

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

KEVIN GROSS
JUDGE

844 KING STREET, SUITE 2124
WILMINGTON, DE 19801
(302)573-4571

March 1, 2007

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**RE: In re 15375 Memorial Corporation, et al.,
Case Nos. 06-10859 and 06-10860 and Adversary No. 06-50822**

Dear Counsel:

The Court is responding to discovery issues arising from the referenced cases. The parties submitted letter memoranda in accordance with the Court's Order Regarding Discovery and Related Issues, dated February 7, 2007, ("the Order"). In the interest of timeliness, the Court will not discuss the background procedural posture or factual allegations relating to the substantive issues presented. With trial scheduled for April 4-5, 2007, and a discovery cutoff of March 13, 2007, practicality takes priority over an extensive recitation of background. It is sufficient to state that the proponent of the discovery, BEPCO, L.P. f/k/a Bass Enterprises Production Company ("Bass"), seeks the discovery at issue in connection with its motion to dismiss or convert the bankruptcy cases, or to appoint a chapter 11 trustee or to appoint an examiner. The instant discovery dispute arises from claims by the parties charged with responding to Bass's discovery that a portion of the discovery is protected by the attorney-client privilege and work product privilege protections. The parties asserting the

protections are the debtors, 15375 Memorial Corporation (“Memorial”) and SantaFe Minerals, Inc. (“SantaFe”) (collectively, “Debtors”); which in turn are subsidiaries of entities (collectively referred to as “GlobalSantaFe”) which the Court allowed to intervene in the on-going litigation.

The areas of dispute and the Court’s resolution are set forth below.¹

1. Discovery Related to the Investigation Regarding Property of SantaFe, Interests in Property of SantaFe Transferred to Memorial, GlobalSantaFe or Other Affiliates in Connection with the Liquidation, Winding Up and/or Dissolution of SantaFe.

Debtors have objected to this category of Bass’s discovery on the ground of attorney-client and work product privileges. The Court concludes that such discovery is appropriate and by separate Order accompanying this letter opinion, will compel debtors to respond accordingly. The work-product protection is qualified and the burden lies with the asserting party to demonstrate entitlement to such protection. *Conoco, Inc. v. United States*, 687 F. 2d 724, 730 (3rd Cir. 1982), citing *United States v. Nobles*, 422 U.S. 225, 239 (1975). The discovery is directed and relevant to the issue of Debtors’ good faith in filing their bankruptcy cases, i.e., that the petitions are supported by a valid bankruptcy purpose. Bass is seeking discovery relating to or arising from an investigation by the Kean Miller Jarman LLP law firm (“Kean Miller”) utilizing the services of Ernst & Young LLP or affiliates (“E&Y) covering SantaFe properties or transfers (“the E&Y Investigation”). The Court is satisfied the discovery is probative and relevant or, as the Bankruptcy Rules make clear, may lead to the discovery of admissible evidence. Rule 7026(b)(1). The Court’s decision to overrule Debtors’

¹ Bass has requested clarification of paragraph 5 of the Order wherein the Court framed the privilege issues in an abbreviated fashion. The Court did so for convenience and with the understanding that the parties previously discussed and agreed upon the scope of the privilege dispute. The Order was not intended to modify or negate the parties’ agreement. Indeed, Debtors’ and GlobalSantaFe’s letter memoranda addressed the privilege issues consistent with the parties’ agreement.

objection is, of course, not premised upon general principles but the Debtors' affirmative use of the E&Y Investigation to establish that Debtors had and therefore could pursue claims against affiliated companies and thereby to support Debtors' assertion that their bankruptcy cases were filed in good faith. At a hearing on October 19, 2006, David E. Faure, Debtors' Assistant General Counsel, testified and used the E&Y Investigation as evidence of Debtors' good faith filing. Once Debtors used the E&Y Investigation as a "sword", they may not raise the work product doctrine as a "shield". See *United States v. Nobles*, 422 U.S. 225 (1975) (Defense counsel prohibited from using an investigator's testimony unless the investigator's report and materials were made available to the opposition).

Debtors argue that there was no waiver because the work-product privilege, in essence, belongs to Kean Miller, not Debtors, citing *In re Hechinger Investment of Delaware*, 303 B.R. 18 (Bankr. D. Del. 2003). The Court is satisfied that Debtors' voluntary and affirmative use of the E&Y Investigation precludes Kean Miller's assertion of a work product protection. See, e.g., *American Netrocomm Corp. v. Duane Morris & Heckscher LLP*, 274 B.R. 641, 655 - 56 (Bankr. D. Del. 2002). Further, the fact that Kean Miller was present at the hearing at which Debtors supplied testimony concerning the E&Y Investigation and did not object or assert its privilege further establishes the waiver.

However, the Court is satisfied that the waiver does not extend to Kean Miller's opinion work product i.e., its "mental impressions, conclusions, opinions, legal theories" See *In re Cendant Corp., Sec. Litig.* 343 F. 3d 658, 663 (3d Cir. 2003). Opinion work product is discoverable only upon exceptional circumstances not present here. *Id.* at 663. Such protection, however, does not extend to E&Y's opinion and/or mental impressions since E&Y's employees are not attorneys

and their opinion and/or mental impressions are reflected in the information used by Debtors in Mr. Faure's testimony at the October 19 hearing.

2. Discovery Concerning Intercompany Claims and Causes of Action Relating to Property of SantaFe (including Transfers of Property or Proceeds).

