IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
CHEROKEE SIMEON VENTURE I, LLC	)	Case No. 12-12913 (KG)
	)	
Debtors.	)	**Re Dkt. Nos. 145, 154, 185, 187, 192, 195.**
_____	)	

MEMORANDUM ORDER

The Court is ruling on an evidentiary issue that arose at the hearing on April 8-9, 2013, continued from March 11, 2013 (the "Hearing"), namely, whether the community of interest privilege applies. Cherokee Simeon Venture I, LLC (the "Debtor" or "CSV"), Zeneca Inc. ("Zeneca"), and EFG-Campus Bay, LLC ("EFG"), submitted letter memoranda on the limited issue of the availability to Debtor and Zeneca of the common-interest privilege.[1] During the hearing, EFG cross-examined the Debtor's authorized agent, Brian Spiller, regarding communications made between Mr. Spiller and counsel for Debtor and Zeneca related to the prosecution of EFG's motion to dismiss the Chapter 11 case and in particular, the claim by EFG that Debtor, acting on behalf of Zeneca, filed the bankruptcy case in bad faith. Debtor and Zeneca objected to the line of questioning based on the common-interest privilege. Upon consideration of the parties' arguments, the Court

[1] Letter Memorandum Re: Common Interest Privilege of Debtor and Zeneca filed jointly by Cherokee Simeon Venture I, LLC ("Debtor) and Zeneca Inc. ("Zeneca") (D.I. 185 and 187) (the "Letter"); EFG's Responsive Memorandum re: Common Interest Privilege filed by EFG-Campus Bay, LLC (D.I. 192) ("EFG") (the "Response"); the Reply Letter Re: Common Interest Privilege of Debtor and Zeneca filed by Debtor and Zeneca (D.I. 195) (the "Reply"); the Emergency Motion to Dismiss Case Filed by Cherokee Simeon Venture I, LLC (D.I. 154) ("CSV's Motion to Dismiss"); and EFG-Campus Bay LLC's Omnibus Reply and Supplemental Memorandum Concerning Proceedings on March 11, 2013 (D.I. 145]) ("EFG's Motion to Dismiss").

finds that Debtor and Zeneca have a common interest in the defense against EFG's bad faith claim, and the communications at issue are therefore privileged.

JURISDICTION

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

BACKGROUND

Before rendering its decision, because the nature of the common interest privilege hinges on a relationship between co-defendants, the Court finds it necessary to provide the background on the connection between Zeneca and Debtor. This chapter 11 case revolves around Debtor's sole asset, an approximately 89 acre parcel of property located near the San Francisco Bay (the "Campus Bay Property" or "Property").[2] The Campus Bay Property has been mired in complex environmental remediation issues due to extensive contamination.[3] Zeneca originally deeded the Campus Bay Property to Debtor in 2002, apparently believing that the environmental issues had been sufficiently remediated; however, regulatory authorities re-opened the remediation in 2006 following further examination of the property by the California Department of Toxic Substance Control.[4]

Zeneca remains liable to the California Department of Toxic Substance Control as a responsible party for a significant portion of these further remediation expenses.[5] Additionally, (1)

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[2] D.I. 58, Exhibit A, Declaration of Brian A. Spiller ("Declaration"), ¶ 4.

[3] *Id.*

[4] *Id.* at ¶ 9.

[5] *Id.* at ¶ 14.

Debtor's Operating Agreement provides that Zeneca is the Manager of Debtor, (2) Zeneca appointed Debtor's Authorized Representative, Mr. Brian Spiller, and since (3) January 2013, Zeneca has largely funded the Debtor's chapter 11 case as the emergency post-petition DIP lender.[6] Zeneca provided a $75,000 loan with possible future loan extensions; however, Zeneca had no legal liability to provide additional funding.[7] EFG, Debtor's primary secured creditor, repeatedly refused to allow Debtor to use cash collateral, or to extend DIP financing.[8]

