SO ORDERED.

SIGNED this 4th day of December, 2023.

Dale L. Somers
Dale L. Somers
United States Chief Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re: Brownrigg Ranches LLC, Debtor.	Case No. 23-20562-12
Sheryl Jean Andersen, Michael R. Brownrigg, Lori Lynn Brinker, Plaintiffs, Scot D. Brownrigg, Garie Jean Brownrigg, Colby R. Brownrigg, Brownrigg Ranches LLC, Defendants.	Adv. No. 23-6016

Order Denying Motions to Quash and Granting in Part Motion to Extend

The Court held a status conference on pending matters in this adversary proceeding on December 1, 2023. The Court issues the following

rulings therefrom.

I. Procedural Background

Debtor Brownrigg Ranches, LLC filed a Chapter 12 petition on May 19, 2023. Debtor's Schedule B alleges Debtor has an interest in a fraudulent transfer claim related to tracts of real property conveyed in January 2023 as part of a settlement of state court litigation.[1] Shortly after Debtor's Chapter 12 filing, Plaintiffs Sheryl Jean Andersen, Michael R. Brownrigg, and Lori Lynn Brinker—also the plaintiffs from that state court litigation—filed this adversary complaint against Debtor and three individually named Defendants. The individually named Defendants—Scot, Garie Jean, and Colby Brownrigg—are members of the Debtor LLC and were also parties in the prepetition state court litigation. At some point, Scot purported to become the successor trustee of a trust in which all Plaintiffs and Defendants have at least some interest. In other words, the parties all have a familial relationship and have been litigating over a trust and certain transfers of real property for a number of years. The Court will refer to parties by their first name.

As amended, the adversary complaint states the following seven claims: 1) accounting of all actions taken by Scot while acting as trustee of the trust

[1] Case No. 23-20562-12, Doc. 1 p. 9.

at issue, 2) breach of fiduciary duty against Scot, 3) removal of trustee against Scot under Kan. Stat. Ann. § 58a-706 and appointment of Sheryl as trustee, 4) unjust enrichment against Debtor and Colby, 5) civil conspiracy against all Defendants, 6) declaratory judgment against Debtor declaring no fraudulent transfer, 7) nondischargeability claim under § 523(a)(2)(A), (a)(4), and (a)(6).[2]

All Defendants answered the complaint, and Debtor also filed a counterclaim for recovery of fraudulent transfer under § 548.[3] The counterclaim asks that the real property at issue be deeded to Debtor and titled in Debtor's name. Debtor's answer also asserts a conflict of interest between Debtor and the individual Defendants (Scot, Garie Jean, and Colby). Debtor's answer also appears to deny Debtor had competent counsel (Scott Ryburn) in the state court litigation.

On September 7, 2023, Plaintiffs filed a Notice of Intent to Issue Subpoena for Production of Documents to Anderson & Byrd, LLP.[4] The subpoena sought production by September 15, 2023, of the following:

> "1. All emails, text messages, letters and other communications relating in any way to the August 2022 settlement agreement (the "First Settlement") . . . or the January 2023 settlement agreement . . . , including but not

[2] Doc. 26.
[3] Doc. 18.
[4] Doc. 33.

> limited to communications between Scott Ryburn and Scot Brownrigg, Colby Brownrigg, Garie Jean Brownrigg, and/or Brownrigg Ranches, LLC.
>
> 2. All documents and communications relating to the value of the . . . real property . . .
>
> 3. All emails, text messages, letters and other communications relating in any way to allegations of misconduct, conflict of interest, or incompetence of Scott Ryburn relating to the State Court Action, the First Settlement, or the Second Settlement."

Counsel for Plaintiffs indicated at the status conference that the subpoena was served on Mr. Ryburn via email. Plaintiffs issued written discovery to Defendants at approximately the same time in September 2023.

