

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)	Chapter 11
NORTHSHORE MAINLAND)	Case No. 15-11402 (KJC)
SERVICES, INC., <i>et al.</i> , ¹)	
)	
Debtors)	Ref: D.I. 304, 424, 430
_____)		

**MEMORANDUM AND ORDER REGARDING REQUEST
FOR PROTECTIVE ORDER BY CCA BAHAMAS, LTD.**²

CCA Bahamas, Ltd. (“CCA”) filed a motion to dismiss with prejudice the Debtors’ chapter 11 cases pursuant to Sections 105(a), 109(a), 305(a), and 1112(b) of the Bankruptcy Code (D.I. 206) (the “Motion to Dismiss”). A hearing on the Motion to Dismiss is scheduled for August 28, 2015.

On August 6, 2015, CCA sent a letter to the Court requesting a protective order to prevent the Debtors from engaging in “unwarranted and inappropriate” discovery. (D.I. 304.) CCA wrote that “the Debtors seek . . . production of a broad array of unspecified documents ‘relating to’ communications between the government of The Bahamas and CCA Bahamas, and their respective affiliates, advisors, and others.” CCA objected to the Debtors’ requests on a number of grounds, including that certain documents are protected by the attorney-client and work product privileges and, further, that the exchange of information between CCA and the Bahamian government is

¹ The Debtors in the jointly administered chapter 11 cases are: Northshore Mainland Services, Inc., Baha Mar Enterprises, Ltd., Baha Mar Entertainment Ltd., Baha Mar Land Holdings Ltd., Baha Mar Leasing Company Ltd., Baha Mar Ltd., Baha Mar Operating Company Ltd., Baha Mar Properties Ltd., Baha Mar Sales Company Ltd., Baha Mar Support Services Ltd., BML Properties Ltd., BMP Golf Ltd., BMP Three Ltd., Cable Beach Resorts Ltd., and Riviera Golf Ventures Ltd. (the “Debtors”).

² This Memorandum constitutes the findings of fact and conclusions of law, as required by Fed.R.Bankr.P. 7052. This Court has jurisdiction to decide the Motion pursuant to 28 U.S.C. §157 and §1334. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A).

protected by a common interest or community of interest privilege.³ The Debtors responded to the CCA letter. (D.I. 317; *see also* D.I. 310 and D.I. 319.) The Export-Import Bank of China (“CEXIM”) also sent the Court a letter seeking a protective order from the Debtors’ discovery requests on similar grounds. (D.I. 312, D.I. 321.)

At an August 10, 2015 hearing to consider the discovery disputes, I ordered CCA and CEXIM to provide the Debtors with a detailed privilege log for any documents they claimed as privileged. (Tr. 8/10/2015 at 32:22 - 33:3) (D.I. 338).

On August 17, 2015, CCA produced more documents and a privilege log identifying 302 documents that were withheld under the common interest doctrine. On August 18, 2015, CCA produced additional documents and a supplemental privilege log containing two categorical entries for 168 documents. On August 20, 2015, a telephonic conference was held to consider the Debtors’ argument that CCA’s privilege logs lacked sufficient detail. I ordered the parties to meet and confer on August 21, 2015 and, if the parties could not resolve the issues, then they should submit letters to the Court describing the outstanding discovery issues.

On August 21, 2015, the Debtors send another discovery dispute letter to the Court. (D.I. 424.) CCA filed a response (D.I. 430) and hearing was held on August 25, 2015. At the end of the hearing, I ordered CCA to provide copies of the documents which it claimed were subject to the common interest privilege to be delivered to chambers on August 26, 2015 for *in camera* review. I have reviewed them.⁴

³ In *Teleglobe*, the Court distinguished between “common interest” (i.e., when multiple clients hire the same counsel to represent them on a matter of common interest), and “community of interest” (i.e., when clients with separate attorneys share otherwise privileged information in order to coordinate their legal activities). *In re Teleglobe Commc’n Corp.*, 493 F.3d 345, 359 (3d Cir. 2007). While the matter before me falls into the “community of interest” category, the parties, here, as do many courts, use the terms interchangeably.

