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WHO'S IN CONTROL?:
AN OVERVIEW OF CONTROL OF THE ATTORNEY-CLIENT PRIVILEGE IN CORPORATE AND CONSUMER BANKRUPTCY PROCEEDINGS

By Nathan A. Wheatley[1]

I. INTRODUCTION

The bankruptcy process in general, and a bankruptcy proceeding specifically, can be a fast-paced environment that is not always conducive to careful planning and forethought. In the hustle and bustle of this process, the issue of who possesses the right to assert or waive the attorney-client privilege can often fall by the way side, only to re-surface at inopportune times. This article is intended to provide a brief overview of the attorney-client privilege and who controls and directs the privilege in bankruptcy.

II. THE ATTORNEY-CLIENT PRIVILEGE

A party to litigation may discover evidence which is 1) relevant and 2) non-privileged. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[2] Under this definition, there is a wide range of evidence that is discoverable. However, a key limitation on discovery is the existence of a privilege.[3] If a document or communication is privileged, it may be withheld from opposing counsel and may only be discovered under very limited circumstances.

One of the most well-established forms of privilege is the attorney-client privilege.[4] If information is subject to the attorney-client privilege, the rules of procedure and evidence will not require a party to disclose such privileged information, and will not permit such information to be entered into evidence.[5]

What is the Attorney-Client Privilege?

According to the United States Supreme Court in *Upjohn Company v. United States*, the attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.[6] Its purpose is to "encourage full and frank communication between attorneys

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[2] Fed. R. Evid. 401.

[3] *Hickman v. Taylor*, 329 U.S. 495, 507-508, 67 S.Ct. 385 (1947) (stating that discovery has ultimate and necessary boundaries that come into existence when the inquiry touches on the irrelevant or encroaches upon the recognized domains of privilege.)

[4] *Ross v. City of Memphis*, 423 F.3d 596, 600 (6th Cir. 2005) (attorney-client privilege is the oldest of the privileges for confidential communication known to the common law).

[5] *United States v. Lentz*, 524 F.3d 501, 524 (4th Cir. 2008) (stating that it is a well settled principal of law that confidential conversations between a defendant and his counsel generally are protected by the attorney-client privilege, which afford the communication complete protection from disclosure.)

[6] 449 U.S. 383, 389, 101 S.Ct. 677 (1981).

and their clients and thereby promote broader public interests in the observance of law and administration of justice."[7]

The attorney-client privilege protects the confidentiality of communications between an attorney and the client made for the purpose of securing legal advice.[8] To invoke the privilege, a party must demonstrate: 1) a communication between client and counsel that 2) was intended to be and was in fact kept confidential, and 3) was made for the purpose of obtaining or providing legal advice.[9]

Scope of the Attorney-client Privilege

Any individual, entity, or government body that seeks the advice of an attorney and establishes an attorney-client relationship will be considered a client that has the right to assert privilege over its communications with his/its attorney(s).[10] Moreover, the attorney-client privilege is not limited to oral communications between attorney and client. It also attaches to documents prepared for the purpose of seeking legal advice, legal opinions, legal services, or assistance in a legal proceeding.[11]

However, while the attorney-client privilege extends to communications and documents, it does not protect the discovery of underlying facts.[12] Therefore, while a client cannot be asked what he communicated to his attorney, he may not refuse to disclose factual information simply because it was incorporated into a communication with his attorney.[13]

Finally, the attorney-client privilege extends to communications with both in-house and outside counsel, and can even attach to communications between the corporation's attorney and employees of all levels within a company.[14]

Controlling law

The laws governing attorney-client privilege depend on the type of claim being asserted. In federal courts, the attorney-client privilege is governed by "the principles of the common law as it may be interpreted by the court of the United States in light of reason and experience."[15] However, Federal Rule of Evidence 501 provides that, in civil actions with respect to an element of a claim or defense over which State law controls, privilege shall be determined in accordance with State law.[16] Therefore, if federal law determines the substantive rights of the parties, then

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[7] *Id.*
[8] *In re Grand Jury 90-1*, 758 F. Supp. 1411, 1412 (D. Colo. 1991).
[9] *Pritchard, et al. v. The County of Erie, et al. (in re the County of Erie)*, 473 F.3d 413, 419 (2nd Cir. 2007).
[10] *Ross*, 423 F.3d at 602-603.
[11] *Clarke v. American Commerce Nat. Bank*, 974 F.2d 127, 129 (9th Cir. 1992).
[12] *Upjohn*, 449 U.S. at 395 (citing *Philadelphia v. Westinghouse Electric Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962)).
[13] *Id* at 396.
[14] *Id* at 394-397 (finding privilege of low-level employee questionnaires was necessary for attorneys to render adequate legal advice to their corporate client).
[15] *United States v. BDO Seidman, LLP*, 492 F.3d 806, 814 (7th Cir. 2007).
[16] FED R. EVID. 501; The Federal Rules of Evidence apply in cases under the Bankruptcy Code pursuant to Federal Rule of Bankruptcy Procedure 9017 and Federal Rule of Evidence 1101.

the federal common law of privilege governs; but if the underlying claim or defense is governed by State law, then the State privilege law will control.[17]

Control of Attorney-Client Privilege and Waiver

It is well established that the attorney-client privilege is held and controlled by the client and not the attorney.[18] Therefore, while the attorney-client privilege is most often asserted by the attorney on behalf of the client, ultimately it is the client, and not legal counsel, who may choose to assert the privilege or waive its protections.[19]

The attorney-client privilege may also be waived through a variety of means,[20] including affirmative disclosure,[21] conduct inconsistent with confidentiality,[22] and if the client places in issue a communication that that goes to the heart of a claim in controversy.[23] To determine if the privilege has been waived, courts will examine whether there has been a disclosure of a "significant part" of a privileged communication.[24]

Who is the client?

Given the importance of the control of the attorney-client privilege and the ability to either assert or waive said privilege, identifying the client is a critical task. Until such a determination is made, there may be a dispute as to who has the right to assert the attorney-client privilege.

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[17] *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 254 (Bankr. S.D. N.Y. 2005).

[18] *See Chirac v. Reinicker*, 24 U.S. 280 (1826).

[19] *See Fisher v. U.S.*, 425 U.S. 391, 96 S.Ct. 1569 (1976); *See Hunt v. Blackburn*, 128 U.S. 464, 9 S.Ct. 125 (1888).

[20] First, privilege is waived if documents are produced without objection to their privileged nature. *See Steen v. First Nat. Bank*, 298 F. 36 (C.C.D. Mo. 8th Cir. 1924). Second, privilege is waived when the client makes a disclosure that is inconsistent with the confidentiality of the attorney-client privilege. *See Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323 (N.D. Cal. 1985). While some courts have found that the disclosure must be voluntary and intentional, other courts have found inadvertent disclosures also waive privilege. *Compare People v. Gardner*, 198 Ca. Rptr. 452 (Cal Ct. App. 1984) *with In re Pioneer Hi-Bred Intern., Inc.*, 238 F.3d 1370 (Fed. Cir. 2001). In some cases, the mere presence of third persons during an otherwise privileged communication will waive privilege. *See State v. Barnhart*, 442 P.2d 959 (Wash. 1968). Third, privilege can also be waived when a client has, "placed in issue a communication which goes to the heart of the claim in controversy." *Chicago Title Ins. Co. v. Superior Court*, 220 Cal. Rptr. 507, 512 (Cal. Ct. App. 1985).

