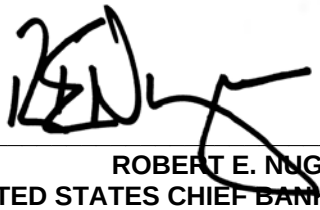
SO ORDERED.

SIGNED this 25 day of June, 2007.



ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

NOT DESIGNATED FOR PUBLICATION

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
JUSTIN WAYNE SPOONEMORE,	)	**Case No. 05-17380**
CASSANDRA KATHALEEN SPOONEMORE,	)	**Chapter 7**
	)	
Debtors.	)	
	)	

ORDER REGARDING DOCUMENTS CLAIMED PRIVILEGED
BY CREDITOR CIT GROUP

Introduction

This matter is before the Court on a discovery dispute between the chapter 7 trustee Linda Parks, and creditor CIT Group and its attorney, Phyllis Schauffler. The discovery in this case arises in the context of the Trustee's motion for turnover and sanctions against the CIT Group for its violation of the stay relief order by commencing a state court foreclosure action without naming the trustee as an *in rem* party in the foreclosure proceedings, taking a deed in lieu from the debtors, and

seizing and exercising control of an asset of the estate without seeking further stay relief.[1] Suffice it to say that the Trustee has sought in discovery to ascertain how, why, and by whom the decision to take these actions was made. The Trustee's first set of interrogatories and requests for production of documents were served on CIT on or about November 15, 2006.[2] Readers of this order are referred to this Court's order denying CIT's motion for summary judgment and the factual findings made therein.[3]

Factual Background

Pursuant to the hearing held on May 10, 2007 on the trustee's second motion to compel production of documents and this Court's order that creditor CIT Group submit to the Court for *in camera* review those documents it was claiming privileged,[4] the Court has now examined *in camera* certain written communications between and among the CIT Group ("CIT"), Foreclosure Management Corp.("FMC"), and Martin Leigh Laws & Fritzlen, PC ("Law Firm") to determine the degree and extent to which these documents may be withheld from production by CIT on the basis of the attorney-client privilege or the work product doctrine. The Court received 23 documents on May 21, 2007 and has reviewed the matters contained in the redacted portions of the documents.

The relationship between CIT, FMC and the Law Firm and their respective roles in the challenged conduct and discovery dispute was the subject of much probing by the Court and remains unclear. This lack of clarity contributed to the Court's difficulty in its *in camera* review. According

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[1] Dkt. 28 filed July 20, 2006.

[2] Dkt. 43.

[3] Dkt. 107.

[4] Dkt. 102.

to its counsel, CIT is the holder of one, and possibly two, mortgages on debtor's real property. Counsel was adamant that CIT was her client. According to her, CIT delegates files to FMC for handling, including mortgage foreclosures and borrowers in bankruptcy. She did not go so far as to identify FMC as the servicer of CIT's mortgages but did suggest that FMC was an agent for CIT. Until this discovery dispute arose, Ms. Schauffler communicated almost exclusively with FMC personnel regarding these CIT mortgages and took her direction from FMC. CIT presented no testimony from any CIT or FMC representative to more clearly articulate the relationships and line of authority.

When the Trustee first requested production of these emails, CIT declined to produce any communications between and among itself, FMC, and Law Firm asserting a blanket objection based upon privilege and work product. It did not, however, provide a privilege log with its blanket objection.[5] The Trustee filed her first motion to compel.[6] At the March 8, 2007 hearing on the Trustee's first motion to compel, the Court ordered that CIT provide a privilege log consistent with Fed. R. Civ. P. 26(b)(5).[7] When the privilege log was provided, it did not sufficiently describe the nature of the documents to enable the Court or the Trustee to assess the appropriateness of the privilege claim. The Trustee filed a second motion to compel.[8] Thereafter, on May 10, the Court convened a teleconference at which time CIT was directed to refine its log, giving careful consideration to what might or might not be covered by the attorney-client privilege or work product

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[5] *See* Fed. R. Civ. P. 26(b)(5).

[6] Dkt. 46.

