustee originally asserted that Trans Health Management, Inc. ("**THMI**") had a right to discover Kirkland & Ellis LLP's ("**Kirkland**") communications with Fund VI and Trans Healthcare, Inc. ("**THI**"), simply because (i) THI's officers were also officers and employees of THMI, and (ii) Kirkland jointly represented THMI on certain limited matters. (Dkt. 129) Given the factual and legal error in those arguments, the Trustee now advances another barrage of arguments to access Fund VI's privileged documents, premised this time on claims of waiver.[1] The Trustee's new arguments fare no better than those that came before.

This time, the Trustee's privilege assault is ostensibly based on the THI Receiver's inadvertent production in 2011 of a small number of privileged documents. But the conduct that the Trustee's supplemental memorandum really puts at issue is that of the plaintiff Estates, who repeatedly made improper use of facially privileged documents, including:

- The Estates' failure, in violation of Rule 4-4.4 Regulating the Florida Bar, to "promptly notify" THI (or Fund VI) when they received documents that were facially privileged;
- The Estates' intentionally filing of two privileged memoranda in the public record;
- The Estates' failure, in violation of Fed. R. Civ. P. 26(b)(5), to return the privileged documents and to cure the prior disclosure of the two documents, after the THI Receiver notified the Estates the documents were privileged and had been inadvertently produced;
- The Estates' repeated use of the privileged documents in violation of Fed. R. Civ. P. 26(b)(5) after receiving THI's claw-back demand, including *filing again* the two privileged memoranda in a public file with two additional privileged documents.

[1] The Trustee's new waiver arguments concern two privileged memoranda addressed from Kirkland to Fund VI and THI, and a cover email distributing one of those memoranda to these clients. Contrary to the Trustee's assertion, Fund VI unquestionably is asserting privilege in its own right as to these documents.

Far from evidencing any "intentional relinquishment" of a known right by the THI Receiver and Fund VI, as required to establish waiver, the events surrounding these disclosures reflect that (i) THI and Fund VI repeatedly communicated to the Estates (and later to the Trustee) that the documents were privileged—as was plain from their face, and (ii) the Estates' counsel disregarded these notices and persisted in making improper use of the documents.[2] Further, in these bankruptcy proceedings, the Trustee's counsel has similarly persisted in attempting to use privileged documents that were expressly clawed back, including documents the Trustee's counsel improperly accessed through the Relativity Database. Under no circumstances should the Trustee, and the Estates on whose behalf the Trustee seeks recovery, benefit from counsel's violations of professional and legal rules barring their use of facially privileged documents and requiring plaintiffs to return those materials and to remedy their prior disclosures. *See In re Anson*, 457 B.R. 130, 137 (Bank. M.D. Fla. Sept. 30, 2011) (Williamson, J.) ("overriding equitable principles" govern all bankruptcy cases).

BACKGROUND

A. The Intentional Disclosure of Facially Privileged Documents In The Florida Supplementary Proceedings.

Between May and July 2011, the THI Receiver apparently produced around 110,000 pages of documents to the Estates counsel, in the matter of *Estate of Elvira Nunziata v. THMI, et al.*, Case No. 24-C11-002271 (Md. Cir. Court for Baltimore City). (Ex. K, Ruark Affidavit ¶ 4)[3] Neither Fund VI nor any other Kirkland client was a party to that lawsuit or received a copy of the production. The THI Receiver's production contained two facially privileged memoranda,

[2] See Ex. AA, Chronology of Conduct Surrounding Inadvertent Production of Privileged Materials.