[21] Attorney-client privilege is waived if documents are produced without objection to third-parties, or the substance of privileged communications is revealed to third-parties. *In re Grand Jury Proceedings*, 78 F.3d 251, 254 (6th Cir. 1996). (Affirmative disclosures may not waive the attorney work-product protections. *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).)

[22] In many cases, the mere presence of third persons during an otherwise privileged communication may waive privilege. *See Barnhart*, 442 P.2d 959. While some courts have found that the disclosure must be voluntary and intentional, other courts have found inadvertent disclosures also waive privilege. *Compare Gardner*, 198 Ca. Rptr. 452 *with In re Pioneer Hi-Bred Intern., Inc.*, 238 F.3d 1370.

[23] *Chicago Title Ins. Co.*, 220 Cal. Rptr. at 512.

[24] *In re OM Securities Group Litigation*, 226 F.R.D. 579, 590 (N.D. Ohio 2005); *see In re Perrigo Co.*, 128 F.3d 430, 438 (6th Cir. 1997); *In re Dayco Corp. Derivative Securities Litigation*, 99 F.R.D. 616 (S.D. Ohio 1983) (no waiver of the attorney-client privilege because a "significant part" of an internal investigative report was not released where only a 2-page press release stating that an internal investigation had been conducted and providing only the findings and conclusions was produced).

Where the client is an individual, this question is easily answered. But what of those circumstances, far too common in the business world, where the client is a legal entity? And who within such legal entities possesses the ability to determine how and when the privilege will be asserted?

In the context of corporations, attorney-client privilege becomes more complex. As a legal fiction, a corporation must rely on agents to protect its interests. For solvent corporations, courts have held the attorney-client privilege is controlled by a corporation's management.[25] Members of management must act in a manner consistent with their fiduciary duty to act in the "best interests of the corporation and not of themselves as individuals."[26]

In regard to transitioning management, the Supreme Court has stated "new managers installed as a result of a takeover, merger, loss of confidence by shareholders, or simply normal succession, may waive the attorney-client privilege with respect to communications made by former officers and management."[27] Former managers have no control over the attorney-client privilege, even for communications made during their tenure.[28]

III. ATTORNEY-CLIENT PRIVILEGE IN THE BANKRUPTCY CONTEXT

The protections afforded by the attorney-client privilege are not eliminated by the commencement of a bankruptcy proceeding.[29] The same protections and burdens control within the bankruptcy forum as they apply outside of bankruptcy.[30]

This is not to say that the commencement of a bankruptcy proceeding has no affect upon the attorney-client privilege. Indeed, the ability of an individual or entity to assert the attorney-client privilege may be significantly affected by an insolvency proceeding, because the filing of a bankruptcy proceeding may transfer the authority to exercise or waive the protections of the attorney-client privilege from the debtor to another party. The remainder of this article will address how the federal courts resolve the issue of who controls the attorney-client privilege in the bankruptcy context.

IV. CORPORATE BANKRUPTCY PROCEEDINGS

In *Commodity Futures Trading Commission v. Weintraub*, the United States Supreme Court held that, because the attorney-client privilege is controlled outside of bankruptcy by a corporation's management, the actor whose duties most closely resemble those of management should control the privilege within bankruptcy.[31] Therefore, in the typical corporate Chapter 11

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[25] *See Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 349 (1985) (commenting the attorney-client privilege may be exercised by a solvent corporation's officers and directors).

[26] *Id.* (citing *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919)).

[27] *Id.*

[28] *Id.*

[29] *E.g. In re North Plaza, LLC*, 395 B.R. 113 (S.D. Cal. 2008).

[30] *Id.*

[31] *Weintraub*, 471 U.S. at 251-52 (unless this results in interference with the policies underlying the bankruptcy laws.)

bankruptcy proceeding, and in the absence of a bankruptcy trustee, the debtor in possession controls the corporation's attorney-client privilege.[32]

While interested parties, such as creditors' committees, have attempted to exercise the attorney-client privilege on behalf of a debtor or force a waiver of the attorney-client privilege on behalf of the debtor in possession, courts have held the *Weintraub* analysis does not extend the trustee's power to a creditor's committee.[33] However, under the "common interest privilege," attorney-client privileged communications between a debtor and the unsecured creditors' committee may be protected from disclosure where the communication at issue was in furtherance of the debtor's and the committee's common legal interest.[34] The common interest privilege exists where a communication is made by separate parties in the course of a matter of common interest, the communication was designed to further that effort, and the privilege has not been waived.[35]

Finally, where a trustee, including a liquidation trustee, is appointed in a bankruptcy proceeding, the attorney-client privilege can be expected to pass to that individual, provided that he or she has been vested with control over the debtor's bankruptcy estate or the particular claims to which the privilege applies.[36] This general rule also applies to those situations were an examiner has been appointed by the bankruptcy court,[37] or where a Chapter 7 Trustee is appointed after a Chapter 11 case has been converted to a Chapter 7 case.[38]

In light of the foregoing, best practices require that legal counsel consider both the scope and preservation of the attorney-client privilege in the bankruptcy forum, as well as the effect of the appointment of a trustee or examiner on the issue of control of the privilege. Moreover, because there is relatively little case law that directly addresses the transfer of the attorney-client privilege pursuant to a plan of reorganization or liquidation, when drafting a bankruptcy plan and/or liquidation trust agreement, the wise practitioner will expressly identify who will control the attorney-client privilege post-confirmation, the scope of such privilege, and the authority to assert or waive such privilege.[39]

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[32] *See In re Eddy*, 304 B.R. 591, 599 (Bankr. D. Mass. 2004); *In re Cenargo Int'l, PLC*, 294 B.R. 571, 601 n.37 (Bankr. S.D.N.Y. 2003); *Ramette v. Bame (In re Bame)*, 251 B.R. 367, 373 (Bankr. D. Minn. 2000).

[33] *Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman*, 342 B.R. 416, 421-23 (S.D. N.Y. 2006).

[34] *In re Value Property Trust v. Zim Co. (In re Mortgage & Realty Trust)*, 212 B.R. 649, 652-54 (Bankr. C.D. Cal. 1997).

[35] *Id.* (*citing In re Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 126 (3rd Cir. 1986); *Griffin v. Davis*, 161 F.R.D. 687, 692 (C.D. Cal. 1995)).

[36] *Weintraub*, 471 U.S. at 358 (the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege); *Official Committee of Unsecured Creditors v. Fleet Retail Finance Group (In re Hechinger Investment Co. of Delaware)*, 285 B.R. 601, 613 (D. Del. 2002) (finding that attorney-client privilege is controlled by liquidation trustee, to whom the debtor's litigation claims passed, pursuant to the terms of the plan and liquidation trust agreement.)

[37] *See In re Bioleau*, 736 F.2d 503, 506 (9th Cir. 1984) (finding examiner could waive privilege when granted powers normally held by a trustee).

[38] *Weintraub*, 471 U.S. at 352-54.

[39] *Hechinger*, 285 B.R. at 613 (holding that attorney-client privilege passed to liquidation trustee pursuant to liquidating plan); *See also, In re Hunt*, 153 B.R. 445, 454 (Bankr. N.D. Texas 1992) (refusing to permit the liquidation trustee to waive the debtors' attorney-client privilege and noting that the confirmed plan was silent as to the transfer of the privilege).