[7] Dkt. 76.

[8] Dkt. 92.

doctrine. The Court entered an order that day directing that all documents as to which CIT still claimed the privilege should be submitted to the Court for *in camera* inspection.[9] In response to that order, CIT has now submitted 23 documents, pared down from the original 103 as to which the privilege was initially claimed. The Court has reviewed the documents and will refer to them by the bates-stamp number on the lower right hand corner of the documents.

Analysis

In determining whether or not these communications and documents are protected, the Court applies the federal common law of privilege because this proceeding arises incident to a case filed under Title 11 and is related to conduct undertaken by CIT and its counsel in the course of a bankruptcy case, specifically the alleged violation of the automatic stay under 11 U.S.C. § 362.[10] The privilege applies when (1) legal advice of any kind is sought (2) from a professional legal adviser 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 adviser, (8) unless the protection be waived.[11] CIT, the party asserting the privilege, bears the burden of establishing that the privilege applies, including proof that it did not

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[9] Dkt. 102.

[10] *See Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1551 (10th Cir. 1995), *cert. denied* 517 U.S. 1190 (1996) (federal court applies state law of privilege to state law causes of action); Fed. R. Evid. 501; *In re Foster*, 188 F.3d 1259 (10th Cir. 1999) (federal common law governed debtor's claim of privilege in bankruptcy trustee's turnover proceeding); *Simmons Foods, Inc. v. Willis*, 191 F.R.D. 625 (D. Kan. 2000) (stating that there is no real conflict between federal and Kansas law regarding the attorney-client privilege).

[11] *Great Plains Mut. Ins. Co. v. Mutual Reinsurance Bureau*, 150 F.R.D. 193, 196 (D. Kan. 1993).

waive the privilege.[12] Not all attorney-client communication is privileged, only that which is confidential and necessarily occurring in the course of requesting or giving legal advice.[13] The privilege protects client communications with in-house counsel, but only as to those communications concerning legal advice, predominating over business advice.[14]

The work product doctrine is governed by federal law as well, both in Fed. R. Civ. P. 26(b)(3) and by case law commencing with the Supreme Court's decision in *Hickman v. Taylor*, 329 U.S. 495 (1947). For this doctrine to apply, the Court must be shown that (1) the protected materials are documents or tangible things (2) prepared in anticipation of litigation or for trial; and (3) prepared for a party or a representative of the party.[15] If this is shown, then the requesting party must show that it has a substantial need for the material and is unable to acquire its substantial equivalent without undue hardship. Documents assembled in the ordinary course of business are not protected. Nor are documents prepared during the inchoate chance or likely possibility of litigation. The threat of litigation must be "real and imminent."[16] Routine investigation of a possible claim is not work product.[17] Rule 26(b)(3) also protects the mental impressions, conclusions,

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[12] *Motley, supra; McCoo v. Denny's Inc.*, 192 F.R.D. 675 (D. Kan. 2000).

[13] *Burton v. R.J. Reynolds Tobacco Co.*, 170 F.R.D. 481, 484 (D. Kan. 1997). *See also Motley*, 71 F.3d at 1550-51 stating that "the mere fact that an attorney was involved in a communication does not automatically render the communication subject to the attorney-client privilege."

[14] *See Motley, supra* at 1550-51.

[15] *Id.*

[16] *Lewis v. UNUM Corp. Severance Plan*, 203 F.R.D. 615, 622-23 (D. Kan. 2001) (Materials assembled in the ordinary course of business or for other non-litigation purposes are not protected by the work product doctrine.)

[17] *Burton*, 170 F.R.D. at 486.

opinions or legal theories of counsel concerning litigation. The standard for discovering opinion work product is very high, requiring "extraordinary justification."[18]

The Court considers the remaining 23 redacted e-mails and communications in light of the foregoing legal standards. As a preliminary note, the Court concludes that the several redactions of communications related to other bankruptcy cases (*i.e.* not pertaining to the Spoonemores) are proper, if not as privileged or work product information, then as irrelevant to the business at hand.