In separate motions, both Debtor and EFG have moved for dismissal of these chapter 11 cases.[9] The only remaining issue in dispute is whether, as EFG insists, the cases should be dismissed for bad faith under the standards established by the Court of Appeals for the Third Circuit. *See Santa Fe Minerals, Inc. v. BEPCO, L.P. (In re 15375 Memorial Corp.)*, 589 F.3d 605, 618 (3d Cir. 2009) (setting forth a two-prong test for bad faith, namely (1) whether the petition serves a valid bankruptcy purpose, and (2) whether the petition is filed merely to gain a tactical advantage). In EFG's Motion to Dismiss, it alleges that the CSV's chapter 11 case has a "darker side," and was instituted solely for the benefit of Zeneca. EFG alleges that by virtue of the bankruptcy proceedings, Zeneca retains control over the Campus Bay Property to manage and potentially reduce its clean-up expenses through the administrative processes. The Court held a hearing on this issue on March 11, 2013, continued on and April 8-9, 2013.

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[6] D.I. 121 (Transcript regarding Hearing Held 01/18/2013 RE: Interim Dip Financing), 5, ¶¶ 17-24

[7] Zeneca's decision in April 2013 to stop funding the chapter 11 case led to the Debtor's Motion to Dismiss.

[8] *See supra* n. 6.

[9] CSV's Motion to Dismiss (D.I. 154); EFG's Motion to Dismiss (D.I. 145).

On cross-examination of Debtor's Authorized Representative, Brian Spiller, counsel for EFG asked questions purportedly implicating privileged information. EFG asked questions of Mr. Spiller revolving around how Zeneca and Debtor developed plans for litigation strategy and cross-examination at the Hearings.[10] Counsel for Debtor and Zeneca raised objections (the "Joint Objections") to these questions under the common-interest privilege.[11] In preparation for the Hearing, Debtor and Zeneca claim they developed a common defense strategy hinging on communications between Mr. Spiller, the client representative for Debtor, Debtor's counsel, Elliot Greenleaf, and counsel for Zeneca, McCarter & English. The Court deferred ruling upon the matter, and requested the letter memoranda outlined above.

DISCUSSION

As one of the oldest privileges at common law, the attorney-client privilege was developed by the Supreme Court to encourage "full and frank communications between attorneys and their clients." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). A subset of the attorney-client privilege is the common-interest privilege, which is applicable in litigation where two or more clients face a common opponent, and counsel for those parties work together to prepare a defense as part of an ongoing common defense strategy. *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 362-66 (3d Cir. 2007)*; Haines v. Liggett Grp.*, 975 F.2d 81, 94 (3d Cir. 1992). The Third Circuit Court of Appeals recognized the privilege and:

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[10] *See., e.g.*, D.I. 176, *Id.* 189 Lines 1-2 ("Would you say there was input from Zeneca to CSV on matters other than this Motion [to Dismiss] with respect to the Chapter 11 case?); *Id.*, at 193, Lines 21-22 ("Did you discuss with Zeneca's Counsel the plans for cross-examination of EFG's witness?).

[11] *Id.* at 193, ¶¶ 13-21.

> [r]ecognizing that it is often preferable for co-defendants represented by different attorneys in criminal proceedings to coordinate their defense, courts developed the joint-defense privilege . . . Later, courts replaced the joint-defense privilege, which only applied to criminal co-defendants, with a broader one that protects all communications shared within a proper 'community of interest,' whether the context be criminal or civil. Thus, the community-of-interest privilege allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others

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In re Teleglobe Commc'ns Corp., 493 F.3d at 363-64.

Designed to protect the free flow of information where parties have undertaken a joint strategy or defense, the common-interest privilege has a three-part test, wherein the party invoking the privilege must demonstrate: (1) the communication was made by separate parties in the course of a matter of common interest; (2) the communication was designed to further that effort; and (3) the privilege has not otherwise been waived. *In re Leslie Controls, Inc.*, 437 B.R. 493, 496 (Bankr. D. Del. 2010); see also *In re Tribune Co.*, No. 08–13141 (KJC), 2011 WL 386827, *1, *4 (Bankr. D. Del. Feb. 3, 2011). Notably absent from the list, the privilege does not require a formal agreement reduced to writing. Rather, a "meeting of the minds" is sufficient provided communications were given in confidence and the clients reasonably understood them to be so given. *Am. Mgmt. Servs., LLC v. Dep't of the Army*, 842 F.Supp.2d 859, 876 (E.D. Va. 2012);[12] *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989). *See also In re Teleglobe*, 493 F.3d at 363; *Xerox Corp v. Google, Inc.*, 802 F.Supp.2d 293, 303 (D. Del. 2011).