On September 11, 2023, both Debtor and the individual Defendants filed motions to quash the subpoena.[5] Defendants argue Mr. Ryburn represented all Defendants in the state court litigation and the subpoena impermissibly seeks to circumvent the attorney-client and perhaps work-product privileges by seeking information pertaining to the litigation. Plaintiffs opposed the motions to quash and argued: 1) Defendants failed to meet their burden to show all records are protected by the attorney-client privilege, 2) the crime-fraud exception to the privilege applies "because Debtor has alleged it and Ryburn participated in a fraud,"[6] and 3) the

[5] Docs. 34 and 36.
[6] Doc. 43 p. 4.

privilege has been waived because Debtor put Ryburn's advice at issue by alleging the counterclaim for fraudulent transfer.

On November 20, 2023, Scot, Garie Jean, and Colby filed a motion seeking: 1) the stay of a deposition scheduled for Mr. Ryburn on December 12, 2023, additional time to respond to the discovery propounded to them by Plaintiffs, and an extension of the discovery cutoff date previously set by the Court's Scheduling Order.[7] Debtor filed a pleading in support of the individual Defendants' motion, and specifically asked for a new discovery cutoff date of February 29, 2024.

As noted above, the Court held a status conference on these issues on December 1, 2023. At that status conference, the parties notified the Court they had agreed to stay the date of Mr. Ryburn's deposition until the underlying discovery issues are resolved.

II. Analysis

A. Motions to Quash

A motion to quash a subpoena is a "discovery dispute" per D. Kan. Rule 37.2.[8] Under Rule 37.2, courts "will not entertain" a Rule 45 motion unless

[7] Doc. 56.

[8] A discovery-related motion should not be filed with a notice of objection deadline. Rather, a discovery-related motion is governed by D. Kan. Rule 6.1, and all responses and replies should be filed within the time directed in that Rule.

counsel for the moving party first confers or makes reasonable effort to confer with opposing counsel prior to filing the motion. Per D. Kan. Rule 37.1, counsel must then contact the Court to arrange for a discovery telephone conference with the presiding Judge. As a preliminary matter, no party described any efforts to meet and confer prior to filing the current motions, nor did they contact the Court to arrange for a conference. Counsel should endeavor to strictly follow the Federal and Local Rules hereafter.

Subpoenas are governed by Federal Rule of Civil Procedure 45.[9] Under Rule 45(d)(3)(A)(iii), upon "timely motion," the court "must quash" a subpoena that "requires disclosure of privileged or other protected matter, if no exception or waiver applies." Rule 45(e)(2) further governs claims of privilege in response to a subpoena:

> (2) Claiming Privilege or Protection.
>
> > (A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:
> >
> > > (i) expressly make the claim; and
> > >
> > > (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

[9] Rule 45 is applicable in bankruptcy via Federal Rule of Bankruptcy Procedure 9016.

A party seeking to quash a subpoena based on privilege has the burden of showing the privilege applies.[10]

B. Assertion of Privilege

Both Debtor and the individual Defendants filed motions arguing the subpoena should be quashed based on attorney-client privilege and/or the work-product doctrine. To assert the attorney-client privilege, the following "essential elements" must be shown:

> (1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except if the protection is waived.[11]

Because of the importance of protecting the relationship between counsel and client, "waivers of the privilege are to be narrowly construed."[12] The work product doctrine then protects from disclosure documents and tangible things prepared by counsel "in anticipation of litigation or for trial."[13]

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[10] *Foster v. Hill (In re Foster)*, 188 F.3d 1259, 1264 (10th Cir. 1999).

[11] *Harrington v. Kansas*, No. 5:20-CV-4081-HLT-KGG, 2021 WL 5505452, at *3 (D. Kan. Nov. 24, 2021).

[12] *Id.* at *4.

[13] *Id.* (citing Fed. R. Civ. P. 26(b)(3)). *See also Burton v. R.J. Reynolds Tobacco Co.*, 167 F.R.D. 134, 139 (D. Kan. 1996) ("In order to be protected by work product immunity, the party asserting the privilege must show (1) that the material is a document or tangible thing, (2) that the material was prepared in anticipation of litigation, and (3) that the material was prepared by or for a party or by or for the party's representative.").