V. CONSUMER BANKRUPTCY PROCEEDINGS

While the question of who controls the attorney-client privilege in a corporate bankruptcy can be relatively straight forward, the issue of who controls the privilege in the context of a consumer bankruptcy is far more convoluted. This is because, first, the interests and protected liberties of an individual differ significantly from that of a corporation. Moreover, the Fifth Amendment provides protections to an individual that are unavailable to a corporation. Finally, because of the foregoing, the case law governing the control of the attorney-client privilege in an individual bankruptcy can vary between the federal circuits, and even within the circuits.

Because the Chapter 7 trustee, rather than the individual debtor, controls the assets of the bankruptcy estate in Chapter 7 bankruptcy proceedings, the principal question that must be addressed in any Chapter 7 bankruptcy is whether the debtor or the Chapter 7 trustee controls the attorney-client privilege. Generally, judicial opinions fall within three distinct groups: those that permit the trustee to control the attorney-client privilege in individual bankruptcies; those that give the individual debtor exclusive control over the attorney-client privilege; and the final group, which utilize a balancing test based upon the facts and circumstances of a specific bankruptcy to determine whether the individual debtor or the Chapter 7 trustee controls the privilege. Extreme care should be taken to determine which methodology your jurisdiction follows if the attorney-client privilege is likely to be an issue in a bankruptcy proceeding.

a. Trustee-control of privilege

The first category of decisions are those which hold the attorney-client privilege passes from the individual debtor to the Chapter 7 trustee upon the commencement of the bankruptcy proceeding. In these cases, courts hold that the trustee has absolutely control of the privilege, and may waive or assert the privilege despite objections from the debtor.[40] Thus far, the only reported case where the court employed the "trustee-control" approach in its "pure" form to an individual debtor's Chapter 7 bankruptcy proceeding is the Bankruptcy Court for the Southern District of Florida in the *In re Smith* case.[41]

Courts that have adopted a version of the "pure trustee-control" approach for both individual and corporate bankruptcies generally allow that a trustee must have access to relevant information to make a fair and accurate disposition of a debtor's assets.[42] Therefore, the trustee must be permitted to waive or assert the attorney-client privilege as necessary. The other appeal of this approach is that it provides a "bright line" rule that can be quickly and consistently implemented by the bankruptcy courts. However, critics of this approach argue that it has a chilling effect on communications, and discourage full and frank communications between a debtor and his counsel.[43]

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[40] *See In re Smith*, 24 B.R. 3, 4 (Bankr. S.D. Fla. 1982); e.g., *In re Williams*, 152 B.R. 123, 124 (Bankr. N.D. Texas 1992) (stating that, under confirmed Chapter 11 plan, transfer of right to pursue avoidance actions also effects transfer of evidentiary privileges).

[41] *Id.*

[42] *See, In re Williams*, 152 B.R. at 129.

[43] *Trustees: The Ability to Waive the Debtor's Attorney-Client Privilege*, 106 Com. L.J. 1, *10 (Spring 2001); *Fifteen Years After Weintraub: Who Controls the Individual's Attorney-Client Privilege in Bankruptcy?*, 80 B.U.L. Rev. 635, 661 (April 2000).

b. Debtor-control of privilege

The second, and slightly more accepted, category of cases adopts the opposite approach. In these cases, the debtor rather than the trustee maintains exclusive control over the exercise of the attorney-client privilege.[44] Those courts that have adopted the "debtor-control" approach have generally done so based upon three guiding principals: first, unlike a corporate entity, an individual has an expectation to always remain in control of the attorney-client privilege; second, an individual has a greater interest in privacy than a corporate entity; and finally, the ability of a Chapter 7 trustee to waive the attorney-client privilege of an individual debtor would likely have a chilling effect on communications between an individual and his attorney.[45]

Like the "trustee-control approach, this position has the advantage of providing a black-letter rule of law that permits consistent application. However, critics of this approach are quick to point out: 1) the "expectation of control of the privilege" argument is invalid because both corporate entities and individuals can possess expectation and beliefs concerning their control of the attorney-client privilege; 2) not all debtors can be expected to be forthcoming to the bankruptcy court, and may use the attorney-client privilege as a method for concealing assets or defrauding the bankruptcy court; and 3) not all debtors can be expected to know when it may be in their best interests to waive the attorney-client privilege.[46]

c. Balancing test

The final category of cases utilizes a so-called "balanced approach" to determining who controls the attorney-client privilege by considering the unique facts of each case. Under the balancing test, the court weighs the interests of the debtor in preserving the privilege, and the potential harm that could result from its waiver, against the ability of the trustee to carry out his statutory duties and uphold the underlying policies of the bankruptcy code.

In rejecting the bright-line approaches of the preceding two doctrines, courts employing the balance test consider the interests of the debtor in preserving the attorney-client privilege, and weigh such interests against the obligations imposed upon the Chapter 7 trustee and the goals of a bankruptcy proceeding. In application, this test can have very different results depending upon the circumstances of each case. For example, in *In re Bazemore*, generally regarded as a seminal case for the balance test approach, the Bankruptcy Court for the Southern District of Georgia permitted the Chapter 7 trustee to waive the attorney-client privilege in order to permit the examination of the debtors' legal counsel regarding his pre-petition representation of the debtors in a personal injury lawsuit.[47] In reaching its decision, the *Bazemore* court considered *Weintraub's* mandate that such inquiry requires balancing the interests of "a full and frank discussion in the attorney-client relationship and the harm to the debtor upon a disclosure with the trustee's duty to maximize the value of the debtor's estate," and found that, because the trustee wished to waive the attorney-client privilege for the purposes of determining whether the

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[44] E.g., *McClarty v. Gudenau*¸ 166 B.R. 101, 102 (E.D. Mich. 1994) (holding that debtor, and not trustee or bankruptcy court, can determine whether to waive attorney-client privilege); *In re Silvio De Lindegg Ocean Dev. of America, Inc*., 27 B.R. 28 (Bankr. S.D. Fla. 1982).
[45] *McClarty*, 166 B.R. at 102 (citing *In re Hunt*, 153 B.R. at 450-53).
[46] *Trustees: The Ability to Waive the Debtor's Attorney-Client Privilege*, 106 Com. L.J. at 13-14.
[47] *Moore v. Eason (In re Bazemore)*, 216 B.R. 1020 (Bankr. S.D. GA 1998).

debtors have a claim against their attorney and insurer, no harm would come to the debtors.[48] In contrast, permitting the trustee to waive the privilege would permit the trustee to comply with her statutory duty to investigate the potential assets of the debtors' estates and maximize their value.[49]

In contrast to the *Bazemore* case, the Bankruptcy Court for the Northern District of Ohio in *In re Miller* applied the balance test set forth in *Bazemore* and held that, because the Chapter 7 trustee and the debtors were in an adversarial relationship, it would be improper to permit the trustee to waive the attorney-client privilege.[50] In *Miller* the Chapter 7 trustee was attempting to set aside the debtors' Chapter 7 discharged based upon the debtors' receipt and expenditure of estate assets post-discharge.[51] Additionally, there was a very real possibility that the information obtained by the trustee as a result of his waiver of the privilege could be used against the debtors in a subsequent criminal prosecution for violations of the Bankruptcy Code.[52] As a result, the bankruptcy court held that, because the potential harm to the debtors was particularly acute and because the trustee would not be significantly hampered in his representation of the estate if the privilege was not waived, the Chapter 7 trustee was not authorized to waive the attorney-client privilege.[53]

While the *Bazemore* and the *Miller* cases reached different results, they both employ a balancing test based upon the language of the *Weintraub* decision and are indicative of the dominant trend in bankruptcy case law in Chapter 7 bankruptcy proceedings.[54]

VI CONCLUSION

The importance of the attorney-client privilege to a debtor, and the variance between the treatment of corporate and individual debtors with regard to control of the privilege, necessitates a bankruptcy practitioner carefully weigh considerations of the attorney-client privilege prior to the commencement of a bankruptcy proceeding, or as soon thereafter as practicable.