Bass seeks discovery of communications between Debtors and GlobalSantaFe concerning the decision to file the bankruptcy cases. Bass seizes upon Debtors' response to Interrogatory number 10 that: "David E. Faure sought counsel from James L. McCulloch, the senior vice president and general counsel of GlobalSantaFe Corporation, regarding the decision to file Bankruptcy Cases." Bass deems this to be a waiver alleging that Debtors and GlobalSantaFe do not share a common interest and, in fact, are potential adversaries in intercompany claims litigation or challenges. The Court rejects Bass's position. First, the mere disclosure that Mr. Faure and Mr. McCulloch communicated with one another does not constitute a waiver of the privilege with respect to the substance of such communications, absent Debtors' or GlobalSantaFe's attempt to use the fact of the communications as evidence of good faith in filing the bankruptcy cases. More conclusively, there is overwhelming case law supporting the proposition that the existence of communications of privileged information between a parent and its subsidiary does not constitute a waiver of an applicable privilege. See, e.g., *In re Nucletron Manufacturing Corp.*, 1994 WL 16191611 (Bankr. E.D. VA. 1994, *2 (quoting *United States v. AT&T*, 86 F.R.D. 603 (D.D.C. 1979): "a corporate 'client' includes not only the corporation by whom the attorney is employed or retained, but also parent, subsidiary, and affiliate corporations".) See also *Duplan Corp. V. Deering Milliken Inc.*, 397 F. Supp. 1146 (D.S.C. 1974), holding that the attorney-client privilege is not waived when a corporation with a legal interest in an attorney-client communication relays it to a related

corporation. Bass does not dispute the case law on which GlobalSantaFe relies, nor does it cite any cases in support of its broad proposition that by communicating with affiliated companies, Debtors waived the attorney-client privilege. In support of upholding the privilege, GlobalSantaFe submits the Declaration of Mr. McCulloch who describes his responsibilities as Chief Legal Counsel for the GlobalSantaFe affiliates, that he renders legal advice to all affiliated entities and, relevant here, provided advice associated with the bankruptcy cases.² According to Mr. McCulloch's Declaration, all of the communications regarding the bankruptcy were limited to attorneys employed by GlobalSantaFe and their affiliates and were not disclosed to third parties. Lastly, additional support for GlobalSantaFe's arguments arises from a Management Agreement which the Court approved whereby GlobalSantaFe agreed to furnish Debtors with legal services. Under the circumstances, communications which are privileged under the attorney-client privilege remain so despite communications between Debtors and GlobalSantaFe or its affiliated companies. The protection afforded Debtors and GlobalSantaFe extends only to documents and communications consisting of legal advice sought and rendered. It does not extend to documents on which counsel were merely copied in the ordinary course. This limitation on the protection of the privilege is in keeping with the narrow construction of the privilege. *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F. 2d 1414 (3d Cir. 1991). Thus, otherwise non-privileged information cannot be cloaked with privilege merely by sharing information with a lawyer.

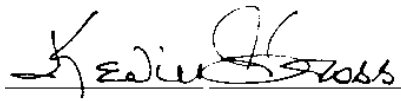
² The Third Circuit defined the elements of the attorney-client privilege in *Rhone-Poulenc Rorer Inc. v. Home Indemnity Co.*, 32 F. 3d 851 (3d Cir. 1994). Each of those elements is present here.

3. Communications Between Faure and McCulloch Re Decision to File Bankruptcy Cases.

For the ruling on this category of discovery, the Court refers the parties to the discussion and ruling under heading no. 2.

The Court will issue an Order consistent with this Opinion.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kevin Gross", written over a horizontal line.

Kevin Gross, USBJ

cc: Phillip G. Eisenberg, Esquire
Leanne O. Moses, Esquire

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

In re:)	Chapter 11
)	
15375 MEMORIAL CORPORATION, et al.,)	Case No. 06-10859(KG)
)	(Jointly Administered)
Debtors.)	
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SANTA FE MINERALS, INC.,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 06-50822(KG)
)	
BEPCO, L.P., formerly known as BASS)	
ENTERPRISES PRODUCTION COMPANY,)	
)	
Defendant.)	
)	
GLOBALSANTAFE CORPORATION,)	
GLOBALSANTAFE CORPORATE)	
SERVICES INC. AND ENTITIES)	
HOLDINGS, INC.,)	
)	
Intervenors.)	
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		Re: Dkt. Nos. 85, 86, 87 & 88

ORDER

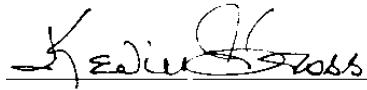
The Court has before it objections to discovery propounded by BEPCO, f/k/a Bass Enterprises Production Company (“Bass”) whereby Debtors and GlobalSantaFe entities (as defined in the accompanying letter opinion) have asserted the attorney-client and work product privileges.

IT IS HEREBY ORDERED consistent with the Court’s letter opinion, dated March 1, 2007, that:

1. Debtors shall forthwith produce communications, information, documents and materials concerning, relating to or arising from the investigation by Kean Miller & Jarman LLP (“Kean Miller”) and Ernst & Young LLP (“E&Y”) or its affiliates concerning or relating to the property or transfer of property owned by SantaFe Minerals, Inc.; excepting therefrom Kean Miller’s (but not excepting E&Y’s) mental impressions, conclusions, opinions or legal theories.

2. The remainder of Debtors’ and GlobalSantaFe’s privilege objections are sustained except as provided in the letter opinion.

Dated: March 1, 2007

A handwritten signature in black ink, appearing to read "Kevin Gross", written over a horizontal line.

Kevin Gross, USBJ