The Tenth Circuit requires a party asserting a privilege to identify specific communications or documents that are covered—a "blanket claim" is not permitted.[14] Relying on Rule 45(e)(2)'s requirement to produce a privilege log, the Tenth Circuit noted that "[w]ithout knowing the nature of the documents, neither the requesting party nor the court can possibly assess the claim."[15] In fact, failure to produce a privilege log can itself result in a waiver of the privilege.[16]

The Court agrees that the blanket claim of privilege made by Defendants herein is insufficient to quash the subpoena. A portion of the documents sought by the subpoena may be subject to legitimate claims of privilege. For example, the subpoena seeks "communications between Scott Ryburn" and Defendants. Presumably, some of those communications will involve legal advice made in confidence. Plaintiffs argue, however, that at least some documents responsive to each topic would not be privileged. For

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[14] *In re Foster*, 188 F.3d at 1264.

[15] *Texas Brine Co., LLC & Occidental Chem. Corp.*, 879 F.3d 1224, 1229 (10th Cir. 2018).

[16] *White v. Graceland Coll. Ctr. for Pro. Dev. & Lifelong Learning, Inc.*, 586 F. Supp. 2d 1250, 1266 (D. Kan. 2008) ("Failure to follow the Federal Rules of Civil Procedure may result in waiver of the attorney-client privilege and/or work-product protection. . . . Acknowledging the harshness of a waiver sanction, however, courts have reserved such a penalty for only those cases where the offending party committed unjustified delay in responding to discovery. Minor procedural violations, good faith attempts at compliance and other such mitigating circumstances bear against finding waiver.").

example, there could also be documents containing business advice (only legal advice is protected),[17] and there could be communications with non-clients as well.

Defendants informed the Court at the status conference that they had received documents from Mr. Ryburn and were looking through those documents. Defendants should produce documents and a privilege log responsive to the requests made. A privilege log should include:

> 1. A description of the document explaining whether the document is a memorandum, letter, e-mail, etc.;
> 2. The date upon which the document was prepared;
> 3. The date of the document (if different from # 2);
> 4. The identity of the person(s) who prepared the document;
> 5. The identity of the person(s) for whom the document was prepared, as well as the identities of those to whom the document and copies of the document were directed, "including an evidentiary showing based on competent evidence supporting any assertion that the document was created under the supervision of an attorney;"
> 6. The purpose of preparing the document, including an evidentiary showing, based on competent evidence, "supporting any assertion that the document was prepared in the course of adversarial litigation or in anticipation of a threat of adversarial litigation that was real and imminent;" a similar evidentiary showing that the subject of communications within the document relates to seeking or giving legal advice; and a showing, again based on competent evidence, "that the documents do not contain

[17] *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 232 F.R.D. 669, 675 (D. Kan. 2005) ("Legal advice must predominate for the communication to be protected. The privilege does not apply where the legal advice is merely incidental to business advice. There is also a distinction between a conference with counsel and a conference at which counsel is present; the mere presence of counsel at a meeting does not make all communications during the meeting privileged.").

> or incorporate non-privileged underlying facts;"
> 7. The number of pages of the document;
> 8. The party's basis for withholding discovery of the document (i.e., the specific privilege or protection being asserted); and
> 9. Any other pertinent information necessary to establish the elements of each asserted privilege.[18]

That stated, if a communication is "clearly within the attorney-client relationship" and "legal advice is being sought or given," then a simpler entry on a privilege log may be regarded as sufficient.[19] Without a privilege log, however, there is no way to assess the claim of privilege made.

Defendants should respond to all previously issued discovery by December 22, 2023, unless they intend to assert the attorney-client privilege or work-product doctrine applies to a particular item being sought. Defendants should produce a privilege log detailing those additional items by January 5, 2024.