[3] To limit confusion, the Respondents have used the same lettering on exhibits from the previous privilege motions. (Dkts. 191 & 305) Exhibits to this Response will start with "AA" because the Respondents' previous motion on this topic ended with exhibit "Z."

dated April 13, 2005 and August 3, 2005, addressed from Kirkland to its clients, "Trans Healthcare, Inc." and "GTCR Fund VI, L.P.," plainly providing legal advice ("**Kirkland Memoranda**"). Every page of the two memoranda was marked "Privileged & Confidential," "Attorney Work Product," and/or "Attorney-Client Communication." (Exs. H & N, 1/17/14 & 3/6/14 Priv. Logs, Docs. 9 & 22)[4] The Receiver's production of these documents was inadvertent. (Ex. K, Ruark Affidavit ¶ 7)

Under Florida Bar Rule 4-4.4, "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." The Estates' counsel, however, did not notify counsel for the THI Receiver (nor counsel for Fund VI) that they had received the facially privileged memoranda among the many thousands of documents the THI Receiver had produced. Instead, on August 23, 2011, the Estates' counsel filed the two Kirkland Memoranda in a § 56.29 proceeding supplementary in which the Estate had impleaded Fund VI and other defendants, and in which THI was not a party. Specifically, the Estates' counsel filed a Notice of Filing of Supplemental Evidence that attached ten documents, including the Kirkland Memoranda.

Fund VI did not, and has never, produced the Kirkland Memoranda and therefore did not know where or under what circumstances the Estates' counsel had obtained them. Fund VI responded to the Estates' court filing by investigating the documents' source, and discussed the Estates' possession of them with the THI Receiver's counsel. (Ex. K, Ruark Affidavit ¶ 7; Ex. BB, Rottenborn Affidavit ¶ 4) The THI Receiver's counsel then undertook to determine whether they had inadvertently included the documents in the recent *Nunziata* production—a task

[4] The Receiver's production included a third, related document: an April 13, 2005 cover email from Kirkland to THI and Fund VI recipients that attached the April 13, 2005 Kirkland Memorandum. (Exs. H & N, 1/17/14 & 3/6/14 Priv. Logs, Doc. 8)

complicated not only by the volume of documents but by the fact that the Kirkland Memoranda the Estates filed were not bates numbered. Upon determining that the documents had been inadvertently included in the *Nunziata* production, counsel for the Receiver promptly wrote to the Estates' counsel on September 14, 2011, stating that between May and July 2011, she had inadvertently produced 21 privileged documents, including the two Kirkland Memoranda and an April 13, 2005 Kirkland email that distributed one of the memoranda to Kirkland's clients, and demanding that the privileged documents be returned, sequestered, or destroyed. (Ex. K, Ruark Affidavit ¶ 8 & 9/14/11 Letter from M. Ruark to J. Freeman; Dkt. 576 at 5) The letter also stated that "the Receiver does not waive and has not waived the attorney-client privilege or the work product doctrine with regard to these or any other documents." (Ex. K at 6–7)

Under federal and state procedural rules, the THI Receiver's notification to the Estates imposed specific obligations on them. In particular, the federal rule on inadvertent disclosure requires that a party who is informed that documents in its possession are privileged (1) "must promptly return, sequester, or destroy the specified information and any copies it has;" (2) "must not use or disclose the information until the claim is resolved;" (3) "must take reasonable steps to retrieve the information if the party disclosed it before being notified;" and (4) "may promptly present the information to the court under seal for a determination of the claim." Fed. R. Civ. P. 26(b)(5); *see also* J. Michael G. Williamson, *The Art of Practical Evidence*, 030713 ABI-CLE 121 (citing Fed. R. Civ. P. 26(b)(5)).

The Florida Rules of Civil Procedure impose similarly stringent obligations on a party receiving notice of an inadvertent production of privileged documents, to:

> (1) "promptly return, sequester, or destroy the materials specified in the notice, as well as any copies of the material;

> (2) "promptly notify any other party, person, or entity to whom it has disclosed the materials of the fact that the notice has been served and of the effect of this rule;" and
>
> (3) "take reasonable steps to retrieve the materials disclosed."

Fla. R. Civ. P. 1.285 ("Inadvertent Disclosure of Privileged Materials"). The rule also states that it in no way limits a party's obligations under Ethical Rule 4-4.4(b) to notify a producing party, on its own initiative, of the receipt of privileged documents. *Id.* ("Nothing herein affects any obligation pursuant to R. Regulating Fla. Bar 4-4.4(b).").

