DENNIS M. DEVETTER, et al.	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
ALEX. BROWN MGMT. SVCS., INC., et al.	*	BALTIMORE CITY
	*	Part 20
Defendants		
	*	Case No.: 24-C-03-007514

****

DISCOVERY ORDER

Among the discovery matters pending before the Court are (i) plaintiffs' Notice of Intent to File Exceptions to Special Master's Findings and Recommendations of December 12, 2005, (ii) plaintiffs' Motion for Reconsideration of Special Master's Conclusions and Recommendations Regarding Attorney-Client Communications with Certain Plaintiffs' Agents, which was incorporated as plaintiffs' formal exceptions by agreement of the parties; (iii) Motion of Alex. Brown Management Services, Inc. to Begin Videotape Depositions of Roy Ballentine, Robert Goyette and Andrew McMorrow Subject to Continuation on December 13, 2005; (iv) defendants' letter request for return of privileged documents inadvertently produced to plaintiffs; and (v) defendants Alex. Brown Management Services, Inc. and Deutsche Bank Securities, Inc.'s Exceptions to Special Master's Findings and Recommendations.[1]

These matters were referred by the Court to Special Master Donald A. Rea pursuant to an Order dated August 9, 2005. Having received the report and recommendations of the Special Master with respect to these matters, the Court must determine whether his findings

[1] Filed March 16, 2006 following submission of the Special Master's Findings and Recommendations on March 6, 2006. The Findings and Recommendations of the Special Master are attached hereto for reference.

are clearly erroneous or well supported by the evidence and whether his recommendations are correct as a matter of law.

The question whether plaintiffs Greenberg and Moore can assert an attorney-client privilege as to communications with counsel involving their financial advisors at Ballentine Finn implicates the incorporation in Maryland law of the so-called "intermediary doctrine." The Special Master believed that the doctrine controlled the situation presented here and that the record contained the necessary factual predicates of reasonable necessity and reasonable expectation of confidentiality, citing as on all fours the decision of the U.S. District Court in *Neighborhood Development Collaborative v. Murphy*, 2005 WL 3272711 (D. Md. 2005) (the "NDC" opinion).

While I can readily see how the Special Master might find the NDC opinion persuasive, as a logical extension of the intermediary doctrine's application to a business context, I am not prepared to say that Maryland's appellate courts will agree. To the extent that the doctrine can be extracted from the Court of Appeals' holding in *Newman v. State*, 384 Md. 285, 306-09 (2004), it was expressly limited to the situation where the client merely acquiesced to the presence of a third party in attorney communications. It has never been extended by a Maryland court to a situation where the client specifically retains a third party to communicate with counsel.

The court is mindful that it has a responsibility to address legal issues unique to the corporate world in managing specially designated business and technology cases. But there is nothing novel about the application of the attorney-client privilege that would authorize this Court to extend its application in the context of a business case beyond that sanctioned by

Maryland's appellate courts. Even if the Court were interested in adopting the NDC opinion's rationale, it is doubtful that our Court of Appeals would find the responsibilities of plaintiffs Greenberg and Moore directly analogous to those of the President of the United States, as set forth in *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1958). With or without a reasonable necessity requirement, some compelling basis seems to be required for third party inclusion under the intermediary doctrine as articulated in *Newman v. State*, *supra*, 384 Md. at 306-09. Consequently, the Court will sustain defendants' exceptions to the Special Master's findings and recommendations concerning the asserted attorney-client privilege involving Ballentine Finn and hold that Ballentine Finn's involvement occasioned a waiver of both that privilege and plaintiffs' asserted work product protection.

In all other respects the Special Master's findings and recommendations will be accepted by this Court.

Accordingly, the Court orders as follows:

1. Plaintiffs' Motion for Reconsideration of the Recommendations submitted to the Court filed on December 19, 2005 is **DENIED**. Plaintiffs Greenberg and Moore waived privilege as to communications among Messrs. Ballentine, Goyette, and McMorrow and either plaintiffs Greenberg or Moore or their counsel.
2. To the extent plaintiffs' Notice of Intent to File Exceptions to Special Master's Findings and Recommendations seeks affirmative relief in connection with the Special Master's December 12, 2005 Recommendations, it is **DENIED** as moot in light of the ruling above.

3. The Motion of Alex. Brown Management Services, Inc. to Begin Videotape Depositions of Roy Ballentine, Robert Goyette and Andrew McMorrow Subject to Continuation on December 13, 2005, is **GRANTED**.

4. Defendants' letter request dated January 6, 2006, for the return of privileged documents inadvertently produced to plaintiffs is **DENIED** in part and **GRANTED** in part as follows: defendants' request is **DENIED** with respect to documents Bates numbers *MD-AB-DB-0122036-38*, which plaintiffs shall be entitled to retain in their un-redacted form; and defendants' request is **GRANTED** with respect to all remaining documents designated on defendants' Privilege Log. To the extent any such documents have not been returned to defendants, plaintiffs shall do so within ten (10) days of the issuance of this Order.