C. Crime-Fraud Exception

Regarding Plaintiffs' assertion that the crime-fraud exception applies to Defendants' claim of attorney-client privilege, the Court overrules that argument at this point, although the parties may brief the argument if there is further challenge to the privilege log that is ultimately produced. Under the crime-fraud exception, the attorney client privilege does not extend to

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[18] *Id.* at 673 (internal quotation omitted).
[19] *Id.*

communications regarding legal services sought or obtained in order to enable or aid the commission or planning of a crime or tort."[20] To assert the exception, the party asserting the exception must make "a prima facie showing that a crime or fraud has been perpetrated."[21]

In this adversary proceeding, Debtor asserts a claim for fraudulent transfer under § 548. Under that statute, the court may avoid "any transfer . . . of an interest of the debtor in property . . . that was made or incurred on or within 2 years before the date of filing of the petition" if the debtor:

> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
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> (B)
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> (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
> (ii)
>
> (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

Debtor's counterclaim is titled generically as being brought under § 548, but then the elements of § 548(a)(1)(B)(i) through (B)(ii)(I) are quoted. In other

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[20] *Burton*, 167 F.R.D. at 140 (internal quotation omitted).

[21] *Id.* "A prima facie case requires evidence which, if left unexplained or uncontradicted, would be sufficient to carry the case to the jury and sustain a verdict in favor of the plaintiff on the issue it supports." *Id.* at 141 (internal quotation omitted).

words, it does not appear that Debtor is proceeding under § 548(a)(1)(A)—which would require proof of an intent to "hinder, delay, or defraud," an *actually* fraudulent transfer—but is instead proceeding under § 548(a)(1)(B)(i)-(ii)(I)—which requires a showing that Debtor received less than a reasonably equivalent value and that Debtor was insolvent, a *constructively* fraudulent transfer.[22]

Plaintiffs cite cases applying the crime-fraud exception to the attorney client privilege to *actually* fraudulent transfer litigation under § 548(a)(1)(A) and argue even if some of the documents sought are the subject of attorney client privilege, the crime-fraud exception to that privilege applies.[23] But

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[22] To state a claim for a constructively fraudulent transfer under § 548(a)(1)(B)(i)-(ii)(I), Debtor must show: 1) Debtor transferred property within two years before the petition date, 2) Debtor received less than reasonably equivalent value for the transfer, 3) Debtor was insolvent when the transfers were made or became insolvent as a result of the transfers. *Weinman v. Walker (In re Adam Aircraft Indus., Inc.)*, 510 B.R. 342, 352 (10th Cir. BAP 2014). The party seeking to avoid the transfer bears the burden of proof, by a preponderance of the evidence. *Jobin v. McKay (In re M&L Bus. Mach. Co., Inc.)*, 155 B.R. 531, 534 (Bankr. D. Colo. 1993). Regarding "reasonably equivalent value," value can mean satisfaction of a debt, and debt can mean liability on a claim. *See* 11 U.S.C. § 101(12); *In re M&L Bus. Mach. Co., Inc.*, 84 F.3d at 1340. Regarding insolvency, the Code looks at balance sheet insolvency—whether liabilities exceed assets. *Stillwater Nat'l Bank v. Kirtley (In re Solomon)*, 299 B.R. 626, 639 (10th Cir. BAP 2003).

[23] *E.g.*, *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 319 F.R.D. 100, 109 (S.D.N.Y. 2017) (applying crime-fraud exception to attorney client privilege assertion regarding actually fraudulent transfer claim under § 548(a)(1)(A)); *Feltman v. Leading Edge Grp. Holdings, Inc. (In re Certified HR Servs. Co.)*, No. 05-22912-BKC-RBR, 2008 Bankr. LEXIS 4430, at *10 (Bankr. S.D. Fla. July 16, 2008) (applying crime-fraud exception to compel discovery of prepetition counsel regarding a § 548 claim based on actual intent to hinder, delay or defraud).

there is no persuasive precedent for applying the exception to *constructively* fraudulent transfer claims made under § 548(a)(1)(B). The purpose of the crime-fraud exception is to ensure that communications made for the purpose of getting advice for the commission of a fraud or crime are not concealed.[24] Here, Debtor is not asserting that it made the transfers with the actual intent to defraud but is instead asserting that the transfers were made while it was insolvent and that it received less than reasonably equivalent value for the transfers. At this point, the crime-fraud exception to the attorney client privilege has not been shown.