Content of the Communications

The Court first examines the content of each of the redacted communications to determine whether the communication is in the nature of a request for or the giving of legal advice or entails work product.[19]

Bates no.	Analysis
200369	This letter from Ms. Schauffler of Law Firm to "Bryan" (apparently with FMC) contains strategy discussions that likely fall under the mantle of opinion work product and the mental impressions of Law Firm and is properly withheld.
200406	This communication between Law Firm and FMC pertains to billing and is not attorney-client privileged as it does not request or impart any legal advice or strategy; rather it simply seeks a report on how much time Law Firm has

[18] *See Frontier Refining Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 704 n.12 (10th Cir. 1998).

[19] The Court has only detailed its analysis of those documents or communications that it considered questionable or were not protected. If the document bates number does not appear in the Court's list, the attorney-client privilege or attorney work product doctrine was properly asserted and the document or communication is not discoverable by the Trustee.

	in the case to date. This communication is not privileged and is discoverable.
200375	Same as 200406.
200378	Same as 200406.
200379	These communications of February 22 and 23, 2007 between Law Firm and FMC pertains to Law Firm's billing and a request to FMC for an affidavit for a summary judgment motion. Neither communication consists of legal advice and is not privileged.
200380	Same as 200406.
200385	The redactions in the first paragraph of this communication discusses billings, and, to that extent, does not impart legal advice. The balance concerns the merits of moving for summary judgment and the appropriate theories for CIT to pursue. As such, the balance of the redactions is, at a minimum, opinion work product and not discoverable.
200386	The redactions in the first paragraph of this communication reflect that Law Firm is transmitting discovery for response. The redaction in the last paragraph again refers to billing. Neither of these redactions implicate legal advice or work product and are not protected. The redactions in the third paragraph of the communication contain Ms. Schauffler's analysis of a settlement offer and as such reveal an attorney's mental impressions and are protected as opinion work product .
200390	The substance of this e-mail from Ms. Schauffler to Lattimore at FMC relates to the manner in which CIT should respond to the interrogatories. Much of

the redacted portions consist of Ms. Schauffler's report to FMC of what transpired with the Court, the manner in which the Court directed responses to particular interrogatories, and the information that needs to be supplied. The Court does not construe any of the redacted portions to contain the giving of legal advice or attorney work product. This communication is discoverable.

200392-394 This thread of e-mails is between and among CIT personnel (Marina Gambill, Storm Turner, Roy Stringfellow) and FMC in-house lawyer (David Noblit and Andrea Lattimore), and various other personnel with CIT. The Court initially observes that the series of communications do not appear to contain much information that could fairly be characterized as legal advice. Rather, they all seem to refer to requests for factual information.

Beginning on page bates numbered 200393, the second paragraph of Ms. Gambill's (CIT) e-mail to David Noblit (bankruptcy manager for FMC) on August 1, 2006 does not seek legal advice. While Ms. Gambill used the word "researching," she used the word in the context of asking for answers to certain questions. Those questions do not seek legal advice. Instead, they contain questions about why certain factual details were not reported to CIT by FMC. This e-mail is not privileged.

The August 2, 2006 communication on bates number 200393 from Roy Stringfellow (CIT) to David Noblit, copied to numerous CIT personnel (not all of whom are attorneys and some of whose identities are undisclosed) does

not appear to be confidential in nature, but does request legal advice at one point. Provided an attorney-client relationship exists between Noblit and CIT, the Court suggests an appropriate redaction of this e-mail is as follows:

First paragraph: redacted in total
Second paragraph: If we have completed the dil, then we own the property and I don't see what the trustee is trying to do other than being silly! (balance of paragraph redacted)
Third paragraph: Let's get all over this one and push this to resolution ASAP.
Fourth paragraph: Darrell obviously at this point we don't want to sell the home.
Fifth paragraph: Dale, I assume the dil has been recorded, but can we reverse this?
Sixth paragraph: Keep REO in the loop on this one as it is very complicated.

The communication of August 1, 2006 on bates number 200393 from Dale Cook (CIT) to Ms. Gambill (CIT) and David Noblit (FMC) conveys instructions, not legal advice, and is not privileged.