Control of the corporate debtor's attorney-client privilege will pass to that entity which most closely resembles management, whether that entity is the debtor-in-possession or a trustee. The loss of control of the attorney-client privilege can have unfortunate and unpredictable results on a corporate debtor. Therefore, as part of insolvency planning, management of the potential corporate debtor should be informed of, and carefully weigh the risks of, the potential loss of control of the attorney-client privilege and consider its impact on the corporate entity. Similarly, a bankruptcy practitioner must consider the potential effect of the threatened or actual appointment of a Chapter 7 or Chapter 11 trustee upon the privilege. Finally, when preparing a proposed bankruptcy plan, the debtor should expressly identify whether the attorney-client

[48] *Id.* at 1024.
[49] *Id.* at 1024-25.
[50] *French v. Miller (In re Miller),* 247 B.R. 704 (Bankr. N.D. Ohio 2000).
[51] *Id.* at 706-7.
[52] *Id.* at 710
[53] *Id.* at 710-11.
[54] *In re Pearlman,* 381 B.R. 903, 910 (Bankr. M. D. Fla. 2007) (stating that the majority of courts employ a balancing test whereby "the specific facts of a case are evaluated and balanced, including the risk of harm to the debtor versus the benefit to the estate.")

privilege will be conveyed to a non-debtor party, as well as the scope and potential impact of such a transfer; in the absence of such provision, established case law will control.

With regard to the consumer debtor, the current majority approach clearly favors the balancing test for determining whether the debtor or a trustee may exercise control over the attorney-client privilege. Because this test requires consideration of the unique facts surrounding each case, prior to commencing a bankruptcy proceeding counsel for a consumer debtor should consider what effect, if any, transfer of control of the attorney-client privilege to a trustee may have upon his client and how the debtor will respond to such a request by a trustee. Conversely, prior to a trustee attempting to waive the attorney-client privilege on behalf of a consumer debtor, the trustee should be prepared to articulate the bases upon which a bankruptcy court may decide that the interests of the individuals in maintaining the privilege are overcome by the duties and obligations set forth within the Bankruptcy Code.

Finally, whether representing a corporate debtor, consumer debtor, or trustee, a bankruptcy attorney must carefully consider the issues surrounding the attorney-client privilege and its potential impact upon the client. As in most things, the keys to success with regard to the issues surrounding privilege are research, deliberation and preparedness.



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Insights

IN BANKRUPTCY, ATTORNEY-CLIENT PRIVILEGE IS NOT ABSOLUTE

The U.S. Bankruptcy Code gives debtors access to powerful rights and remedies that are not available under non-bankruptcy law. As a balance to these extraordinary powers however, a debtor may lose some or all control over its own affairs under certain circumstances. One of the rights that the debtor "puts into play" when it files bankruptcy is the attorney-client privilege (the Privilege). This article addresses two ways in which a debtor can lose the right to assert the Privilege, and similarly how creditors, trustees, and interested parties can succeed in obtaining privileged communications during the bankruptcy proceeding.

Trustees' Control Of Attorney-Client Privilege

In *Commodity Futures Trading Comm'n v. Weintraub*[1] the U.S. Supreme Court held that the "trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to pre-bankruptcy communications."[2] In *Weintraub*, the debtor was a discount commodity brokerage house registered with the Commodity Futures Trading Commission (CFTC). Before the filing of the bankruptcy petition, the debtor was under investigation by the CFTC. Shortly after the debtor filed a petition under Chapter 7 of the Bankruptcy Code, the CFTC subpoenaed the debtor's former counsel seeking testimony regarding various matters, including suspected fraudulent activities. The former counsel refused to answer certain questions, asserting the debtor's attorney-client privilege. At the request of the CFTC, the Chapter 7 trustee waived the attorney-client privilege on behalf of the debtor. The CFTC then succeeded in compelling the former attorney to comply with the subpoena. In support of its holding, the Supreme Court concluded that "vesting in the trustee control of the corporation's attorney client-privilege most closely comports with the allocation of the waiver power to management outside of bankruptcy without in any way obstructing the careful design of the Bankruptcy Code."[3]

The Supreme Court in *Weintraub* was clear that their holding "ha[d] no bearing on the problem of individual bankruptcy." The lack of guidance from the Supreme Court and Circuit Courts has produced much conflicting case law on the issue. Generally, courts fall within three groups when deciding who controls the Privilege during a bankruptcy proceeding: those that: (1) permit the trustee to control the Privilege; (2) permit the debtor to control the Privilege; and (3) utilize a balancing test based upon the facts and circumstances of the case to determine who controls the Privilege.[4] A recent bankruptcy court commented that the trend of the cases is toward a balancing approach.[5] The authors have not found a single reported decision in the Second Circuit to address who controls the Privilege in an individual's bankruptcy.

A business (or individual) filing under Chapter 11 of the Bankruptcy Code still risks losing control of the Privilege. Unlike in a Chapter 7 case where a trustee is appointed by operation of law, a Chapter 11 debtor enjoys the rights and responsibilities of a trustee (a "debtor-in-possession" in bankruptcy parlance) and can continue operating its business. However, under §1104 of the Code, a trustee can be appointed by motion (which is very unusual). In addition, under §1104 a case that is filed as a Chapter 11 can later be converted to a Chapter 7 case if, among other things, the debtor fails to reorganize (which is much less unusual). Lastly, courts have allowed examiners,[6] similar to a trustee but whose role is much more limited, to assume control of a debtor- in-possession's Privilege, as was the case in the *Enron* bankruptcy.

Fraudulent Transfers And Crime-Fraud Exception

Not only is there a concern that the Privilege is waived by a bankruptcy trustee, the crime-fraud exception (the Exception) may expose attorney-client communications made in furtherance of an alleged fraudulent transfer that occurred prior to the bankruptcy. Although fraudulent transfer claims exist under both state law and bankruptcy law, fraudulent transfer litigation more commonly arises in bankruptcy.

In the Second Circuit, application of the Exception applies where there is: (1) a determination that the client communication or attorney work product in question was itself in furtherance of the crime or fraud; and (2) probable cause to believe that the particular communication with counsel or attorney work product was intended in some way to facilitate or to conceal the criminal or fraudulent activity.[7] The fact that the communication itself might provide evidence of a fraud or crime is not enough to vitiate the Privilege. Moreover, the Exception applies even if the attorney was not aware that the advice was sought in furtherance of an improper purpose.