5. The Court's Order Appointing Special Master entered on August 9, 2005 shall remain in full force and effect, in the event that there are further matters referred to the Special Master for consideration and recommendations.

/s/
ALBERT J. MATRICCIANI, JR.
Judge
March 22, 2006

Attachment
cc: All Counsel of Record (via e-mail)
Donald A. Rea, Esquire (via e-mail)

McGuireWoods LLP
7 Saint Paul Street
Suite 1000
Baltimore, MD 21202-1671
Phone: 410.659.4400
Fax: 410.659.4599
www.mcguirewoods.com

Donald A. Rea
Direct: 410.659.4438

McGUIREWOODS

drea@mcguirewoods.com
Direct Fax: 410.659.4545

March 6, 2006

VIA ELECTRONIC MAIL

The Honorable Albert J. Matricciani, Jr.
Circuit Court of Maryland for Baltimore City
Courthouse East
Room 330
111 North Calvert Street
Baltimore, Maryland 21202

Re: DeVetter, et al. v. Alex Brown Management Services, et al., Case no. 24-C-03714

Findings and Recommendations

Dear Judge Matricciani:

As you are aware, on December 19, 2005, Plaintiffs noted their intent to file exceptions pursuant to Md. Rule 2-541(g) to recommendations I provided to the Court, a copy of which are attached hereto as **Exhibit A** (12/12 Recommendations). The recommendations concerned Plaintiffs' assertion of the attorney/client privilege and attorney work-product doctrine in connection with communications involving their financial advisory firm, Ballentine Finn & Company, Inc. ("Ballentine Finn").

All counsel agreed that before this Court ruled on Plaintiffs' exceptions, they would submit a Motion for Reconsideration of my initial recommendations. Plaintiffs' submitted their Motion for Reconsideration to me on January 2, 2006, and an additional oral argument followed on February 17, 2006.

In essence, Plaintiffs Jerry Greenberg and Stuart Moore contend that communications between themselves, Ballentine Finn representatives and Plaintiffs' counsel are privileged and that work-product provided to Ballentine Finn should also be protected from disclosure. Defendants contend that, to the extent a privilege exists, it was waived by disclosure of privileged communications to Ballentine Finn.

I originally determined that the privilege was waived by the disclosure. Plaintiffs submitted additional evidence and authority in support of their assertions together with their motion for reconsideration. For the reasons discussed below, I have reconsidered

privilege. I also believe that neither that privilege, nor the protections of the attorney work-product doctrine have been waived. Therefore, as set forth more fully in the proposed order attached hereto as **Exhibit B**, I recommend that the communications and materials be protected from disclosure.

Finally, during the February 17 teleconference, another issue was raised that will be addressed in these recommendations. Defendants contend that they inadvertently produced to Plaintiffs a "Group Credit Report" in an unredacted form. Defendants previously produced the document in redacted form and contend that the redactions concern privileged communications. For the reasons stated below, I recommend that this Court order that the document be produced in its unredacted form.

I. Procedural Background

On December 1, 2005, Defendants' counsel wrote my office to address several discovery disputes. Plaintiffs responded, in part, on December 5, 2005. On December 6, a conference was held at McGuireWoods' offices to discuss the matters raised. Although Plaintiffs' counsel were not previously afforded the opportunity to submit a written memorandum in connection with the privilege issue, they nonetheless decided to address it during that conference. Plaintiffs provided legal authority to support their assertion of the attorney/client privilege and the attorney work-product doctrine.

On December 12, 2006, I wrote to all counsel and addressed the remaining issues, including the privilege issue. (See12/12 Recommendations.) The recommendation at that time was that communications between Plaintiffs Greenberg and Moore and Ballentine Finn representatives, Messrs. Ballentine and Goyette, as well as communications between Ballentine and Goyette and counsel for Plaintiffs, are not privileged. (See id., passim.)

Defendants' counsel filed a Motion of Alex Brown Management Services, Inc. to Begin Videotape Depositions of Roy Ballentine, Robert Goyette and Andrew McMorrow Subject to Continuation on December 13, 2005. At that time, Defendants requested a teleconference with me to address the subject of the motion and Plaintiffs objected absent an opportunity to respond in writing.

On December 19, 2005, Plaintiffs filed an opposition to Defendants' motion to continue the depositions. At that time, Plaintiff's counsel also served the parties with Plaintiffs' Notice of Intent to File Exceptions to Special Master's Findings and Recommendations of December 12, 2005, pursuant to Md. Rule 2-541(e). A copy of Plaintiffs' notice is attached hereto as **Exhibit C** (hereinafter "Plaintiff's Notice").