The Estates did not comply with their obligations under these rules. They violated the requirement to return, sequester, or destroy the privileged documents. They also violated the requirements to take steps to cure their prior disclosure of the privileged materials, including retrieving the materials. The Estates' only "response" to the Receiver's privilege assertions was to make ***further improper use*** of the clawed-back documents, in clear violation of the rules.

For example, at a November 18, 2011 deposition, the Estates' counsel marked and attempted to question a deponent about both Kirkland Memoranda that the THI Receiver had clawed back. Fund VI's counsel responded immediately, stating that the documents were facially privileged, that the THI Receiver had provided notice of the inadvertent production, and that the documents had to be returned. (Ex. CC, 11/18/11 Jannotta Dep. Tr. at 233:9–234:12; 237:15–22; 238:7–239:8) Fund VI's counsel refused to permit the witness to answer questions about the privileged Kirkland Memoranda, and the documents were put under seal. (Ex. CC, 11/18/11 Jannotta Dep. Tr. 233:24–235:6; 238:20–240:5)

Then, just three days later, on November 21, 2011, the Estates' counsel filed with the state court an affidavit of a purported expert witness, attaching nearly 1,000 pages of documents, including the two Kirkland Memoranda as to which the THI Receiver had asserted privilege in

writing, and over which Fund VI had just reiterated that privilege assertion.[5] Given the Estates' repeated improper use of the clawed-back documents, on December 15, 2011, Fund VI sent a follow-up letter to the Estates' counsel, reiterating the THI Receiver's written request and Fund VI's request in deposition that the Estates return the privileged documents. Over the ensuing months, the Estates did not return the documents, and they did nothing to cure their prior disclosures of those privileged materials. In May 2012, Fund VI filed a motion to compel the return of the privileged documents. (Ex. DD, 5/8/12 Mot. to Compel)

The Trustee makes much of the fact the state court has not decided that motion, and that the documents the Estates put in public court files remain there.[6] But the Trustee's argument overlooks that the Estates should not have publicly disclosed facially privileged documents in the first place. Further, the Estates had a duty to cure those disclosures after receiving the THI Receiver's notice of inadvertent production.[7] The Estates' violations of their responsibilities under state and federal rules cannot be a basis for finding waiver by Fund VI.

B. Plaintiffs' Improper Use And Disclosures Of Privileged Documents In These Bankruptcy Proceedings.

On December 19, 2013, the Trustee and the Estates filed an Amended Complaint that quoted excerpts from the Kirkland Memoranda. (Dkt. 72, Am. Cmplt. ¶¶ 171, 219, 220) Within a week, counsel for Fund VI wrote the Estates and the Trustee, stating again that the Kirkland

[5] The affidavit also attached the Kirkland cover email distributing one of the memoranda to THI and Fund VI and another privileged memorandum from Kirkland to THIB and Fund VI. (Exs. H & N, 1/17/14 & 3/6/14 Priv. Logs, Docs. 6 & 8) Notably, two months earlier, the Trustee had asserted privilege and requested that the Estates return or destroy both these documents. (Ex. K, Ruark Affidavit ¶ 8 & 9/14/11 Letter from M. Ruark to J. Freeman) Document 6 from the Amended Privilege Log had not had been filed with any court before the Estates' November 21, 2011 violation.

[6] The trial court entered an order that stayed all proceedings for roughly a year while Fund VI appealed an order, until January 10, 2013. Those impleader proceedings have been enjoined by this Court since November 19, 2013.

[7] Also, contrary to the Trustee's suggestion, public disclosure does not, regardless of circumstances, mean that privilege is waived. *See infra*, Section I.B.