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[12] "[T]he Fourth Circuit has made clear that neither a written agreement nor participation in litigation are requirements for invocation of the common-interest doctrine. As the Fourth Circuit put it, 'The common-interest doctrine requires a meeting of the minds, but it does not require that the agreement be reduced to writing or that litigation actually have commenced.'" *Am. Mgmt. Servs., LLC*, 842 F. Supp. 2d at 876, *aff'd*, 703 F.3d 724 (4th Cir. 2013) (*quoting Hunton & Williams v. U.S. Dep't of Justice*, 590 F.3d 272, 287(4th Cir. 2010).

In the context of a bankruptcy, the common-interest privilege has been applied between a debtor and (1) an ad hoc committee; (2) a prepetition future asbestos claims representative; (3) a creditors committee; and (4) an affiliate company. *See, e.g., In re Tribune Co.*, 2011 WL 386827 at *4; *In re Leslie Controls*, 437 B.R. at 496; *Kaiser Steel Corp. v. Frates*, 84 B.R. 202, 205 (Bankr. D. Colo. 1988); *In re Quigley Co.*, Case No. 04–15739 (SMB), 2009 WL 9034027, *1 (Bankr. S.D.N.Y. Apr. 24, 2009).

EFG argues that in the Third Circuit, the common-interest privilege only covers communications between counsel for different clients, but does not apply to communications by one client representative to attorneys of another party in matters of common interest. However, EFG misinterprets the precedent set forth in this Circuit, as the privilege specifically protects "communications between a client and its attorneys and attorneys of another client. . ." *In re Tribune Co.*, 2011 WL 386827 at *4 (*quoting In re Leslie Controls*, 437 B.R. at 496).

EFG also argues that communications must be among counsel, and that a client's participation in those communications defeats the privilege. EFG asserts that Mr. Spiller's association with both parties, in that he represents Debtor but was appointed as authorized representative by Zeneca, effectively destroys the privilege. But this very connection between Mr. Spiller and both parties is in itself evidence of a close relationship associated with the common-interest privilege. Further, the common-interest privilege protects "communications between individuals and entities and counsel for another person or company when the communications are 'part of an on-going and joint effort to set up a common defense strategy.'" *Robert Bosch v. Pylon Mfg.*, 263 F.R.D. 142, 146 (D. Del. 2009). Finally, EFG contends Debtor and Zeneca cannot share a common interest because Zeneca was only an insider asserting large claims against the estate. This

claim runs contrary to established precedent, because the privilege still applies even where parties' interests are adverse in substantial respects, but aligned with respect to others. *In re Leslie Controls*, 437 B.R. at 497.

The Court finds that the common-interest privilege protects the communications in question between Debtor and Zeneca and their respective counsel, Elliott Greenleaf and McCarter & English. First, the communications at issue were between and among Debtor, through the Authorized Representative, Mr. Spiller, Debtor's counsel and Zeneca's counsel, and were in furtherance of their common effort both to prosecute the case and then to defend against EFG's bad faith claim. Second, the purposes of the communications were to develop privileged legal strategies related to EFG's Motion to Dismiss, and to prepare for the Hearing. Third, the privilege was not waived. Accordingly, Debtor and Zeneca have met the required burden to establish that the common-interest privilege applies. *See In re Leslie Controls, Inc.*, 437 B.R.at 496; *In re Tribune Co.*, 2011 WL 386827 at *4.

Debtor's and Zeneca's request to sustain the Joint Objections and close the record of the Hearing are therefore granted. Moreover, the Court agrees that no further testimony on this issue is necessary.

SO ORDERED.

Dated: May 31, 2012

KEVIN GROSS, U.S.B.J.