A teleconference was held on December 20, 2005, during which it was agreed that Plaintiff's counsel would submit a Motion for Reconsideration of the Special Master's Recommendations to which Defendants would have an opportunity to

respond.[1] Thereafter, formal recommendations would be provided to the Court for its ruling on the privilege issue and on Plaintiffs' Notice. On December 21, 2005, this office issued a Memorandum summarizing the previous day's teleconference and making certain recommendations principally with respect to the deposition of Mr. McMorrow, a copy of which is attached hereto as **Exhibit D** ("12/21 Recommendations"). That memorandum included a recommendation that a protective order be issued in connection with Mr. McMorrow's deposition. (See 12/21 Recommendations at 1-2.)

On January 3, 2006, Plaintiffs timely submitted their Motion for Reconsideration of Special Master's Conclusions and Recommendations Regarding Attorney-Client Communications with Certain Plaintiffs' Agents, a copy of which is attached hereto as **Exhibit E** (hereinafter cited as "Pls.' Mot."). Defendants timely filed an Opposition to the Motion on January 25, 2006, a copy of which is attached hereto as **Exhibit F** (hereinafter cited as "Defs.' Opp."). Plaintiffs timely replied on February 1, 2006, a copy of which is attached hereto as **Exhibit G** (hereinafter cited as "Pls.' Reply").

A teleconference was held on February 17, 2006, and all counsel were provided the opportunity for oral argument on this and other pending matters. That teleconference and one of the recommendations discussed herein were summarized in an email from my office to all counsel on the same date. (See email from Donald A. Rea to all counsel attached hereto as **Exhibit H**.)[2]

II. Relevant Factual Background

Plaintiffs Greenberg and Moore are the co-Chief Executive Officers of Sapient Corporation, a large publicly traded company that designs, develops and implements critical information systems for large organizations in a variety of industries. Plaintiffs allege that their time is extremely limited as a function of their responsibilities and the considerable travel required of them as Sapient's most senior officials. (Pls.' Mot. at 5 & n.2.)

In 1996, Plaintiffs Greenberg and Moore retained Ballentine Finn as their financial advisors. (Pls.' Mot. at 4 and declarations attached thereto.) Roy Ballentine and Robert Goyette principally communicated with Plaintiffs Greenberg and Moore at that time. (Id.) With respect to the Exchange Fund that is the subject of the instant litigation, Ballentine Finn's services included (i) reviewing semiannual reports to

---

[1] It was also agreed that Plaintiffs' Motion for Reconsideration and supporting Memorandum would be incorporated in, and serve as, their formal exceptions to the prior recommendations of the special master for the Court's review.

[2] With the exception of the two matters addressed in these recommendations, all other matters were resolved. With respect to the redaction of the "Group Credit Report," Defendants respectfully requested that my recommendations by formalized for this Court's ruling. (See Ex. H, Item No. 4.)

investors on behalf of Greenberg and Moore, (ii) reviewing partnership K-1 tax forms, and (iii) interacting with Fund managers on behalf of Plaintiffs. (Id.)

In June, 2002, Ballentine Finn informed Plaintiffs that the Fund suspended all redemptions. (Pls.' Mot., Ex. A, Decl. of Jerry Greenberg, ¶ 4; Ex. B, Decl. of Stuart Moore, ¶ 4.) Plaintiffs subsequently requested that Ballentine Finn assist them in retaining counsel to investigate the Fund's alleged failure and with respect to any claims Plaintiffs might assert against the Fund. (Id. ¶ 5-6.)

In December of 2002, Andrew McMorrow became employed with Ballentine Finn and his work with Greenberg and Moore in connection with the Fund began in February, 2003, at the earliest. (Pls.' Mot. at 5 & declarations attached thereto.)[3] Sometime in 2003, Greenberg and Moore retained Martin Fishkin, Esq. to advise them regarding their legal recourse and to assist them in retaining litigation counsel. (Id.) They requested that Mr. McMorrow communicate directly with attorney Fishkin about their investment in the Fund. (Id.) According to Plaintiffs, McMorrow and Fishkin jointly interviewed potential litigation counsel on behalf of the Plaintiffs. (Id.) In November of 2003 at the earliest, Plaintiffs' retained the law firm of Susman Godfrey, LLP to represent them in the instant litigation. (Id.) Once Susman Godfrey was retained, McMorrow continued to have substantive communications with Plaintiffs' counsel. (Id.)

Thus, McMorrow communicated extensively with Plaintiffs' counsel and served as a conduit for communications between counsel and Plaintiffs Greenberg and Moore. (Defs.' Opp. at 2 and attachments thereto.) Plaintiffs contend it was their understanding that all communications would be treated confidentially and information provided to Ballentine Finn would be disclosed only to Plaintiffs Greenberg and Moore. (Id. at 5-6.) Indeed, Plaintiffs attest that they instructed Ballentine Finn's representatives to keep all such communications confidential. (Pls.' Mot., Ex. A, Decl. of Jerry Greenberg, ¶¶ 5-9; Ex. B, Decl. of Stuart Moore, ¶¶ 5-8.)