Attorneys do not usually perceive an intentional fraudulent transfer made with "actual intent to hinder, delay, *or* defraud"[8] a creditor as "real" fraud (e.g., common law fraud or securities fraud). Certainly, all bankruptcy and commercial attorneys (hopefully within the bounds of the law and ethics) have at some point advised insolvent clients on how to avoid paying debts. Nonetheless, the U.S. Court of Appeals for the Second Circuit has applied the Exception to communications made in furtherance of an alleged fraudulent conveyance under New York Creditor Debtor Law §276.[9] So have bankruptcy courts, including the Bankruptcy Court for the Southern District of New York.[10] A recent decision by Judge Eileen Bransten of the New York Supreme Court, County of New York, demonstrates how the probable cause standard for applying the Exception is not as rigorous as it may sound.[11]

About the Authors:



Eric Snyder is a Partner at Wilk Auslander, who has focused his practice around complex commercial creditor-debtor/landlord-tenant relationships for 25 years. He provides bankruptcy advice to corporations, landlords, creditors' committees, and bankruptcy trustees. Eric can be reached at: 212-981-2328 or via email at: esnyder@wilkauslander.com.

Eloy A. Peral is an Associate at Wilk Auslander, and



works with trustees, creditors, creditors' committees, and debtors in a wide range of complex bankruptcy cases throughout the U.S. Eloy may be reached at: 212-981-2316 or via email at: eperal@wilkauslander.com.

1. 471 U.S. 343 (1985).

2. 471 U.S. at 358.

3. 471 U.S. at 354.

4. *In re Still*, 444 B.R. 520, 522-23 (Bankr. E.D. Pa. 2010).

5. Id.

6. See 11 U.S.C. §§1104, 1106.

7. *In re Richard Roe*, 168 F.3d 69, 71 (2d Cir.1999).

8. 11 U.S.C. 548(a)(1)(A); N.Y. Debt. Cred. Law §276.

9. *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1034 (2d Cir. 1984).

10. *In re MarketXT Holdings*, 2009 WL 7216076, at *3 (Bankr. S.D.N.Y. March 4, 2009) (Bernstein, J.). See also *In re Certified HR Servs. Co.*, 2008 WL 2783157, at *1 (Bankr. S.D. Fla. July 16, 2008); *In re Andrews, 186 B.R. 219, 222 (Bankr. E.D. Va. 1995).*

11. Fragin v. First Funds Holdings, 2016 WL 4256984 (N.Y. Sup.), 1, 2016 N.Y. Slip Op. 31537(U), 3 (N.Y. County Sup. Ct.).

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Arnold & Porter

July 11, 2019

Who Controls the Privilege in a Chapter 11 Liquidation Proceeding?

Advisory

By Rosa J. Evergreen, Veronica E. Callahan, Kathleen Reilly, Lucas B. Barrett

In *In re Old BPSUSH Inc.*,[1] Judge Kevin Carey of the Bankruptcy Court for the District of Delaware addressed a developing area of the law related to the attorney-client and work-product privileges and the transfer of any such privileges to liquidation trustees in chapter 11 proceedings. The Bankruptcy Court held that an audit committee's privileges had transferred to the liquidation trustee upon confirmation, and the effective date, of the chapter 11 plan.

Background

Prior to the bankruptcy, the debtor-corporation's (Corporation) independent audit committee (Audit Committee) engaged a law firm (Law Firm), among other professionals, in connection with an internal investigation relating to "whether the [Corporation's] senior financial management could be relied upon with respect to financial reporting and certifications."[2] The Corporation subsequently filed a chapter 11 petition and, ultimately, the Bankruptcy Court confirmed a liquidation plan (Plan). The Plan conveyed all of the debtor-Corporation's claims and causes of action to a liquidation trust overseen by a trustee (Liquidation Trustee). The Plan also provided that, "[o]n the Effective Date, all of the Debtors' respective rights, titles and interests in any Privileges in respect of any Retained Causes of Action shall automatically vest jointly in the Liquidation Trust and the Reorganized Debtors pursuant to and in accordance with the Plan, and the Liquidation Trustee, as trustee for the Liquidation Trust and in its capacity as the Litigation Representative for the Reorganized Parent Debtors, shall have the sole power and authority to assert or waive such Privileges (subject only to the consent of the Liquidation Trust Advisory Board to the extent required under Section 3.5(b) of the Liquidation Trust Agreement) as further provided in the Plan and the Liquidation Trust Agreement."[3]

After the effective date of the Plan, the Liquidation Trustee filed a motion under section 542 of the Bankruptcy Code for entry of an order compelling, among other things, turnover of the records collected by the Audit Committee's professionals in connection with its investigation. The Law Firm objected to the relief sought in the motion, asserting that it provided "the Liquidation Trustee with 'all non-privileged factual information' requested by the Liquidation Trustee, and that the remaining materials sought by the Trustee [were] subject to the work product privilege."[4]

Attorney-Client Privilege and Work-Product Doctrine

In analyzing who controlled the attorney-client privilege at issue, the Bankruptcy Court began by recognizing the applicability of the United States Supreme Court case *Commodity Futures Trading Commission v. Weintraub*.[5] In that case, the Supreme Court held that a chapter 7 bankruptcy trustee had the power to waive a debtor-corporation's attorney-client privilege. The case further provided that the control of the privilege passed along with control of the corporation itself. The Law Firm argued that the situation in *In re Old BPSUSH* was distinguishable from *Weintraub*, as the Corporation's board of directors had granted the Audit Committee certain powers, including the authority to engage independent counsel. In making its argument, the Law Firm cited *In re BCE West, LP*,[6] which stated that a special committee is "a separate and distinct group" and that it controlled its own privilege. Specifically, the court in *BCE West* provided that the "Plan Trustee [could not] waive the Special Committee's attorney-client privilege" and that "[b]ecause the Special Committee is a separate and distinct group from the Board of Directors . . . the privilege afforded it is not the privilege of the corporation, but rather, is the privilege of the Special Committee."[7]

The Liquidation Trustee, however, relied on a 2015 Southern District of New York case, *In re China Med. Tech., Inc.*,[8] which declined to follow *BCE West*. That case decided the same issue in the opposite direction, ruling that the *Weintraub* analysis extended to an independent audit committee and that control of the committee's privilege in that case passed to the foreign representative/liquidator.

Ultimately, after considering the arguments of both sides, the Bankruptcy Court in *In re Old BPSUSH* followed *China Medical*, ruling that, upon confirmation, and the effective date, of the Plan, control over the former Audit Committee's privilege passed to the Liquidation Trustee.

The Bankruptcy Court then addressed the Law Firm's assertion that the work product doctrine protected certain documents and found that (i) in line with extending the Supreme Court's analysis in *Weintraub* and *China Medical*, the Liquidation Trustee had stepped into the shoes of the Audit Committee for the purpose of a work-product analysis and (ii) the work-product doctrine could not be asserted by counsel to withhold documents from a client or former client. As such, the Bankruptcy Court ruled that the records were not protected under the work-product doctrine.