Plaintiffs make one additional argument against application of the attorney-client privilege, namely the waiver of the attorney client privilege that comes from putting otherwise privileged information "at issue" in the case.[25] Plaintiffs first argue waiver occurred because "[b]y making the claim

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[24] *United States v. Zolin*, 491 U.S. 554, 563 (1989).

[25] The attorney client privilege is "waived" if the matter is put "at issue," and three elements must be shown: "1) the assertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting party; 2) through this affirmative act, the asserting party put the protected information at issue making it relevant to the case; and 3) application of the privilege would deny the opposing party access to information vital to its defense." *Martley v. City of Basehor, Kan.*, No. 19-2138-DDC-GEB, 2021 WL 5918916, at *7 (D. Kan. Dec. 15, 2021). Waiver is an equitable consideration: the attorney client privilege is waived "when the party, through its own actions, places information protected by it at issue through some affirmative act for his own benefit, and to allow the privilege to protect against such disclosure of such information would be manifestly unfair to the opposing party." *Id.*

of fraud, Debtor has put its counsel's actions at issue."[26] Plaintiffs also argue they should be able to conduct discovery as to whether the settlement of the state court litigation was entered into at arm's length and in good faith, and "why Debtor entered the settlement with the advice of counsel after months of litigation."[27] Plaintiffs claim these are elements of determining whether reasonably equivalent value was given.

The analysis of reasonably equivalent value is a totality of the circumstances test. Court should "consider the totality of the circumstances, including (1) the fair market value of the benefit received as a result of the transfer, (2) the existence of an arm's-length relationship between the debtor and the transferee, and (3) the transferee's good faith."[28] As a result of these factors, Plaintiffs are correct that issues of good faith and arm's length are relevant. But that said, the analysis of reasonably equivalent value is an *objective* one—*i.e.*, the factors should be viewed from "the objective creditor's perspective, without regard to the subjective needs or perspectives of the debtor or transferee."[29] As a result, the *subjective* thoughts of counsel or Defendants as to good faith or the arm's length nature of the transaction may

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[26] Doc. 43 p. 11.

[27] *Id.*

[28] *FNF Sec. Acquisition, Inc. v. Mercury Cos., Inc. (In re Mercury Cos., Inc.)*, 527 B.R. 438, 447 (D. Colo. 2015).

[29] *Id.* at 449.

not be relevant.

Again, at this point, without a privilege log applied to the documents at issue, the Court cannot issue a ruling. Like above, Plaintiffs can make an argument about waiver of the attorney-client privilege, if necessary, after responses to discovery and the privilege log are produced.

III. Conclusion

As a result of the above rulings, the Court denies the motions to quash[30] as filed. If the parties wish to file discovery motions after production has been made, they may incorporate any arguments made to date therein.

Regarding the individual Defendants' motion to extend,[31] Defendants should respond to all previously issued discovery by December 22, 2023, unless they intend to assert the attorney-client privilege or work-product doctrine applies to a particular item. As to those items, Defendants should produce a privilege log detailing those additional items by January 5, 2024. The deposition of Mr. Ryburn is stayed until after the production on January 5, 2024.

If any party has a dispute with an opposing party concerning discovery issued, or responses thereto, they should have a meaningful conference to

[30] Doc. 34, Doc. 36.
[31] Doc. 56.

address their issues. If the parties cannot come to an agreement, then they should contact the Court for a conference. At that point, the Court may have the parties brief the Court about specific items or documents they dispute as privileged.

The Court sets this adversary proceeding for a status conference on January 9, 2024, at 2:15 p.m, on the Topeka docket. The parties should meet and confer about a new discovery cutoff date and extension to other deadlines set in the Court's prior Scheduling Order. If they cannot agree to terms, then the Court will set new dates at the January 9, 2024 status conference. Any hearings in this adversary proceeding will be scheduled on Topeka dockets, until the Court orders otherwise.

The status conference previously set in Debtor's main bankruptcy case on January 11, 2024, will be continued to February 15, 2024. Hearings in Debtor's main case should continue to be noticed to dockets in Kansas City.

It is so Ordered.

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