Plaintiff Moore was deposed on November 22, 2005 and Plaintiff Greenberg on December 5, 2005. Messrs. Ballentine and Goyette of Ballentine Finn were deposed on February 7, 2006 and December 21, 2005, respectively. Mr. McMorrow was not deposed pursuant to my 12/21 recommendations. During the depositions of Ballentine, Goyette, Greenberg and Moore, the witnesses were all instructed not to answer questions regarding communications between them that would have occurred after June, 2002, regarding communications between each of them and Plaintiffs' counsel. During the February 17 oral argument on the matter, Plaintiffs claimed that the witnesses were permitted to answer questions regarding communications that occurred between 1996 and June, 2002.

[3] Although all of the exhibits attached to various memoranda have not been attached hereto for the sake of volume, the declarations are attached through Exhibit E hereto for Your Honor's convenience.

III. Issues Presented and Arguments of the Parties

A) Issues Presented

The principal issues addressed in these recommendations are as follows:

1. Are communications between Plaintiffs and representatives of Ballentine Finn, as well as communications between those representatives and Plaintiffs' counsel, protected by the attorney/client privilege?

2. Are materials generated by Plaintiff's counsel and provided to Ballentine Finn protected from disclosure by the attorney work-product doctrine?

3. Are entries on Defendants' Group Credit Report that principally concern litigation risks protected by the attorney/client privilege?

B) Plaintiff's Argument

Plaintiff's principally rely on the "intermediary doctrine" espoused by the United States District Court for the District of Maryland in Neighborhood Dev. Collaborative v. Murphy, __ F.R.D. __, 2005 WL 3272711 (D. Md. 2005) (attached hereto as **Exhibit I**) (hereinafter "NDC"). Plaintiffs contend that communications between their counsel and Ballentine Finn, as Plaintiffs' intermediary, are privileged. Under the so-called intermediary doctrine, the attorney/client privilege protects communications between an intermediary of a client and counsel.

Plaintiffs contend that the key inquiry in application of the intermediary doctrine is "'"whether the *client* reasonably understood the conference to be confidential," *notwithstanding* the presence of third parties.'" (Pls.' Mot. at 8 (citations omitted) (emphasis in Pls. Mot.)) Thus, a communication "'by *any form of agency* employed or set in motion by the client is within the privilege.'" (Id. at 9 (quoting 8 Wigmore, Evidence §2317 at 618 (McNaughton rev. 1961) (emphasis in original.)) Plaintiffs conclude that "when an agent of a client communicates confidentially 'with an attorney for the purpose of seeking legal advice on behalf of the client – the agent's principal or employer – the agent's communications are privileged.'" (Id. at 10 (quoting Paul C. Rice, 1 Attorney-Client Privilege in the U.S. §4:2 (2005) (emphasis in Pls. Mot.))

On essentially the same grounds, Plaintiffs contend that the attorney work-product doctrine's protection also extends to counsel's work-product disclosed to Ballentine Finn. (Pls.' Mot. at 17-18.) However, Plaintiffs note that the work-product doctrine is broader than the attorney/client privilege, and its protections are not automatically waived by disclosure to third persons. (Pls.' Mot. at 17-18.) Although not discussed in the Memorandum supporting Plaintiffs' Motion for Reconsideration,

Plaintiffs contended during oral argument that the work-product doctrine is not waived by disclosure to third persons so long as Plaintiffs' counsel reasonably expected that such disclosure would not result in their work-product being divulged to adverse parties.

Finally, with respect to the Group Credit Report, Plaintiffs contend that the privilege was waived because the communications were not between counsel and Defendants' business personnel for the purposes of obtaining legal advice. Instead, say Plaintiffs, the purpose of the document was to make the business decision to provide the Fund further financing and in doing so, the litigation risk was related from the credit risk group to other business personnel.

C) Defendants' Argument

Defendants primarily contend that Maryland has never recognized the intermediary doctrine. Defendants further claim that even if the intermediary doctrine were applicable in Maryland, a third person constitutes a "'confidential agent for communication if the person's participation is *reasonably necessary* to facilitate the client's communication with a lawyer or another privileged person.'" (Defs.' Opp. at 11 (quoting Rest. (Third) of the Law Governing Lawyers, §70, cmt. f (2000) (emphasis in Defs.' Opp.) Defendants argue that "[a]lthough Messrs. Moore and Greenberg are the co-CEO's of Sapient Corporation, Plaintiffs have not offered any reason why Messrs. Moore and Greenberg needed Ballentine, Finn to communicate with Plaintiffs' counsel." As such, Plaintiffs may have used Ballentine Finn as "a matter of mere convenience" but have failed to prove that such communications were reasonably necessary. (Defs.' Opp. at 6 & 10-11.)

Defendants also argue that Plaintiffs reliance on Newman v. State, 384 Md. 285, 863 A.2d 321 (2004), regarding the extension of the attorney-client privilege to a third person who participated in meetings between a client and her attorney, is misplaced. Defendants argue that Newman involved a third-party being physically present during communications with counsel at the behest of counsel and under counsel's control. (Defs.' Opp. at 7-8.) Instead, Ballentine Finn served only as third-party intermediaries between Plaintiffs and their counsel. (Id.) Thus, where "'the third party is acting at the attorney's behest, ... the client's consent to the third party's continued presence does not constitute waiver of the privilege because the decision to include the third party was not made by the client, but rather by the attorney.'" (Id. at 8 (quoting Newman, 384 Md. at 308, 863 A.2d at 334.)