Memoranda were privileged and reiterating the prior requests that counsel return and stop using privileged documents. (Ex. EE, 12/26/13 Letter from M. Nirider to B. Lazarra & S. Berman) In addition, Fund VI's letter demanded that plaintiffs place the complaint under seal and re-file a redacted version. (*Id.*) Plaintiffs complied with that request, sealing the Amended Complaint and filing a version redacting the quotations from the Kirkland Memoranda. (Dkt. 80) Fund VI also provided plaintiffs a privilege log for the Kirkland Memoranda and other clawed-back documents (Exs. H & N, 1/17/14 & 3/6/14 Priv. Logs), and the Estates' counsel appeared finally to comply with their obligations under Rule 26(b)(5) by purporting to return to Fund VI's counsel the Kirkland Memoranda, the Kirkland email distributing one of the memoranda to THI and Fund VI, and the other clawed-back documents on Fund VI's privilege log.

In reality, however, plaintiffs' counsel retained the privileged documents and later tried again to use them, again violating Fed. Rule Civ. P. 26(b)(5). In depositions in these adversary proceedings, the Trustee's counsel repeatedly attempted to question witnesses about the Kirkland Memoranda between February and March 2013. Each time, Fund VI's counsel re-asserted the same privileges, directed the witness not to answer, and required that the privileged exhibits be put under seal. (Ex. I, 2/5/14 Nolan Dep. (Confid'l) at 25:16–30:14; Ex. J, 2/28/14 Jannotta Dep. at 498:24–504:17; *see also* Ex. FF, 3/17/14 Box Dep. (Confid'l) at 7:4–11:9) In addition, on April 4, 2014, the Estates served on all parties interrogatory responses that quoted from and paraphrased the Kirkland Memoranda that had been requested back multiple times. Counsel for Fund VI responded by again objecting to the Estates' use of the privileged documents (Ex. GG, 4/12/2014 E-mail from J. Warren to B. Lazarra), causing the Estates to submit revised interrogatory responses, removing references to the Kirkland Memoranda.

C. The Trustee's Unsupported Attempts To Access Privileged Documents.

On February 19, 2014, the Trustee filed her Motion to Determine the Absence of Privilege, centering on the erroneous assertions that THMI had a right to access privileged communications and core work product because (i) the advice was addressed to THI (as well as Fund VI), and THI's officers were also officers and employees of THMI; and (ii) Kirkland represented THMI on certain limited matters. (Dkt. 129) As addressed in Respondents' prior briefing on these issues (Dkts. 191 & 305), neither the law nor this Court's prior privilege rulings support the Trustee's arguments:

- *First*, as THI Holdings and THI's retention agreements make clear, those entities retained Kirkland to represent them in restructuring-related matters, and "no parent, ***subsidiary***, affiliate, or other related entity or person has the status of a client." (Exs. A, & C (emphasis added))

- *Second*, the THMI stock purchase agreement provides that Kirkland and Arent Fox were not retained by THMI in the sale transaction, and, if THMI received legal advice from Kirkland or Arent Fox "that relate[d] in any way" to the transaction, the privilege would not pass to THMI when the sale transaction closed. (Ex. D, 2/28/06 SPA at 14)

- *Third*, the fact that THI's officers were also officers or employees of THMI was not a basis for piercing the privilege, either. Privilege determinations must 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. *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 372 (3d Cir. 2007). THI's officers received memoranda addressed to "Trans Healthcare, Inc.," addressing issues on which THI had retained Kirkland, in their capacity as THI officers. (*See also* Ex. HH, Respondents' Connection to THI and THMI)

- *Fourth*, while Kirkland jointly represented THMI along with 12 other defendants in the Aegis landlord litigation from 2004 through 2006, that limited joint representation did not entitle the Trustee to access documents explicitly and exclusively addressed to THI and Fund VI, or portions of those documents, discussing issues such as THI's restructuring as to which there was no joint retention by THMI. It is those off-limits documents and portions of documents that the Trustee is after. As the Trustee conceded at the April 3, 2014 hearing: "To be clear, we're really not interested in the aegis landlord-tenant dispute litigation." (Ex. T, 4/3/2014 Hr'g Tr. at 52:18–19 (Mr. Berman).)

- *Finally*, the Joint Defense Agreement that established Kirkland's joint representation of THMI and 12 other defendants in the landlord litigation states that information disclosed in 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)) Thus, as a contractual matter, the Trustee could not access, much less make use of documents concerning the joint representation (*i.e.*, the landlord litigation), for purposes of prosecuting claims against other holders of the privilege in these proceedings.