⁴ The documents delivered by CCA matched those designated on the August 17, 2015 privilege log, except that CCA failed to produce documents listed as numbers 285 through 300.

“[T]he community-of-interest privilege allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others.” *In re Teleglobe Commc’n Corp.*, 493 F.3d 345, 364 (3d Cir. 2007). “It expands the reach of the attorney-client privilege and the work product doctrine by providing that, under certain circumstances, the sharing of privileged communications with third parties does not constitute a waiver of the privilege.” *In re Leslie Controls, Inc.*, 437 B.R. 493, 496 (Bankr.D.Del. 2010). “[M]embers of the community of interest must share at least a substantially similar legal interest.” *Teleglobe*, 493 F.3d at 365. The privilege should not be used as a *post hoc* justification for impermissible disclosures, but should apply when attorneys, not clients, decide to share information in order to coordinate legal strategies. *Id.*

“The burden of establishing each of the elements of the privilege rests on the party asserting it.” *In re Rivastigmine Patent Litig.*, No. 05-MC-1661, 2005 WL 2310995, * (S.D.N.Y. Sept. 22, 2005). *See also Teleglobe*, 493 F.3d 365, n. 22. To establish a community of interest privilege, the party must demonstrate that (1) the communication was made by separate parties in the course of a matter of common interest (or, in accordance with *Teleglobe*, a substantially similar legal interest); (2) the communication was designed to further that effort, and (3) the privilege was not otherwise waived. *In re Mortg. & Realty Trust*, 212 B.R. 649, 653 (Bankr. C.D.Cal. 1997).

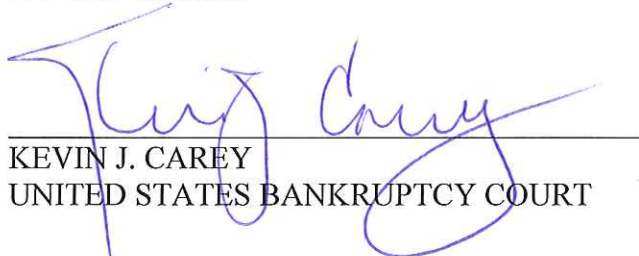
In this matter, CCA argues that it shared a common legal interest with the Bahamian government in establishing The Bahamas as the appropriate forum for the Debtors’ insolvency proceeding. There is no written agreement between CCA and the Bahamian government reflecting the parties’ intent to engage in conduct designed to fall within the community of interest privilege. Here, the parties assert that their “agreement” is reflected in the documents submitted for *in camera* review. Indeed, many communications between and among counsel bear the legend

“CONFIDENTIAL - COMMON INTEREST PRIVILEGE ASSERTED.” CCA also argues that this common legal interest began on June 30, 2015. The documents show that CCA and the Bahamian government shared a common legal interest, but do not reflect that the parties asserted the shared interest prior to July 15, 2015.

CCA asserts that CEXIM also shared the common legal interest with CCA and the Bahamian government in establishing the Bahamas as the appropriate forum for the Debtors’ insolvency proceeding starting on July 14, 2005. However, the documents submitted fail to provide sufficient evidence to support a conclusion that CEXIM joined in the assertion of a community of interest privilege at that time. *See Rivastigmine*, 2005 WL 2319005 at *4 (Although no formal written agreement regarding a common legal interest is required, “parties relying on an oral agreement run the risk that the Court can not determine when or if an agreement was reached.”)

Accordingly, CCA’s request for a protective order will be granted, in part, and denied, in part. CCA is directed to turn over to the Debtors those documents reflected in the privilege log, as supplemented, as are consistent with the foregoing ruling **no later than 3:00 p.m. (Eastern) today**.

BY THE COURT:



KEVIN J. CAREY
UNITED STATES BANKRUPTCY COURT

DATED: August 27, 2015

cc: Laura Davis Jones, Esquire⁵

⁵ Counsel shall serve a copy of this Memorandum and Order upon all interested parties and file a Certificate of Service with the Court.