With regard to the attorney work-product doctrine, Defendants claim that (i) no recommendations were contained in my previous correspondence regarding work-product and (ii) disclosure of work-product to a third party waives the privilege. Based principally on the arguments in the first part of Defendants' Opposition, they contend that disclosure to Ballentine Finn representatives necessarily waived the doctrine's protection. (Defs.' Opp. at 14-15.)

Finally, with respect to the Group Credit Report, Defendants state that they produced all non-privileged materials contained within the report. The only portion of the report withheld is privileged information relayed to the business people by counsel that concerns counsel's advice with respect to the litigation risk.

IV. Analysis

A) Maryland Standards Governing the Attorney/Client Privilege.

Maryland law protects communications between a client and an attorney for the purpose of obtaining legal advice. Md. Code, Cts. & Jud. Proc. Art. §9-108 (1995 Repl. Vol.) ("A person may not be compelled to testify in violation of the attorney-client privilege"). See Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584, 591 (1981). See also Newman, 384 Md. at 301, 863 A.2d at 330 (reasserting that communications between a client and attorney "for the purpose of professional advice or aid" are protected by the privilege). The privilege belongs to the client and extends to communications with prospective counsel as well. E.I. DuPont de Nemours & Co. v. Forma-Pack, Inc., 351 Md. 396, 415, 718 A.2d 1129, 1138 (1998). The burden is on the party asserting the privilege to establish that the communications were confidential and for the purpose of obtaining legal advice. Id.

B) Plaintiffs' Communications Through Their Intermediaries at Ballentine Finn Are Privileged.

The communications between Plaintiffs and representatives of Ballentine Finn and those Ballentine Finn representatives and Plaintiffs' counsel are protected by the attorney/client privilege under the intermediary doctrine. The intermediary doctrine essentially applies the cloak of the attorney/client privilege to communications between a client and counsel under certain circumstances even though those communications are through a third-party intermediary. NDC, 2005 WL at *2.

Factually, the NDC case is practically on all fours the instant case. At issue in NDC was whether the attorney/client privilege attached to communications between an individual "who had been retained by [the defendant] as financial consultant and advisor and had apparently acted as a conduit of information" between the Defendant and counsel. Id. at *1. The District Court held that the attorney/client privilege attached to the communications regardless of whether the financial advisor was an agent of the client or his counsel. Id. (affirming Magistrate Judge's determination that "the doctrine, in fact, protected the privilege with respect to agents of the client *as well as* agents of the attorney" (emphasis in original)).

The "critical factor" in determining whether the doctrine applies is whether the communications are made in confidence for the purpose of obtaining legal advice from

the lawyer. Id. at *3 (citing In re Lindsey, 158 F.3d 1263, 1279-80 (D.C. Cir. 1998)). In the instant case, it is undisputed that the representatives of Ballentine Finn were instructed by Plaintiffs to treat their communications as strictly confidential. Indeed, they were not to communicate with anyone other than Plaintiffs and their counsel. (Pls.' Mot., Ex. A, Greenberg Decl. ¶¶ 5-9; Ex. B, Moore Decl. ¶¶ 5-8.) There is no evidence that Ballentine Finn communicated with anyone other than counsel and Plaintiffs. It therefore appears that Ballentine Finn did, in fact, hold the communications in strict confidence.

Similarly, the purpose of the communications was to obtain legal advice in connection with litigation regarding the Exchange Fund. The evidence shows that all of the communications between Ballentine Finn and Susman Godfrey were for the purpose of obtaining legal advice. (Pls.' Mot., Exs. A through D, Decls. of Jerry Greenberg, Stuart Moore, Andrew McMorrow, William Carmody and Rachel Black.)

Finally, as in NDC, no evidence was presented in the instant case that Ballentine Finn's actions extended beyond the scope of facilitating or transmitting communications between the Plaintiffs and their counsel. The evidence makes clear that Ballentine Finn served as an intermediary with counsel. (Id.) They did not participate in three-way communications but truly served as a conduit for the transmission of communications between counsel and Plaintiffs. Defendants do not contend that Ballentine Finn served in a capacity of more than an intermediary.

1. *Although "Reasonable Necessity" Is Not Required for Application of the Intermediary Doctrine, the Communications at Issue in the Instant Matter Nonetheless Appear Reasonably Necessary.*

Defendants contend that the participation of the intermediary must be "reasonably necessary" in order for the doctrine to protect the communications. However, the NDC court rejected the plaintiff's argument that the doctrine requires a showing of a "fundamental inability to communicate without the intermediary's assistance." Id. at *3. The Court refused to adopt the "reasonable necessity" standard for application of the intermediary doctrine, describing it as a more "stringent standard."