The parties briefed these issues and the Court heard argument on April 3, 2014. On June 14, 2014, the Court granted the Trustee's request for leave to make one last filing on the issue. The Trustee's new waiver theories are no more meritorious than the Trustee's prior arguments.

ARGUMENT

I. Fund VI and THI Did Not Waive Their Privileges In the Kirkland Memoranda.

One party to a jointly held privilege cannot waive the privilege as to other holders of that that privilege. *See, e.g., United States v. BDO Seidman, LLP*, 492 F.3d 806, 817 (7th Cir. 2007) ("[T]he privileged status of communications falling within the common interest doctrine cannot be waived without the consent of all of the parties . . . ."); *In re Teleglobe*, 493 F.3d at 364 ("[O]ne co-defendant could not waive the privilege that attached to the shared information without the consent of all others."). In addition, corporations may own privileges and, when they do, only the corporate holder of the privilege may waive it. *See Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981) (recognizing that the attorney-client privilege applies to corporations, and that the client is the corporation itself and not its constituents). Thus, to prevail on its motion, the Trustee must establish that both THI and Fund VI waived the attorney-client privilege and core work-product protections that attach to the Kirkland Memoranda. They have failed to make this showing as to either holder of the privilege, much less as to both.

It is axiomatic that waiver of a privilege "imports the 'intentional relinquishment or abandonment of a known right or privilege.'" *See, e.g., In re Se. Banking Corp. Sec. & Loan Loss Reserves Litig.*, 212 B.R. 386, 392 (S.D. Fla. 1997). Rule 502(b) of the Federal Rules of Evidence provides that disclosure does not operate as a 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." Further, courts apply a balancing test to determine if reasonable precautions were taken to protect the privilege. The factors considered are "(1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness." *Ray v. Cutter Labs., Div. of Miles, Inc.*, 746 F. Supp. 86, 88 (M.D. Fla. 1990). These factors weigh heavily against finding that the THI Receiver and Fund VI waived their privileges as to the two Kirkland Memoranda.[8]

1. Reasonable precautions to prevent inadvertent disclosure

As an initial matter, Fund VI was not involved in producing the Kirkland Memoranda. It has never produced those documents to plaintiffs. These facially privileged documents were inadvertently produced by the THI Receiver's attorneys to the Estates' lawyers in the *Nunziata* state-court proceeding, to which Fund VI was not a party. There was no disclosure, inadvertent or otherwise, by Fund VI.

The Trustee's waiver argument also fails as to the Receiver, whose attorneys inadvertently produced the documents, despite having taken reasonable precautions to prevent accidental disclosures. (Ex. K, Ruark Affidavit ¶ 6) The production of 21 privileged documents in a production of more than 100,000 pages is unfortunate, but may occur even where precautions are in place. As courts have recognized, "[m]istakes of this type are likely to occur in cases with voluminous discovery." *U.S. v. Pepper's Steel & Alloys, Inc.*, 742 F. Supp. 641, 645 (S.D. Fla. 1990); *see also In re Natural Gas Commodity Litigation*, 229 F.R.D. 82 (S.D.N.Y.

[8] Some courts in this circuit have found that inadvertent disclosure of a privileged document by an attorney is insufficient to constitute a waiver because those rights may only be relinquished intentionally by the client. *Smith v. Armour Pharmaceutical Co.*, 838 F. Supp. 1573, 1576 (S.D. Fla. 1993); *Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936, 938 (S.D. Fla. 1991); *In re Se. Banking Corp.*, 212 B.R. at 392. Here, the initial inadvertent disclosure was made by the Receiver's counsel, not by THI, and so cannot constitute a waiver under this standard.

2005) (party that inadvertently disclosed several privileged pages when producing 65,000 pages did not waive privilege); *Pucket v. Hot Springs Sch. Dist. No. 23-2*, 239 F.R.D. 572, 587 (D. S.D. 2006) (no waiver where inadvertent disclosure was 13 pages of privileged material of over 1,000 pages produced); *see also Se. Banking Corp.*, 212 B.R. at 393 (party took reasonable precautions to ensure against inadvertent disclosures where lawyers reviewed over 900 boxes of documents, but then inadvertently produced additional 200 boxes containing privileged documents).

