

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 7
)	
SIMPLEXITY, LLC, <i>et al.</i>,	)	Case No. 14-10569(KG)
	)	(Jointly Administered)
<u>Debtors.</u>)	
CHARLES A. STANZIALE, JR., Chapter 7)	
Trustee for the Estates of Simplexity, LLC, <i>et al.</i> ,)	
)	
Plaintiff,)	
)	
v.	)	Adv. Pro. No. 16-50212(KG)
)	
VERSA CAPITAL MANAGEMENT, LLC, <i>et al.</i> ,)	
)	
<u>Defendants.</u>	)	Re Dkt. No. 76

OPINION

Charles A. Stanziale, Chapter 7 Trustee for the Estates of Simplexity, LLC, et al., (“Simplexity”), has pending the Motion for the Chapter 7 Trustee to Compel Production of Documents Withheld by Versa Capital Management, LLC [“Versa”] and Sullivan & Cromwell LLP [“S&C”] on the Basis of Privilege, (the “Motion”). The Trustee is seeking the production of documents that Versa and S&C withheld on the basis of attorney-client and work product privilege. The Trustee seeks the documents in connection with the adversary proceeding he is advocating on behalf of Simplexity and associated entities.

Versa previously produced to the Trustee numerous documents, including 2,355 documents that were subject to a Versa and Simplexity joint client privilege. The documents produced included such matters as forbearance agreements, intellectual property issues, litigation, employment matters and negotiation of commercial

agreements. However, Versa withheld 1,093 documents on the basis that they were protected by Versa's own attorney-client privilege. The withheld documents fit into several categories: (1) those created after S&C withdrew from representing Simplexity; (2) documents which pertain to matters unrelated to Simplexity, or (3) documents which concern matters on which Versa and Simplexity did not share a common interest.

The Trustee's arguments in favor of obtaining the withheld documents are: (1) he controls the privilege and is waiving it, (2) Versa and S&C failed to meet their burden to prove the documents are protected from disclosure and (3) as long as persons connected with both Versa and Simplexity received the documents, the privilege was waived.

Jurisdiction

The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

Facts

The uncontested facts are described below. Debtors filed for relief under Chapter 11 of the Bankruptcy Code and thereafter the Court converted the cases to cases under Chapter 7 of the Bankruptcy Code. The Debtors are Simplexity, Simplexity MVNO Services, LLC ("Services") and Adeptio INPC Holdings, LLC ("Holdings"). Simplexity was wholly owned by Holdings, which was also its sole member. Simplexity's

managers were also Versa officers and employees. The relationships are as follows:

Gregory L. Segall - Versa's chairman and chief executive officer was a Simplicity manager and authorized signatory for Holdings.

Paul Halpern - Versa's chief investment officer was a Simplicity manager and signatory for Holdings.

Raymond C. French - Versa's chief investment officer was a Simplicity manager and signatory for Holdings.

David S. Lorry - Versa managing director was also a manager of Simplicity and an authorized signatory for Holdings.

Thomas S. Kennedy - Versa's general counsel was also a secretary for Holdings and assistant secretary for Simplicity and Services.

Randall R. Schultz - Versa's chief financial officer was chief financial officer for Simplicity and Services and an authorized signatory for Holdings.

In the adversary proceeding the Trustee asserts as claims breach of fiduciary duty, aiding and abetting the breach, piercing the corporate veil and avoidance of preferential transfers. The Trustee's argument is that because the Versa defendants also received documents as Simplicity managers, the privilege was waived. The Trustee argues that there are no "split brains" and that the Versa defendants also received and saw the material in their dual role on behalf of Simplicity.

Burden of Proof

As so often happens, the determination of which party bears the burden of proof is an important factor in the outcome. There is no question that the burden rests with the Trustee. It is the Trustee who argues that the joint client adverse litigation exception

to the attorney-client privilege exists and it is the Trustee's burden to prove its existence. It is not the burden of Versa and S&C to prove that the exception to the attorney-client privilege does not exist. The burden of proof is on the party seeking the disclosures. *See, e.g., In re Flonase Antitrust Litig.*, 723 F. Supp. 2d 761, 765 (E.D. Pa. 1010) (noting that the burden of showing the existence of an exception to the attorney-client privilege rests with the party seeking production); *Sky Valley Ltd. P'ship v. ATX Sky Valley, Ltd.*, 150 F.R.D. 648, 656 n. 15 (N.D. Cal. 1993) (holding the burden is on the party claiming the exception).

Joint Representation

The Trustee's argument in support of the exception is primarily this: the requested documents were shared with people who served both Versa and Simplicity and therefore the attorney-client privilege was waived. All of the parties rely heavily on the two *Teleglobe* decisions, *Teleglobe USA Inc. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.)*, 493 F. 3d 345 (3d Cir. 2007) ("*Teleglobe I*"), and on remand, *In re Teleglobe Commc'ns Corp.*, 392 B.R. 561 (Bankr. D. Del. 2008) ("*Teleglobe II*").