Although the doctrine as applied in NDC does not require that the intermediary's participation be "reasonably necessary," the record in the instant case nevertheless shows that Ballentine Finn's involvement was reasonably necessary. As explained in In re Lindsey,

> In applying the standard of "*reasonable* necessity," one must necessarily take into account the client's circumstances and the obstacles preventing direct communication with the attorney. What is reasonable to expect of an ordinary client

> may not be reasonable to expect of the President of the United States.

Id., Lindsey, 158 F.3d at 1279-80. Although the doctrine had its genesis in cases concerning interpreters,[4] that distinction is not dispositive of the doctrine's scope. Id. at 1280.

Obviously, neither of the Plaintiffs in the instant case serves as the President of the United States but they do serve as co-CEOs of Sapient Corporation, a large, publicly traded corporation. Plaintiffs contend that their schedules and their travel make it reasonably necessary to have a conduit for this matter due to the time requirements of their jobs and this litigation. I believe that is a reasonable contention and it represents more than "mere convenience."

2. *Maryland Would Follow the Intermediary Doctrine Under the Circumstances of the Instant Case.*

Although Defendants contend that Maryland has not expressly adopted the intermediary doctrine, upon further analysis, I believe it applies to the instant case as a matter of Maryland law. First, Plaintiffs correctly point out that the NDC Court applied Maryland State law governing the privilege pursuant to Fed. R. Evid. 501.[5] Although the District Court's decision in NDC is not binding on this Court, it is nonetheless highly persuasive. NDC, 2005 WL at *1.

In addition, Plaintiffs have brought to my attention the recent decision of the Court of Appeals of Maryland in Newman v. State, 384 Md. 285, 863 A.2d 321 (2004). Although the intermediary doctrine per se was not at issue in Newman, the decision nevertheless offers insight into how the Court of Appeals interprets the privilege in the context of third party disclosures.

At issue in Newman were meetings between Defendant Elsa Newman, her divorce attorney and her friend, Margery Landry. Id. at 289, 863 A.2d at 323-24. Counsel asked Landry to participate in the meetings with his client in order to have a "'cool head in the room.'" Id. at 290-91, 863 A.2d at 324. During some of the meetings, Newman made comments about murdering her estranged husband, Arlen Slobodow, and one of her children. During others, Newman and Landry loosely discussed plans to murder Slobodow. Id. Landry later broke into Slobodow's home and shot him twice.

---

[4] See, e.g., Hendrick v. Avis Rent A Car Sys., 944 F. Supp. 187, 189 (W.D.N.Y.1996) (paralyzed client); State v. Aquino-Cervantes, 945 P.2d 767, 771-72 (Wash. Ct. App. 1997) (client requiring translator).

[5] Plaintiff correctly contends that NDC was a diversity action and, therefore, the federal court applied Maryland State law. Pls.' Mot. at 10 & n.4 (citing FED. R. EVID. 501).)

Landry was convicted of attempted murder, and Newman's counsel was compelled to testify at Newman's subsequent criminal trial for conspiracy to commit murder.[6]

The Court of Appeals reversed the conviction and held that the trial court erroneously admitted counsel's testimony, which was subject to the attorney/client privilege. Id. at 297-98, 863 A.2d at 328. In so holding, the Court noted that the mere presence of a third party during a privileged communication will not constitute a per se waiver of the privilege. Because only the client has the power to waive the privilege, the Court reasoned that its "essential inquiry is '"whether the client reasonably understood the conference to be confidential" notwithstanding the presence of third parties.'" Id. at 306-07, 863 A.2d at 333 (quoting Rosati v. Kuzman, 660 A.2d 263, 266-67 (R.I.1995) (citation omitted)). This standard clearly appears to be the same as the critical factor identified in NDC.

One distinction between Newman and the instant case was the Court's holding there that "[w]here the third party is acting at the attorney's behest, as Landry did in the present case, the client's consent to the third party's continued presence does not constitute waiver of the privilege because the decision to include the third party was not made by the client, but rather by the attorney." Id. at 308, 863 A.2d at 334. Thus, the Court held that "Newman reasonably understood the communications in question to be confidential, and subject to the attorney-client privilege, because of [counsel's] control over Landry's presence during their meetings." Id.

Even though counsel's control over the participation of the third party in attorney/client communications was evidence of the client's reasonable understanding that the communications would be confidential, it does not appear to be dispositive. As discussed more fully above, Plaintiffs presented other evidence in the instant case that establishes their reasonable belief that communications through Ballentine Finn equally would be treated in a confidential manner for different reasons. Among other things, Plaintiffs attest to the fact that they specifically instructed counsel and Ballentine Finn to treat their communications confidentially. Moreover, the evidence is that the communications were treated in a confidential manner. That testimony is undisputed.

Thus, Newman appears to hold that a third party's participation in privileged communications will not constitute a per se waiver of the privilege if there is sufficient evidence supporting a reasonable expectation that the communications will remain confidential. Inasmuch as such evidence is present here and appears undisputed, the privilege has not been waived.