2. Time to rectify the error

Upon seeing the privileged documents in the Estates' August 23, 2011 court filing, Fund VI's counsel investigated how the Estates' counsel had obtained them and notified the THI Receiver of the disclosure. (Ex. K, Ruark Affidavit ¶ 7; Ex. BB, Rottenborn Affidavit ¶ 4) The THI Receiver's counsel then evaluated whether the un-bates numbered documents had come from the THI Receiver's production in *Nunziata*. The THI Receiver's counsel concluded that the Receiver had erroneously produced the documents and promptly notified the Estates counsel on September 14, 2011. (Ex. K at 6–7) In short, both Fund VI and the THI Receiver took timely steps—Fund VI to notify Receiver's counsel of the production and determine if the documents had been inadvertently produced, and the THI Receiver to review its production and then to issue a notice to the Estates concerning the THI Receiver's inadvertent disclosure.[9] Although that notice alone triggered the Estates' obligations under Rule 26(b)(5) and Florida Rule 1.285, Fund

[9] It bears noting that, contrary to the Trustee's claims (Dkt. 576 at 11), there is no set time table for the assertion of privilege. *Fed. Deposit Ins. Corp. v. Cherry, Bekaert & Holland*, 131 F.R.D. 596, 606 (M.D. Fla. 1990) ("[F]ailure to assert the attorney-client privilege in a timely manner does not waive the privilege even when the privilege is asserted for the first time in a motion for reconsideration of a district court's order to produce.") (citing *Southern Railway Co. v. Lanham*, 403 F.2d 119, 133–134 (5th Cir. 1968)); *Cf. Nova Se. Univ., Inc. v. Jacobson*, 25 So. 3d 82, 87 (Fla. 4th DCA 2009) (no undue delay when motion for protective order was not filed when the disclosure was first discovered but only after several depositions where the privileged documents were referred to); *Abamar Hous. & Dev., Inc. v. Lisa Daly Lady Decor, Inc.*, 698 So. 2d 276, 279 (Fla. 3d DCA 1997) (same). In any event, the THI Receiver's assertions of privilege were prompt after the THI Receiver determined the privileged documents had come from its production in *Nunziata*.

VI reiterated privilege assertions when the Estates subsequently made improper use of the documents. (*See supra* pp. 5–7; Ex. AA, Chronology of Conduct Surrounding Inadvertent Production of Privileged Materials)

3. Extent of the disclosure

Fund VI has not disclosed the Kirkland Memoranda to *any* extent. And the THI Receiver only inadvertently disclosed 21 documents to the Estates among a production of approximately 110,000 pages in *Nunziata*.

The Trustee's counsel previously disclosed that the Trustee had obtained copies of the clawed-back documents, including the Kirkland Memoranda and the distribution email, from the Relativity Database. (Ex. II, 4/3/14 Hr'g Tr. at 38:2–18; 54:8–22; 59:19–60:2; 136:12–17; *see also* Joinder in Obj. to Trustee's Not. to Produce Docs. Contained on the Relativity Database, Dkt. 372) The Trustee now asserts that THI Receiver's law firms produced the Kirkland Memoranda when those firms provided the Trustee copies of the law firms' ***pleadings files*** from the *Jackson* litigation.[10] (Dkt. 576 at 7) As discussed above, these privileged documents appear in the court files only because the Estates improperly put them there and then failed to cure those disclosures. The fact the THI Receiver was compelled by Court Order to share with the Trustee on a confidential basis its lawyers' litigation files from the *Jackson* lawsuit (*see* 3/19/13 Order, Dkt. 716; 6/17/13 Order, Dkt. 919) in no way supports an inference that the THI Receiver, much less Fund VI, waived any privilege as to those documents. And, remarkably, in making this argument, the Trustee omits to mention that, pursuant to the Court-ordered protocol, Fund VI's counsel reviewed the Trustee's proposed production and again objected to production, noting