In *Teleglobe I*, the Third Circuit addressed a situation in which subsidiary corporations sought privileged documents from a parent corporation on the basis that there was a joint representation. There, the trustee for debtor Teleglobe USA, Inc. ("*Teleglobe*"), a wholly owned subsidiary of BCE, Inc. ("*BCE*"), its parent, sought privileged documents from BCE. Teleglobe argued that because BCE's in house lawyer

had advised BCE and Teleglobe on matters relating to Teleglobe, the privilege belonged not only to BCE, but also to Teleglobe which was waiving the privilege. In *Teleglobe I*, the Third Circuit ruled that “absent some compelling reason to disregard entity separateness, in the typical case, courts should treat the various members of the corporate group as the separate corporations they are.” *Teleglobe I*, 493 F. 3d at 372. Further, a court should not find that a waiver of privilege has occurred simply because an officer of the parent also serves as an officer of the subsidiary. *Id.*

The Third Circuit in *Teleglobe I* thus held that: “[w]hether individuals have jointly consulted a lawyer or have merely entered concurrent but separate representations is a fact-laden inquiry determined by the understanding of the parties and the lawyer in light of the circumstances.” *Teleglobe I*, 493 F. 3d at 362. The Third Circuit went on to say that co-clients “legal interests must be identical (or nearly so)” for the joint representation to exist. *Id.* at 366. On remand, the Bankruptcy Court found that “[s]imply because Teleglobe, and possibly the Debtors, were the subject of communications between BCE and its attorneys does not mean that they were clients of BCE’s attorneys.” *Teleglobe II*, 392 B.R. at 509. Indeed, the Third Circuit found that “it does not break confidence to share an attorney-parent communication with an officer of the parent in her capacity as officer of the parent, even though she is also a director or officer of a subsidiary.” *Teleglobe I*, 493 F. 3d at 372, quoting *U.S. v. Bestfoods*, 524 U.S. 51, 69 (1998).

The Trustee has adduced no evidence to rebut the foregoing presumptions. He argued the Motion forcefully but made no attempt to introduce facts in support of his argument. In contrast, Versa submitted the Declaration of Thomas A. Kennedy, Esq. in Support of the Versa Defendants' Response to the Motion to Compel filed by the Chapter 7 Trustee (D.I. 91-1) ("Kennedy Dec."). Mr. Kennedy is Versa's general counsel. He also served as the secretary of Holdings and as assistant secretary of Simplicity and Services. Mr. Kennedy declared that S&C represented Versa and not Debtors (which includes Holdings, Simplicity and Services) on matters which included:

- "a. Transactions involving other portfolio companies owned by Versa;
- b. Versa's attempt to sell Debtors in 2013 and early 2014.
- c. The guaranty of the Debtors' obligations granted to Fifth Third Bank . . . ;
- d. Versa's funding of the Debtors via Adeptio Funding, LLC and the related Amended and Restated Demand Promissory Note."

Kennedy Dec., ¶ 5. Further, Versa expected that confidential communications between it and S&C would remain confidential, that S&C withdrew its representation of Debtors effective March 7, 2014, and that S&C continued to represent Versa after its withdrawal from representing Debtors. Kennedy Dec. ¶¶ 6-8. The Trustee did not present evidence to challenge Versa's evidence. The Court will deny the Motion as further explained.

Documents Following S&C's Withdrawal

S&C withdrew as Debtors' counsel effective March 7, 2014, by letter dated March 10, 2014. It is clear that documents created after the end of representation are not

covered by joint representation. Mr. Kennedy declared that “[a]ll matters for which Sullivan & Cromwell provided legal representation to Versa after withdrawing from its representation of the Debtors were outside the scope of Sullivan and Cromwell’s joint representation of Versa and the Debtors.” Kennedy Dec., ¶ 9. Thus, 334 of the 1,093 withheld documents are included in this category and neither S&C nor Versa is required to produce such documents.

Matters Unrelated to Simplexity’s Interests

Clearly, documents which pertain to Versa and not Simplexity, Services or Holdings need not be produced. This category includes 242 of the 1,093 withheld documents.

Identical Interests not Shared

The Court recognizes that the parties’ interests must be identical or nearly identical for the joint-client privilege to apply. *See, e.g., In re Berks Behavioral Health LLC*, 500 B.R. 711, 721-22 (Bakr. E.D. Pa. 2013). The matters involving interests which Versa and Simplexity did not share, as set forth in the Kennedy Dec. at ¶ 5, involve Versa’s guaranty, funding of Debtors, efforts to sell Debtors and Holdings’ agreement to subordinate its rights to repayment by Simplexity to FTB’s rights. Such subjects are not covered by a joint-client privilege. For Versa’s efforts to sell Debtors, the Third Circuit specifically noted that “parents and subsidiaries will see their interests diverge, particularly in spin-off, sale, and insolvency situations.”

CONCLUSION

The Court will deny the Motion for the foregoing reasons.

Dated: December 4, 2017



KEVIN GROSS, U.S.B.J.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 7
)	
SIMPLEXITY, LLC, <i>et al.</i>,	)	Case No. 14-10569(KG)
	)	(Jointly Administered)
<u>Debtors.</u>)	
CHARLES A. STANZIALE, JR., Chapter 7)	
Trustee for the Estates of Simplexity, LLC, <i>et al.</i> ,)	
)	
Plaintiff,)	
)	
v.	)	Adv. Pro. No. 16-50212(KG)
)	
VERSA CAPITAL MANAGEMENT, LLC, <i>et al.</i> ,)	
)	
<u>Defendants.</u>	)	Re Dkt. No. 76

ORDER

Charles A. Stanziale, Chapter 7 Trustee for the Estates of Simplexity, LLC, and others, filed the Motion of the Chapter 7 Trustee to Compel Versa Capital Management, LLC [“Versa”] and Sullivan & Cromwell LLP [“S&C”] to Produce Documents and Information Withheld on the Basis of Asserted Attorney-Client Privilege or Work Product (the “Motion”). Versa and S&C filed responses in opposition to the Motion and the Court heard oral argument on November 27, 2017. Now, having read the papers in support of and in opposition to the Motion, and having heard the parties’ arguments,

IT IS ORDERED that the Motion is denied.

Dated: December 4, 2017



KEVIN GROSS, U.S.B.J.