Having found that the Liquidation Trustee was entitled to turnover of the records, the Bankruptcy Court then examined whether that meant the Law Firm had to turn over "all" records. The Bankruptcy Court noted that the "Court of Chancery of Delaware has observed that there is a split in authority regarding an attorney's duty to release files to a client or former client."[9] The Bankruptcy Court recognized that the majority of jurisdictions follow an "entire file" approach, by which all documents are available to the client with some narrow exceptions, such as documents reasonably intended only for internal law firm review. The Bankruptcy Court also identified a minority view, referred to as the "end product" approach, by which clients are only entitled to an attorney's external work product. Noting that the Delaware Court of Chancery has "determined that the 'cases applying the entire-file approach are more persuasive and consistent with other aspects of Delaware law governing the attorney-client relationship,'"[10] the Bankruptcy Court ultimately rejected the minority approach and directed the Law Firm to produce the entirety of the records to the Liquidation Trustee other than those documents intended only for "internal law office review and use."[11]

Analysis and Takeaway

The opinion in *In re Old BPSUSH* demonstrates that the law on the survival of the attorney-client privilege and work-product doctrine post-bankruptcy, when it comes to investigatory records created by attorneys hired by an independent audit committee pre-bankruptcy, is still developing. Independent committees and the professionals engaged by such committees should be cognizant that there is a risk that if the company subsequently files for bankruptcy, a bankruptcy trustee could claim that they hold the privilege. Notably, trustees may have different perspectives and objectives than the board of directors that originally appointed the independent committee. Ultimately, if there is a dispute on who controls an independent committee's privileges in a chapter 11 liquidation proceeding, the resolution of such dispute may depend on both the language in the plan and the confirmation order, as well as the court's interpretation of the law surrounding privilege. This is an area that is still developing, and independent committees and their professionals should continue to follow the cases arising in this area of the law.

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[1] *In re Old BPSUSH Inc.*, No. 16-12373 (KJC), 2019 WL 2563442 (Bankr. D. Del. June 20, 2019).

[2] *Id.* at *1.

[3] *Id.* at n.12.

[4] *Id.* at *2.

[5] *Commodity Futures Trading Comm'n v. Weintraub*, 471 US 343, 105 S. Ct. 1986, 85 L. Ed. 2d 372 (1985).

[6] *In re BCE West, LP*, No. M-8-85, 2000 WL 1239117, at *3 (SDNY Aug. 31, 2000).

[7] *Id.* at *2-3.

[8] *Krys v. Paul, Weiss, Rifkind, Wharton & Garrison, LLP* (*In re China Med. Tech., Inc.*), 539 B.R. 643 (SDNY 2015).

[9] *In re Old BPSUSH Inc.*, 2019 WL 2563442 at *7.

[10] *Id.*

[11] *Id.* at *8.

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(2) Impose other appropriate sanctions;

(3) Refer the matter to the appropriate disciplinary authority of the state or jurisdiction in which the attorney is licensed to practice; or

(4) Refer the matter pursuant to the procedures set forth in Local Civil Rule 83-3 or General Order 96-05, Attorney Discipline Procedures in Bankruptcy Court.

LBR 2091-1. ATTORNEYS – WITHDRAWAL, SUBSTITUTION, AND CHANGE OF ADDRESS

(a) Motion for Withdrawal or Substitution. Except as provided in LBR 2091-1(b), a motion filed under LBR 9013-1(p) is required for:

(1) Withdrawal without Substitution. An attorney who has appeared on behalf of an entity or individual in any matter concerning the administration of the case, in one or more proceedings to withdraw as counsel; or

(2) Substitution of Self-Represented Individual. An individual who is currently represented by an attorney in any matter concerning the administration of the case, in one or more proceedings, who now desires to represent himself/herself without an attorney. The attorney and individual may include, as an exhibit to the motion, the court-approved form for substitution of attorney.

(b) Consensual Substitution of Counsel.

(1) A consensual substitution of attorneys may be filed and served to substitute counsel without filing a motion when:

(A) Replacing an Attorney with a Different Attorney. An entity or individual on whose behalf an attorney has appeared in any matter concerning the administration of the case, in one or more proceedings, or both, desires to substitute a different attorney in place of the former attorney; or

(B) Unrepresented/Self-Represented Party Adding an Attorney. A previously unrepresented entity or self-represented individual desires to substitute an attorney employed to represent the entity or individual.

(2) A substitution of attorney must be filed in substantially the same form as court-approved form F 2091-1.1.SUBSTITUTION.ATTY, Substitution of Attorney, and served on those persons entitled to notice under LBR 2091-1(c).

(3) An attorney's employment as a "professional person" under 11 U.S.C. §§ 327 or 1103 is not approved merely by the filing of a Substitution of Attorney and service of notice thereof. Approval of employment must be obtained in compliance with the requirements of the Bankruptcy Code, FRBP, and these rules.

(c) Notice.

(1) Case. An attorney seeking withdrawal or substitution who has appeared on behalf of an entity in any matter concerning the administration of the case must give notice of the proposed substitution or motion for leave to withdraw to the debtor, the United States trustee, any case trustee, any committee appointed in the case, and counsel for any of the foregoing.

(2) Proceedings. An attorney seeking withdrawal or substitution who has appeared on behalf of an entity only in one or more proceedings must give notice of the proposed substitution or motion for leave to withdraw to the debtor, each party who has been named or who has appeared in such proceeding(s), and the United States trustee.

(3) Cases and Proceedings. An attorney seeking withdrawal or substitution who has appeared on behalf of an entity both in the case and one or more proceedings must give notice of the proposed substitution or motion for leave to withdraw to all entities entitled to notice under subsections (c)(1) and (2) of this rule.

(d) Corporation, Partnership, Unincorporated Association, or Trust. An attorney moving for leave to withdraw from representation of a corporation, a partnership including a limited liability partnership, a limited liability company, or any other unincorporated association, or a trust, concurrently or prior to filing any such motion, must give notice to the client of the consequences of its inability to appear without counsel, including the possibility that a default judgment may be entered against it in pending proceedings; or, if the client is a chapter 11 debtor, that the case may be converted to chapter 7, a trustee may be appointed, or the case may be dismissed.

(e) Delay by Withdrawal or Substitution.

(1) A withdrawal or substitution of counsel will not result in a continuance of any matter, absent an order granting a motion for continuance after notice and a hearing pursuant to LBR 9013-1(m).

(2) Unless good cause is shown and the ends of justice require, no substitution or withdrawal will be allowed that will cause unreasonable delay in prosecution of the case or proceeding to completion.

(f) Change of Address.

(1) An attorney who changes office address must file and serve a notice of change of address to update the attorney's address in the court's electronic database.

(2) In the absence of a specific request to the contrary, a change of address will update the attorney's address in the court's electronic database and the mailing list in all open cases in which the attorney represents a debtor or other party in interest.

General Bankruptcy Counsel to
Chapter 11 Debtor and Debtor in Possession,

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA – LOS ANGELES DIVISION

In re: , Debtor and Debtor in Possession.	Case No. Chapter 11 **MOTION FOR ORDER AUTHORIZING TO WITHDRAW AS GENERAL BANKRUPTCY COUNSEL; DECLARATION OF IN SUPPORT THEREOF** [Local Bankruptcy Rule 2091-1] **Hearing**: Date: , 2019 Time: a.m. Location: Courtroom 255 E. Temple St. Los Angeles, CA 90012

TO THE HONORABLE , UNITED STATES BANKRUPTCY JUDGE, THE DEBTOR, AND THE OFFICE OF THE UNITED STATES TRUSTEE:

(the "Firm"), counsel of record for Chapter 11 Debtor and Debtor in Possession (the "Debtor") in the pending bankruptcy case

identified as , Bankruptcy Case No. (the "Bankruptcy Case") hereby moves this Court for an order granting the Firm leave to withdraw as general bankruptcy counsel for the Debtor in the Bankruptcy Case (the "Motion to Withdraw").