[10] In addition to the Kirkland Memoranda, the Trustee states that the Receiver's counsel's pleadings files contained documents 5 and 6 on Fund VI's privilege log—two versions of a privileged memorandum from Kirkland to THIB and Fund VI. (Exs. H & N, 1/17/14 & 3/6/14 Priv. Logs) The Estates first filed one version of that memorandum—document 6—in the *Jackson* court file two months *after* the Receiver had identified the documents as privileged and asked for them back. (*See supra*, fn. 5)

that each document was subject to a claw-back request, and reminding the Trustee's counsel of their obligation to return or destroy all copies of the privileged documents. (Ex. JJ, 6/3/2014 E-mail from M. Nirider to S. Traub) Given that Fund VI had no involvement in the THI Receiver's review and Court-ordered production of electronically stored documents in these adversary proceedings, and that Fund VI made timely claw-back requests each time the Trustee attempted to use or disclose these documents, there was no waiver. *See* Fed. R. Civ. P. 502(b).

In sum, there has been limited and inadvertent disclosure by the Receiver's attorneys, and none by Fund VI. The only broad disclosure of the Kirkland Memoranda was by the Estates and the Trustee, through their improper public filings of the materials. (*See infra*, Section I.B)

4. Overriding issue of fairness

Finally, the fairness prong of the balancing test confirms that the Court should find no waiver here. As a matter of fairness, this Court should not condone—let alone reward—the improper actions of opposing counsel by giving them the "windfall" of access to privileged documents. *See In re Se. Banking Corp.*, 212 B.R. at 392–94 ("The Court cannot and will not condone both the Trustee and his counsel's behavior in obtaining these documents when they knew perfectly well that there was a dispute over their entitlement to them."); *Pepper's Steel*, 742 F. Supp. at 645 (finding fairness factor weighed in favor of protecting privilege over inadvertently produced documents "inasmuch as [opposing lawyers] are not entitled to discover privileged material, and their receipt of these documents was a windfall").

The plaintiffs' purposeful refusal to return privileged documents and their repeated use of those documents are not some accidental, minor misstep. Indeed, their conduct is so serious that, under Florida law, it constitutes grounds for disqualifying counsel. *See Abamar Hous. & Dev., Inc. v. Lisa Daly Lady Decor, Inc.*, 724 So. 2d 572, 573 (Fla. 3d DCA 1998) (disqualifying counsel who reviewed inadvertently produced privileged documents and used those privileged

documents at depositions despite opposing counsel's objections and requests to return the documents); *Atlas Air, Inc. v. Greenberg Traurig, P.A.*, 997 So. 2d 1117, 1118 (Fla. 3d DCA 2008) (disqualifying law firm that made use of inadvertently produced documents rather than returning the documents to the producing party). While Fund VI does not seek to disqualify the Estates and Trustee's counsel for these transgressions, "fairness" dictates that plaintiffs not be permitted to profit by imposing a "waiver" on Fund VI and THI through their violations.

B. Opposing Counsel's Intentional Placement Of Privileged Materials In A Public Court File Does Not Waive The Privilege.

The Trustee argues that the fact that the two Kirkland Memoranda remain in the public court file must mean the privilege has been waived. That is not the law. Courts recognize that public disclosure by someone other than the privilege holder does not void the privilege, even if confidentiality is lost. "Recognizing that, in practical terms, the contents of the document are no longer confidential is different from ruling that, in legal terms, the client holding the privilege has lost the privilege because someone else disclosed the document to the public . . . . The fact that the contents of the document have become widely known is not dispositive of the legal privilege attaching to the document." *Armor Pharm. Co.*, 838 F. Supp. at 1576; *see Caron Found. of Florida, Inc. v. City of Delray Beach*, 879 F. Supp. 2d 1353, 1370 n.6 (S.D. Fla. 2012) (because client holds the privilege, others' "public announcement of the [privileged] conversation would not necessarily waive the privilege").