---

[6] Newman's counsel previously disclosed Newman's comments to a circuit court judge pursuant to Maryland Rule of Professional Conduct 1.6(b)(1). Id. at 291-92, 863 A.2d at 324-25.

3. *The Court of Appeals' Holding in DuPont Does Not Change the Analysis.*

It is important to revisit the Court of Appeals' decision in E.I. DuPont de Nemours & Co. v. Forma-Pack, Inc., 351 Md. 396, 718 A.2d 1129 (1998). Upon reflection on this decision in light of the additional evidence and authority presented by the Plaintiffs, it appears distinguishable on the following grounds.

DuPont involved the hiring of a collection agency to collect a debt. Id. at 402, 718 A.2d at 1132. During its attempts to collect that debt, the collection agency retained counsel to sue the debtor. Id. The Court of Appeals held that communications between the agency and the law firm on behalf of the client were not privileged because the collection agency was hired primarily for a business purpose (*i.e.,* to collect the debt). DuPont did not involve the intermediary doctrine, nor even discuss it. Even if it had, the collection agency's communications with counsel would not fall within the ambit of the doctrine. The collection agency did not serve as a conduit between the client and counsel for the purpose of facilitating communications between them. Id. at 402-22, 718 A.2d at 1141-42. The agency was hired for the business purpose of collecting a debt and it managed counsel to that end. Id. Thus, the collection agency did not serve as simply an intermediary but as an independent agent for the purposes of collecting the debt. As such, it communicated with counsel in its capacity as an independent agent.

C) Plaintiffs' Counsel Has Not Waived the Protection of the Attorney Work-Product Doctrine.

Defendants contend, and Plaintiffs admit, that certain unidentified work-product was provided to Ballentine Finn for transmittal to Plaintiffs Greenberg and Moore. Defendants contend that provision of these materials to a third party constitutes a waiver of the work-product doctrine. I believe that the work-product doctrine has not been waived and, therefore, recommend that disclosure not be compelled.

At the outset, the work-product doctrine is separate and distinct from the attorney-client privilege and is broader in scope. DuPont , 351 Md. at 406, 718 A.2d at 1134. Indeed, "even though it is often referred to as a privilege, the work-product doctrine is not a privilege at all, but is 'merely a requirement that very good cause be shown if the disclosure is made in the course of a lawyer's preparation of a case.'" Id. (quoting City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa.1962)). See Maryland Rule 2-402(d)-(f).

Several federals courts[7] have held that the attorney work-product doctrine is not waived by disclosure unless there is a significant likelihood that the materials will fall into the hands of the party's adversary. Where the third party shares a common interest with the client, the doctrine's protections generally are not waived. In re Doe, 662 F.2d 1073, 1081 (4th Cir. 1981), cert denied, 455 U.S. 1000, 102 S. Ct. 1632, 71 L. Ed.2d 867 (1982). See Restatement (Third) of Law Governing Lawyers § 91 cmt. b at 662 (1998) ("Work-product protection is waived by disclosure to third parties if it occurs in circumstances in which there is a significant likelihood that an adversary in litigation will obtain the materials"). As stated by the Fourth Circuit in In re Doe,

> Disclosure to a person with an interest common to that of the attorney or the client normally is not inconsistent with an intent to invoke the work product doctrine's protection and would not amount to such a waiver. However, when an attorney freely and voluntarily discloses the contents of otherwise protected work product to someone with interests adverse to his or those of the client, knowingly increasing the possibility that an opponent will obtain and use the material, he may be deemed to have waived work product protection. ... In other words, to effect a forfeiture of work product protection by waiver, disclosure must occur in circumstances in which the attorney cannot reasonably expect to limit the future use of the otherwise protected material.

Doe, 662 F.2d at 1081 (citations omitted).

In light of the confidentiality with which counsel's work-product was treated in the instant case, and the common interest of Ballentine Finn, Plaintiffs and counsel, there is no reasonable basis on which one can conclude that any work-product produced to Ballentine Finn would fall into the hands of Plaintiffs' adversaries in the instant litigation.

V. Defendants Group Credit Report

The last remaining dispute concerns redactions Defendants made from a "Group Credit Report" on the grounds of the attorney/client privilege. The redacted and unredacted versions of the report are attached hereto as **Exhibits J** and **K**, respectively (*MD-AB-DB*-0122036-38). The redacted language that Defendants claim is subject to the attorney/client privilege is as follows:

---

[7] As reiterated by the Court of Appeals in DuPont, "Maryland Rule 2-402(c) is almost identical to Federal Rule of Civil Procedure 26(b)(3)." DuPont , 351 Md. at 408-09, 718 A.2d at 1135. Therefore, Maryland looks to federal authority for interpretation of its rule where Maryland authority is silent. Id. (citing Shenk v. Berger, 86 Md. App. 498, 502, 587 A.2d 551, 553 (1991)("Maryland looks to corresponding federal rule for guidance in construing similar Maryland rule")(citing Snowhite v. State, Use of Tennant, 243 Md. 291, 308, 221 A.2d 342, 352 (1966)).