The communication of September 20, 2006 from Ms. Gambill to David Noblit on bates number 200393 confirms receipt of Noblit's e-mail regarding scheduling and asks for the status of her previous request for answers as to why the trustee was omitted from consideration in this case. This e-mail is not privileged as it does not request or give legal advice.

The redacted paragraph from David Noblit's reply e-mail of September 26, 2006 to Ms. Gambill contains no legal advice. It attempts to answer Ms. Gambill's previous requests for information and answers and recites Noblit's belief as to what transpired. This e-mail is not protected and is discoverable.

200397 This March 20, 2007 e-mail is from Andrea Lattimore (FMC) to Storm Turner (CIT). While Ms. Lattimore, identified as a bankruptcy department

manager with FMC, is shown as having a law degree, it is not clear that she is acting in her capacity as a lawyer rather than as a "manager." The communication pertains to what information CIT should provide to respond to the trustee's written discovery. It does not impart legal advice per se, beyond simple enumeration of required responses and reporting on the Court's direction concerning their scope. There is no indication from the e-mail that Lattimore is conveying confidential information from Ms. Schauffler or the Law Firm. The communication is not protected and is discoverable.

200399-400 This is an April 5, 2007 from Ms. Lattimore to Storm Turner and provides further direction or instruction in responding to the Trustee's discovery requests. This e-mail falls into the same analysis and conclusion as 200397. Out of an abundance of caution, the Court will allow redaction of the last paragraph of the April 12 e-mail on bates number 200400 as privileged as it imparts legal strategy or advice.

Existence of Attorney-Client Relationship

In addition to most of the communications noted above as lacking the giving or requesting of legal advice, some of the documents are communications between FMC and CIT, rather than Ms. Schauffler or Law Firm and the purported client CIT. The following documents fall into this category: 200392-94, 200397, and 200399-400. The parties to the communication call into question whether an attorney-client relationship exists between FMC and CIT. Even if the communication involves a FMC in-house lawyer (Noblit or Lattimore), nothing in the communications themselves

or the evidence before the Court suggests that FMC individuals acted in the capacity as a lawyer to CIT. Although Ms. Schauffler's privilege log and in-court statements describe Noblit and Lattimore as "in-house counsel" for FMC, Lattimore's title is "Bankruptcy Department Manager" for FMC and Noblit's title appears in the e-mails as "Bankruptcy Manager" for FMC. Nor is there any indication in these e-mails that FMC was forwarding communications or legal advice from the Law Firm to CIT.

One of the elements of the attorney-client privilege is that the advice be sought from a professional legal adviser in her capacity as such. The communications between Lattimore, Noblit and CIT principals nearly always report facts and rarely convey either legal advice or mental impressions. There is nothing in the record beyond counsel's assertions to indicate what the precise nature of the relationship between these two companies is. None of the parties identified in these e-mail communications testified concerning their position with CIT or FMC or described the nature and scope of their job duties. Thus, even with respect to those individuals who have legal training, it does not appear that they were acting as lawyers or that there was an attorney-client relationship between them and CIT.

The Kansas Supreme Court has stated that:

> The authority of an attorney begins with his retainer; but the relation of attorney and client is not dependent on the payment of a fee, nor is a formal contract necessary to create this relationship. The contract may be implied from conduct of the parties. The employment is sufficiently established when it is shown that the advice and assistance of the attorney are sought and received in matters pertinent to his profession. [citing 7 Am.Jur.2d, Attorneys at Law § 118, pp. 187-88].[20]

At federal law, the relationship is similarly defined. To show the existence of the attorney-

[20] *In re Adoption of Irons*, 235 Kan. 540, 548, 684 P.2d 332 (1984).

client relationship –

> [T]he parties need not have executed a formal contract. See Westinghouse, 580 F.2d at 1317. Nor is the existence of a relationship dependent upon the payment of fees. See id. at 1317 n. 6. However, a party must show that (1) she submitted confidential information to a lawyer and (2) she did so with the reasonable belief that the lawyer was acting as the party's attorney. See Nelson, 823 F.Supp. at 1445.[21]