This Motion to Withdraw is being filed pursuant to Rules 2091-1 and 9013-1(p) (4) of the Local Bankruptcy Rules for the Central District of California and is based on the following facts, the annexed Memorandum of Points and Authorities and Declaration of (the " Declaration"), the concurrently filed Notice of the Motion to Withdraw, all documents on file in the Bankruptcy Case, and upon such further evidence as may be presented before or at the hearing on this Motion to Withdraw.

Pursuant to Local Rule 2019-1(a), the Motion to Withdraw has been served on the Debtor, the Office of the United States Trustee, and counsel for each of the foregoing.

WHEREFORE, the Firm respectfully requests that the Court enter an Order:

1. Granting leave for the Firm to withdraw as counsel for the Debtor; and

2. Granting such other and further relief as this Court deems just and proper under the circumstances.

Dated: 2019

By

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General Bankruptcy Counsel for
Chapter 11 Debtor and Debtor in Possession,

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF RELEVANT FACTS & DISCUSSION

On , 2018, the Debtor commenced the Bankruptcy Case by filing a Chapter 11 petition in *pro per*. The Firm substituted into the Bankruptcy Case on , 2019, and on 2019, filed an *Application to Employ as General Bankruptcy Counsel* (the "Employment Application", Dkt. No.). The Order granting the Employment Application and employing the Firm as the Debtor's general bankruptcy counsel was entered on , 2019 (Dkt. No.).

As set forth in the attached Declaration, the relationship of trust and confidence that is essential to a properly functioning attorney-client relationship has broken down and, in the good faith assessment of counsel, the relationship is irreparable. Withdrawal is appropriate under such circumstances. If the Court concludes that additional information regarding the nature of the breakdown is necessary to decide the motion, counsel requests the opportunity to present such evidence *in camera* in order to protect the confidential nature of the relationship between counsel and its client. *See, e.g.,* Manfredi & Levine v. Superior Court (1998) 66 Cal.App.4th 1128, 1133 (general description of situation sufficient to support withdrawal where there is no reason to doubt counsel's good faith; *in camera* hearing may be held to obtain further non-privileged facts supporting the motion where necessary); Aceves v. Superior Court, (1996) 51 Cal.App.4th 584.

In moving to withdraw, the Firm has avoided foreseeable prejudice, and the Firm's withdrawal will not delay or prejudice these proceedings. On , 2019, the Debtor learned of the Firm's desire to withdraw and the Firm's request that Debtor to search for and locate replacement legal counsel. In connection with the instant motion, and on , 2019, the Firm again encouraged the Debtor to locate replacement counsel. Debtor has been afforded a reasonable period of time to identify replacement counsel and has not yet done so.

The Firm is ready, willing and able to cooperate in a smooth transaction of the bankruptcy file and will make the client file available to Debtor or Debtor's replacement counsel promptly upon the granting of this motion.

The Firm's withdrawal will not delay or prejudice these proceedings. The next scheduled hearing date in this case is a Status Conference set for , 2019 at p.m., with the Status Report due 2019. There is sufficient time to complete all the tasks which need to be completed by the date of the Status Conference. There are no other dates scheduled in the Bankruptcy matter at this time.

II. ARGUMENT

A. Cause Exists for an Order Granting Leave for the Firm to Withdraw as Counsel of Record for The Debtor

A Federal Court has the authority to permit an attorney to withdraw from an action at any time for good and sufficient cause, and upon reasonable notice. In re Wynn, 889 F.2d 644, 646 (5th Cir. 1989) ("An attorney may withdraw from representation only upon leave of the court and a showing of good cause and reasonable notice to the client."); *see also* Lovvorn v. Johnston, 118 F.2d 704, 706 (9th Cir. 1941).

Rule 1.16 [formerly Rule 3-700] of the California Rules of Professional Conduct sets forth when an attorney shall or may withdraw from representing a client. Rule 1.16(b) states that "a lawyer may withdraw from representing a client" in several circumstances, including:

> (4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively;
>
> . . .
>
> (10) the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

This Motion is brought on the grounds that the relationship of trust and confidence so necessary to the effective and proper functioning of an attorney-client relationship has ceased to exist and, in the good faith judgment of counsel, has been permanently and irreparably damaged. As a result, the Firm has determined that it can no longer effectively represent the Debtor and has

sought permission to be relieved. Because the Debtor has objected to the Firm's withdrawal, this motion has become necessary.

The breakdown in the attorney-client relationship has long been recognized as a ground for authorizing the attorney to withdraw. *See, e.g.* Rus, Miliband & Smith v. Conkle & Olesten (2003) 113 Cal.App.4th 656, 673 ("The law can afford to take a relatively permissive attitude toward withdrawals *qua withdrawals*. If attorney and client cannot agree, how can they litigate together? There is no need to unequally yoke a union when one of the parties clearly wants out.").

Due to the breakdown of the relationship between the Firm and the Debtor set forth in the attached Declaration, cause exists for this Court to enter an Order granting leave for the Firm to withdraw as counsel of record in the Bankruptcy Case.

B. The Firm Has Complied with Local Rule 2091-1(c)(3)

Local Rule 2091-1(c)(3) provides that:

> An attorney seeking withdrawal or substitution who has appeared on behalf of an entity both in the case and one or more proceedings must give notice of the proposed substitution or motion for leave to withdraw to all entities entitled to notice under subsections (c)(1) and (2) of this rule.

The Firm has served a copy of this Motion to Withdraw on the Debtor and the United States Trustee, as well as proposed special counsel . Based upon the foregoing, the provisions of Local Rule 2091-1(c)(3) have been satisfied.

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III. CONCLUSION

Based upon the foregoing, the Firm respectfully requests that this court enter an Order granting the Firm leave to withdraw as counsel for the Debtor in the Bankruptcy Case, and for such other relief as this Court deems just and proper.

Dated: , 2019 C

By –

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General Bankruptcy Counsel for
Chapter 11 Debtor and Debtor in Possession,
N

DECLARATION OF

I, , declare and state as follows:

1. I am an attorney at law licensed in the State of California, am admitted to practice before the Central District of California, and am the managing partner of (the "Firm"), counsel of record for , the Chapter 11 Debtor and Debtor in Possession (the "Debtor"), in the above-captioned case. Each of the facts contained in this declaration is based on my personal knowledge and if called as a witness, I could and would competently testify thereto.

2. I make this Declaration in support of the *Motion for Order Authorizing to Withdraw as General Bankruptcy Counsel* (the "Motion to Withdraw") to which this Declaration is annexed.

3. On , 2018, the Debtor commenced the Bankruptcy Case by filing a Chapter 11 petition in *pro per*. The Firm substituted into the Bankruptcy Case as general bankruptcy counsel on , 2019.

4. On , 2019, the Firm filed an *Application of Chapter 11 Debtor and Debtor in Possession to Employ as General Bankruptcy Counsel Effective , 2019* (Dkt. No.). The Order approving the Employment Application and employing the Firm as the Debtor's general bankruptcy counsel in the Bankruptcy Case was entered on , 2019 (Dkt. No.).

5. There has been a fundamental and material breakdown in the relationship between the Firm and the Debtor. The relationship of trust and confidence necessary to the proper functioning of an attorney-client relationship has ceased to exist. In my good faith judgment, the attorney-client relationship has been irreparably damaged and it is no longer possible to carry on an attorney-client relationship with the necessary degree of trust and confidence which is foundational to that relationship. While I do not believe the precise nature of the breakdown can be described without potentially violating the attorney-client privilege or breaching client confidentiality, I am prepared to respond to any questions the court may have *in camera*, if necessary, subject to the limits imposed by case law.