1. This application for committed lending to a fund falls outside batch strategy guidelines, and **would be declined from a standalone credit perspective**. However, the Legal Department has assessed the litigation risk associated with this operation as potentially high as $532m, with a realistic estimated exposure of $53 – 85m, meaning that even a limited recovery rate would result in a lower overall loss to the bank. (*MD-AB-DB-0122036* (emphasis in original).)

2. **By our estimates, DB loses less by extending the $45m loan than declining to refinance.** (Id. (emphasis in original).)

3. The Legal Department advises that the legal risk centres [*sic*] on possible claims by investors that he fund did not hedge the contributed securities to the degree described in the offering materials and that the Fund did not keep investors fully apprised of developments. (*MD-AB-DB-0122037*.)

4. The Legal Department further advises that investors have claimed that if DB does not provide credit to the fund, DB will be effectively 'forcing' the fund to conduct a fire sale at the bottom of the market. In practical terms, the current value of the fund is down 70%. A fire sale would increase this loss to 97% and would eliminate the possibility of any recovery. (Id.)

5. Senior Management is seeking to avoid litigation and consequent reputational risk to DB which would arise from a forced sale of the liquid assets.

6. The Legal risk on this transaction has been assessed by Messrs. Mayopoulos and Lloyd (DBSI Legal), and Seth Waugh (CEO North America), Kevin Parker (Global head of Equities) and Tom Hughes (Global Head of Asset Management) from a business perspective. (Id.)

7. Were DB to lend $45m against the same asset base and liquidate in the short term, $1m net excess is possible ($46m raised), however, a net loss may also result, depending on realized liquidation values. In any such event such losses would appear to be significantly less than

> the estimated losses from litigation as described above. Rating is such that provision should be considered. (*MD-AB-DB-0122038.*)[8]

During the teleconference regarding these matters, Defendants admitted that the document was not prepared by counsel. Instead, it was prepared by the Credit Risk Group to loan approval personnel for the purpose of approving additional financing to the Fund. It concerns both the business aspects of such financing and the quantification of legal risk from litigation in connection with the Fund. The communications of what might otherwise be considered privileged advice within the document constitutes a waiver of any privilege that could be asserted in connection with this document. Groups of business personnel communicated the litigation risk with other groups of business personnel for the business purpose of approving a loan. Therefore, production of the report in an unredacted form is appropriate.

Finally, Plaintiffs contend that they have returned all of the remaining documents on Defendants' privilege log. If that is indeed the case, no more disputes remain with respect to the inadvertent production of privileged documents.

VI. Recommendations

Based on the foregoing analysis, I respectfully recommend the following action:

1. Plaintiffs' Motion for Reconsideration of the 12/12 Recommendations submitted to the Court on December 12, 2005, and serving as their Exceptions to those recommendations, should be granted;

2. The Motion of Alex Brown Management Services, Inc. to Begin Videotape Depositions of Roy Ballentine, Robert Goyette and Andrew McMorrow Subject to Continuation on December 13, 2005, should be denied.

3. No further deposition testimony should be compelled from Messrs. Goyette, Ballentine, McMorrow, Greenberg or Moore in connection with communications among them after June, 2002, or between any of them and Plaintiffs' counsel;

4. Production of any work-product provided by Plaintiffs' counsel to representatives of Ballentine Finn should not be compelled;

---

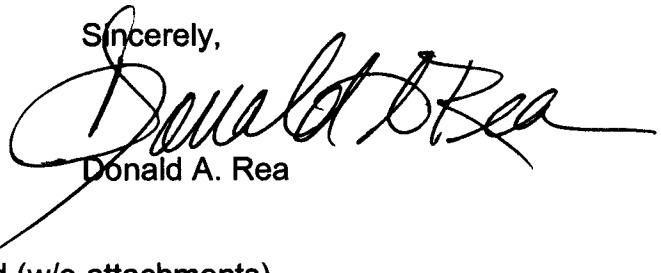
[8] Defendants originally redacted the following entry as well, but have withdrawn the redaction: "Reputational issues arise due to the high profile nature of the investors in the financial community." ((*MD-AB-DB-0122037.*)

5. To the extent this Court does not accept the recommendations with respect to the depositions of Messrs. Goyette, Ballentine, McMorrow, Greenberg or Moore, I respectfully recommend that Plaintiffs' deadline for a motion in limine with regard to testimony elicited from these witnesses be extended for a reasonable period of time beyond the depositions and the current March 8, 2006 deadline; and

6. Plaintiffs should be entitled to retain the documents Bates numbered *MD-AB-DB-0122036-38* in their unredacted form, and should not be compelled to return those unredacted versions to Defendants.

As always, should Your Honor have any questions or require any clarification whatsoever, please do not hesitate to contact me. Thank you.

Sincerely,



Donald A. Rea

cc: All Counsel of Record (w/o attachments)