

SEP 14 1999

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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September 7, 1999

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RE: WT Equipment Partners, L.P. v. Karl M. Parrish, et al.
Civil Action No. 15616
Date Submitted: September 1, 1999

Gentlemen:

The remaining issue on the defendant's Motion to Compel is whether the plaintiff should be required to disclose the substance of its attorney's oral communications, about matters related to the subject of this case, with the United States Attorney for the Southern District of New York. Having reviewed the letter memoranda of counsel, I conclude that that information is privileged under Del. R.

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Evid. 502(b)(3)(1998)(privilege applies to communications “to a lawyer representing another in a matter of common interest”), and that accordingly, the Motion to Compel its disclosure must be denied.

In this case plaintiff’s counsel, believing that the defendants’ activities that are the subject of this litigation might also form the basis for a criminal prosecution, disclosed certain information, in the form of documents and oral communications, to the U.S. Attorney for the Southern District of New York. By their motions to compel, the defendants seek to force the disclosure of that information. Because the defendants have already been furnished all the documents that plaintiff made available to the Government, the only matter in contention concerns counsel’s oral disclosures to the U.S. Attorney’s office.

This effort by defendants to compel disclosure of those oral communications appears to have little substantive or practical relevance to resolving the issues raised in this civil action. Such disclosures would, however, have considerable strategic utility in any criminal proceedings brought against the defendants against the defendants by the U.S. Government. Under our Court Rules, the defendants in this action are entitled to discover into the factual and

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legal bases for the claims being asserted against them, and no argument is made that such discovery has been precluded. But, once those facts are disclosed as a matter of general discovery, it is unclear what, if any, utility is added by compelling the disclosure of essentially the same information in the form of what the plaintiff's counsel told the U. S. Attorney. Any relevance would appear to be at best marginal, and would be vastly outweighed by the prejudice occasioned by the likely chilling effect upon a litigant's counsel, from knowing that his or her communications with the Government, made in a good faith effort to report suspected criminal activity by a litigation adversary, would become discoverable by the adversary in the civil action. That result would, in my opinion, represent poor public policy, for which reason I decline to require it unless authoritative Delaware case law gives me no alternative.

Defendants' counsel has not cited any such authoritative precedent. Defendants rely upon State v. Flowers, Del. Supr, 316 S.2d 564, 566 (1973) and Roviaro v. United States, 353 U.S. 53, 59 (1957) for the proposition that the "informant's privilege" protects only the identity of the informer, but not the contents of the information. But those arguments miss the mark, because the

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plaintiff here does not rely upon the "informer's privilege;" moreover, this is not a criminal proceeding in which that privilege would be invoked. This is a civil action, and the privilege being relied upon here is the "joint prosecution privilege" which applies in both civil and criminal proceedings, actual or potential, and protects communications among persons and/or their attorneys who share a common interest in litigation. See In Re Grand Jury Subpoenas, 89-3 and 89-4, 902 F.2d 244, 249 (1990); see also Del. R. Evid. 502(b)(3)(1998). This privilege has been applied to protect private litigants' communication with the government with respect to a "common adversary." See United States v. AT&T, 642 F.2d 1285 (D.C. Cir. 1980); United States ex rel. Burroughs v. DeNardi Corp., 167 F.R.D. 680, 685, 686, n.2 (S.D. Cal. 1996); Chamberlain Mfg. Corp. v. Maremont Corp., No. 90 C-7127, 1993 WL 625511 (N.D. Ill. 1993). That is the kind of communication into which defendants seek to discover in this case.

For these reasons the Defendants' Motion for a Protective Order is denied. IT IS SO ORDERED.

Very truly yours,



cc: Register in Chancery