6. On , 2019, after the Firm's request for permission to withdraw was declined by the Debtor, I notified the Debtor of the Firm's intention to file a Motion to Withdraw on , 2019, and recommended that the Debtor to seek new counsel as quickly as possible, while offering full cooperation in transitioning to such new counsel. I again notified the Debtor on that the Firm intended to file a Motion to Withdraw and encouraged the Debtor to locate new counsel. As of the date of this Declaration, the Debtor has not identified new counsel to the Firm. The Debtor has stated that he intends to oppose the instant Motion to Withdraw.

7. At this time, the only pending matter in the Bankruptcy Case is the continued Chapter 11 Status Conference scheduled to take place on , 2019 at , with a status report due 2019. I therefore believe that the Firm's withdrawal at this time will not unreasonably prejudice the Debtor.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this declaration was executed by me on the 6th day of , 2019 at , California.

Honorable Scott C. Clarkson

Scott C. Clarkson has served as a United States Bankruptcy Judge for the Central District of California since January 20, 2011. His undergraduate degree is from Indiana University, Bloomington, Indiana and he received his J.D. degree from George Mason University School of Law, Arlington, Virginia (1982).

From 1977 to 1982, Judge Clarkson was legislative assistant to United States Congressman Harold L. Volkmer in Washington, D.C., assigned to the United States House of Representatives Judiciary Committee, where he was a direct observer of and participant in the creation of the 1978 Bankruptcy Code in the U.S. House of Representatives.

Prior to his appointment, Judge Clarkson practiced bankruptcy law and bankruptcy litigation for more than 20 years in Los Angeles, and served as chair of the Los Angeles County Bar Association's Commercial Law and Bankruptcy Section from 2008 to 2009.

Judge Clarkson is also an established documentary photographer. As a photojournalist, he has documented events throughout the United States, Southeast and Central Asia and South America for over 20 years. His book of photographs, *Windows to Vietnam- A Journey in Pictures & Verse*, was published in 2007 and is now in its second edition. The book was designated as "Editors Choice" by the United States Military Academy (West Point) Association of Graduates Alumni Magazine in 2008.

CURRICULUM VITAE OF STELLA HAVKIN

Stella Havkin, received her B.A. from York University in Toronto, Canada with a focus on Psychology and Political Science in 1984. She was awarded her degree with the honor of Magna Cum Laude. While at York University, Ms. Havkin was on Dean's List and Dean's Honor Roll, 1980-1984. She was a member of the Vingt-Deux Club (the top twenty-two graduating students). While at York University, Ms. Havkin worked for the Canadian Armed Forces where she conducted statistical analyses and authored an article which was published in a NATO publication on attrition of women in the military.

Ms. Havkin received her J.D. from University of California, Hastings College of Law in May, 1987. While at Hastings, she was a Member of Hastings International and Comparative Law Review from 1985-1986, Associate Note Editor, 1986-1987 and the author of the Note, *"The Foreign Sovereign Immunities Act: The Relationship Between the Commercial Activity Exception and the Noncommercial Tort Exception in Light of De Sanchez v. Banco Central de Nicaragua*", published in Volume 10:2, September, 1987 which was selected for publication on Westlaw. Also, while at Hastings, Ms. Havkin served as a judicial extern to the Honorable Justice M.O. Sabraw - California Court of Appeal, First District, Fourth Division.

Ms. Havkin has been a member of the California State Bar since 1988. She is admitted to practice before the all the Courts in California, the Ninth Circuit of Appeals, the Fifth Circuit of Appeals, the Federal District Courts in California and in Austin, Texas.

Ms. Havkin is a Certified Bankruptcy Specialist certified by the State Bar of California Board of Legal Specialization and a Certified Consumer Bankruptcy Law Specialist certified by the American Board of Certification.

Ms. Havkin's practice has focused on commercial litigation and bankruptcy. She has represented debtors, creditors and trustees in over 600 Chapter 7, Chapter 13 and Chapter 11 bankruptcy cases as well as in involuntary bankruptcy cases in California, Texas and Florida. Ms. Havkin has been involved in numerous contested matters, adversary proceedings, trials as well as appeals. She has been retained as an expert witness in several bankruptcy cases.

She has been a member of and a presenter at numerous panels on Chapter 13 cases, Motions to Dismiss in Bankruptcy Court, Opinions of the San Fernando Valley Bankruptcy Judges, Current Attacks on the Homestead Exemption, Federal Bar Association Panel on Ethics and Representing Spouses in Bankruptcy, The Unscheduled Lawsuit, Is the Fight Over? Claim and Issue Preclusion in 523 Cases, Chapter 13 Plan Confirmation - Hit me with Your Best Shot as well as Settling Cases with Chapter 7 Trustees.

Ms. Havkin is the author of the Article "*BECAUSE OF CALIFORNIA'S EXPANSIVE DEFINITION OF SECURITIES LAW VIOLATIONS, YOUR CLIENTS MAY HAVE VIOLATED SECURITIES LAWS AND CREATED NONDISCHARGABLE DEBTS ALL WITHOUT THEIR KNOWLEDGE*" published in the Central District of California Consumer Bankruptcy Attorneys Association Newsletter in January, 2013. She is also the author of the Article "*GIVE MOTIONS TO DISMISS IN BANKRUPTCY COURT A SECOND THOUGHT. THEY ARE NO LONGER A LONGSHOT!*" published in the San Fernando Valley Bar Journal June, 2013. She also co-authored the Article "Attorney Client And Attorney Work Product Privileges: How to Protect Them and Not to Lose Them" published in the Central District of California Consumer Bankruptcy Attorneys Association

Newsletter in January, 2015.

Ms. Havkin is editor of the Central District of California Consumer Bankruptcy Attorneys Association Newsletter and is on the Board of the same organization.

Ms. Havkin was named as 2013 - 2017 Super Lawyer in the Super Lawyer Magazine in the field of Consumer Bankruptcy Law.

Ms. Havkin is the Chair with the State Bar of California Bankruptcy Legal Specialization Board.

JAMES R. SELTH

James R. Selth is a 1978 graduate of the University of California at Riverside, where he received a Bachelor of Arts Degree in Political Science and served an internship in the United States Senate. He received his Juris Doctor in 1985 from Western State University College of Law where he graduated Cum Laude.

Prior to becoming an attorney, Mr. Selth was employed by California Federal Savings & Loan Association for seven years, where he last worked as Assistant Vice President and Branch Manager of Cal Fed's Pasadena office.

Mr. Selth served as a Deputy District Attorney in Orange County for two years before joining the firm of McKinley & Capeloto in Pasadena in 1988, where he was a partner from 1994 until 2001. Mr. Selth joined Weintraub Law Corporation as Senior Counsel in 2002. The firm’s name changed to Weintraub & Selth, APC in 2004.

Mr. Selth is recognized as one of the leading consumer and small business bankruptcy attorneys in Southern California, and is a State Bar Certified Legal Specialist in bankruptcy law. In 2015, Mr. Selth was appointed to a four-year term as a Commissioner to the State Bar's Bankruptcy Law Advisory Commission. In addition to representing debtors and creditors in a variety of matters, Mr. Selth has over 30 years of experience representing financial institutions and mortgage lenders in state courts and bankruptcy courts throughout California, specializing in areas of concern to credit unions.