CIT had the burden to prove the applicability of the privilege, but introduced no evidence at the May 23 hearing. The Court cannot determine whether any confidential information was conveyed by CIT to FMC's in-house counsel or that the information was conveyed with the belief that Lattimore and Noblit were acting as CIT's counsel. Nor does it appear that CIT sought Lattimore or Noblit's advice. CIT cites no specific legal authority for its proposition that CIT's and FMC's alleged agency relationship affords CIT the basis for claiming the cloak of privilege of communications between FMC's in-house counsel and CIT's principals. CIT had the burden to demonstrate the actual nature of the relationship between and among CIT, FMC, and the Law Firm and it failed in that burden. It may well be that FMC has contracted with CIT to provide CIT with legal advice, but this Court has no way of divining that in the absence of any factual basis on which to do so. Given CIT's failure to prove an attorney-client relationship between it and FMC, the Court must conclude that even those redacted communications that arguably seek or convey legal advice from FMC personnel is discoverable (*i.e.* 200393 – August 2, 2006 e-mail from Roy Stringfellow (CIT) to David Noblit (FMC), etc. and 200400 – April 12, 2007 e-mail from Ms. Lattimore (FMC) to Storm Turner (CIT)).

On this additional basis, all of the communications referenced above between FMC and CIT

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[21] *Hall v. Martin,* 1999 WL 760213, *4 (D. Kan.1999, Vratil, J.).

are discoverable. No attorney-client relationship has been established between FMC and CIT.

Waiver Problems

Additionally, the Court notes that two documents described above – 200378 and 200406 – were among CIT's privileged documents submitted for *in camera* review but were not included on CIT's initial privilege log.[22] Presumably, the privilege or work product protection of these documents is waived by virtue of that omission. This is an additional basis on which the Court concludes the communications are discoverable. CIT shall produce documents 200406 and 200378 in unredacted form.

Finally, CIT claims the attorney-client privilege with respect to document numbered 200366-67 described as an e-mail dated October 30, 2006 between David Noblit (FMC) and Ms. Schauffler and Larry Roberts with the Law Firm. CIT states that it has redacted a portion of this e-mail pertaining to a billing issue. However, these documents were not among the documents submitted to the Court for *in camera* review and the Court is unable to make a determination of the applicability of the privilege. CIT has waived any claimed privilege with respect to this document on this basis. And as noted in other e-mails reviewed herein, communication regarding billing is not protected by the attorney-client privilege and is discoverable. CIT should produce document 200366-67 in unredacted form if it has not already done so.

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[22] The Court is puzzled by the document numbered 200406 (handwritten, not stamped). The document produced for *in camera* review consists of October 2006 e-mails between Larry Roberts, a paralegal with the Law Firm, and David Noblit of FMC. On the list of e-mails compiled by Ms. Schauffler and submitted with the e-mails in dispute, a different e-mail is identified as document 200406. On the list of all e-mails, 200406 is identified as e-mails dated August 3 and 4, 2006 between one Lori Wolf and one Jeffrey Harms. This document 200406 is not claimed privileged. The Court has not been provided with an explanation of this apparent discrepancy.

Conclusion

At the May 10 hearing the Court advised counsel that CIT would be assessed a $100 sanction for every e-mail communication submitted *in camera* which proved to be unprotected. The Court finds that as to the following communications, CIT has not met its burden of proving the applicability of the attorney-client privilege or work product doctrine, or has waived the protection: 200406, 200375, 200378, 200379, 200380, 200385 (partial protection), 200386 (partial protection), 200390, 200392-94, 200397, 200399-400, and 200366-67. There appears to be no basis upon which to claim either privilege or work product protection, even under an extension of applicable law or rules, and therefore the Court imposes sanctions against CIT in the amount of $1,000.00. CIT shall produce to the Trustee within five (5) business days in unredacted form the communications identified herein that the Court has determined are discoverable and are not protected by the attorney-client privilege or work product doctrine.

IT IS SO ORDERED.

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