The case against waiver is even stronger where, as here, the documents only became "public" as the result of improper actions by opposing counsel. *Cf. Sackman v. Ligget Group*, 173 F.R.D. 358, 364–65 (E.D.N.Y. 1997) ("the assertion of privilege . . . is not waived through public disclosure of a stolen privileged document"); *Dayco Corp. Derivative Securities Litig.*, 102 F.R.D. 468, 469–70 (S.D. Ohio 1984) (denying motion to compel privileged document

improperly leaked to and published in the press). The first public disclosure on which the Trustee relies was made by the Estates in violation of their obligations under Florida Ethical Rule 4-4.4, mandating that a party "promptly notify" a party who has produced facially privileged documents. The Estates then failed to remedy those disclosures as required by Fed. R. Civ. P. 26(b)(5) and Fla. R. Civ. P. 1.285. The other disclosures—the Estates' filing the documents attached to an affidavit, and plaintiffs quoting the documents in their Amended Complaint and in interrogatory responses—all occurred *after* the THI Receiver and Fund VI had asserted the documents were privileged and demanded them back, thus representing continuing violations of plaintiffs' ethical and legal obligations. This Court should not reward the Estates, or the Trustee pursuing litigation on their behalf, for their persistent violations.

II. The Supplemental Brief Is Irrelevant To The Majority of The Clawback Documents.

The documents addressed in the Trustee's supplemental memorandum are only three of the 24 documents Fund VI and other clients of Kirkland have clawed back—the two Kirkland Memoranda and the Kirkland email distributing one of the memoranda to THI and Fund VI. (Exs. H & N, 1/17/14 & 3/6/14 Priv. Logs, Docs. 8, 9, & 22) While there is no waiver as to these three documents, there is certainly no waiver as to the remaining 21 documents on Fund VI's claw-back log.[11]

Moreover, as the 2008 amendment to Federal Rule of Evidence 502 makes clear, "an inadvertent disclosure of protected information can ***never*** result in a subject matter waiver." Fed. R. Ev. 502 Advisory Committee Notes, Subsection (a) (citing Rule 502(b)) (emphasis added); *see also Chick-fil-A v. ExxonMobil Corp.*, 2009 WL 3763032, at *4 (S.D. Fla. Nov. 10, 2009)

[11] In addition to the fact that these documents are privileged, were requested back, and are on Fund VI's privilege log (Exs. H & N, 1/17/14 & 3/6/14 Priv. Logs), the Trustee improperly accessed many from the Relativity Database. (*See* Joinder in Obj. to Trustee's Not. to Produce Docs. Contained on the Relativity Database, Dkt. 372 ¶¶ 6–7)

("Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading, and unfair manner.") (citing Fed. R. Evid. 502 Advisory Committee Notes, Subsection (a)); *Silverstein v. Fed. Bureau of Prisons*, 2009 WL 4949959, *9 (D. Colo. Dec. 14, 2009) ("The new Federal Rule of Evidence 502(b) protects from subject matter waiver a privileged document that has been disclosed inadvertently.") (citing Fed. R. Evid. 502(b)). Nor does subject matter waiver extend to materials that constitute core attorney work product, such as the Kirkland Memoranda. *Chick–fil–A*, 2009 WL 3763032 at *7 ("[R]ule 502 does not abrogate the Eleventh Circuit's ruling that 'the subject-matter waiver doctrine does not extend to materials protected by the opinion work product privilege.'"). Therefore, even *if* Fund VI had waived privilege as to any portion of the Kirkland Memoranda, which it manifestly did not, the Trustee would not be entitled to additional discovery—either depositions or documents—concerning the subject matter of the privileged memoranda that the THI Receiver inadvertently produced.

CONCLUSION

For all of the foregoing reasons and those stated in Respondents' prior briefing on these issues (Dkts. 191 & 305), Respondents respectfully request that the Court issue an order (i) compelling the Trustee to return or destroy and refrain from using the documents described on the January 17, 2014 and March 6, 2014 privilege logs that Respondents 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 June 25, 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.

/s/ Jeffrey W. Warren
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