

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the application of

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), *et al.*

Petitioners,

for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.

Index No. 651786/2011

Assigned to: Kapnick, J.

**STEERING COMMITTEE'S MEMORANDUM OF LAW
IN SUPPORT OF ORDER TO SHOW CAUSE
WHY THE COURT SHOULD NOT COMPEL
DISCOVERY FROM EMPHASYS TECHNOLOGIES, INC.**

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STATUTES

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The Steering Committee of the Intervenor-Respondents and Objectors respectfully moves under CPLR § 3124 to compel EmphaSys Technologies, Inc. (“ETI”), through its representative David Anthony, to (1) produce the documents requested in the Steering Committee’s October 29, 2012 Subpoena to ETI, and (2) answer deposition questions regarding the work that ETI performed relating to the proposed settlement.¹ The Steering Committee also respectfully requests an order for the resumption of ETI’s deposition.

INTRODUCTION

Before the commencement of this action, the Bank of New York Mellon (“BNYM” or “Trustee”) retained ETI, a third party, [REDACTED]. [REDACTED] Despite the obvious importance of the scope of work performed by ETI—including that ETI’s work [REDACTED] [REDACTED]—counsel claims that ETI’s work product is privileged. Counsel for BNYM and ETI also blocked most, if not all, of the questioning by the Steering Committee during ETI’s deposition.

BNYM’s and ETI’s attempts to shield relevant discovery into the work performed by ETI is wholly unjustified, but consistent with BNYM’s apparent efforts to prevent Intervenor and the Court from obtaining critical information about [REDACTED].

[REDACTED] One example of BNYM’s resistance to transparency on this topic is the

¹ The Steering Committee submits this memorandum on behalf of all Intervenor except: the Delaware Department of Justice; the New York State Office of the Attorney General; the Federal Housing Finance Agency; the National Credit Union Administration Board; the Maine State Retirement System; Pension Trust Fund for Operating Engineers; Vermont Pension Investment Committee; the Washington State Plumbing and Pipefitting Pension Trust; the Knights of Columbus and the other clients represented by Talcott Franklin P.C.; Cranberry Park LLC; and Cranberry Park II LLC.

[REDACTED]² Faten Sabry on behalf of NERA testified that in [REDACTED]

[REDACTED]³ Ms. Sabry testified that NERA [REDACTED]

[REDACTED]⁴ [REDACTED]
[REDACTED]⁵ [REDACTED]

[REDACTED]⁶ [REDACTED] is just one example of BNYM’s many efforts to block information concerning [REDACTED]. The Steering Committee reserves its right to challenge BNYM’s decisions concerning [REDACTED]. However, this order to show cause is narrowly focused and will address only the improper privilege objections made with respect to ETI and matters concerning [REDACTED]

ETI’s testimony, documents, and reports will aid the Court and Intervenors in understanding key questions related to whether BNYM conducted an adequate factual investigation and whether the Court should approve the Settlement Agreement, which if

² NERA is a consulting firm that BNYM hired to perform calculations necessary to determine what portion of the settlement payment would be allocated to each Covered Trust.

³ Ex. 10 at 132:23-133:6. Citations to “Ex. ___” reference the exhibits to the Affirmation of Michael A. Rollin In Support of OTSC Regarding EmphaSys Technologies, Inc., dated January 13, 2013, and filed simultaneously with this brief.

⁴ Ex. 10 at 71:23-74:22.

⁵ *Id.* at 68:8-70:12.

⁶ *Id.* at 132:23-133:21.

approved would extinguish the rights of all Certificateholders in the Covered Trusts. In addition, this information will shed much-needed light on [REDACTED]

None of counsel's privilege objections were proper as to ETI, who counsel admitted on the record is a fact witness. First, as made clear by deposition testimony, [REDACTED]

[REDACTED] so ETI cannot be shielded by BNYM's privilege objections. Second, the attorney-client privilege and attorney work-product doctrine are inapplicable because ETI's communications with BNYM are not communications between an attorney and a client and ETI's reports and related documents do not reflect counsel's research, legal theory or strategy. Third, ETI's documents and reports do not qualify as material prepared in anticipation of litigation because [REDACTED]

[REDACTED] The Court should reject BNYM's attempt to shield relevant and discoverable information from Intervenors with inapplicable privilege objections and compel discovery of ETI's documents and testimony.⁷

FACTUAL BACKGROUND

On October 29, 2012, the Steering Committee served EmphaSys Technologies, Inc. with a subpoena requesting the production of five categories of documents:

- (1) All documents or communications exchanged between ETI and BNYM, the Inside Institutional Investors, and/or Bank of America;
- (2) All facts, data, or other documents considered by ETI during the course of its engagement with BNYM;

⁷ The scope of Steering Committee's Motion and Memorandum here is limited to BNYM's counsel's meritless privilege objections. In the event the Court deems any of the information privileged, the Steering Committee respectfully reserves its right to seek further relief from the Court based upon other grounds, including, but not limited to, at-issue waiver and the fiduciary exception.

- (3) All documents and/or files kept by ETI concerning its engagement with BNYM, including but not limited to, hand-written notes and draft documents;
- (4) All documents and/or files kept by ETI concerning communications between ETI and BNYM, the Inside Institutional Investors, and/or Bank of America, including but not limited to hand-written notes; and
- (5) All documents concerning ETI's time records, invoices, and evidence of payment received for any work done in connection with or concerning ETI's engagement with BNYM (all five categories collectively referred to as the "ETI Documents").

Ex. 1.

On November 8, 2012, the Steering Committee served ETI with a deposition subpoena pursuant to CPLR § 2302(a). Ex. 2. In a letter dated November 13, 2012, counsel for BNYM provided written objections to the document subpoena. *See* Ex. 3. According to BNYM's counsel, "the entire ETI engagement relating to the Settlement Agreement, including virtually all of ETI's communications with Mayer Brown or BNYM and all of ETI's work product, is covered by the attorney-client privilege." *Id.* at 3. However, BNYM's counsel stated it would "allow ETI to testify about non-privileged matters." *Id.*

One day before ETI's deposition, BNYM's counsel produced a total of four ETI Documents, including a heavily-redacted version of [REDACTED] and objected to the production of additional documents based on the attorney-client privilege and work product doctrines. *See* Ex. 4. Then, on November 15, 2012, the Steering Committee deposed David Anthony, who appeared on behalf of ETI. Mayer Brown appeared as counsel on behalf of both BNYM and ETI. During the deposition, counsel objected to questioning as "covered by the attorney-client privilege or work product protections." Ex. 5 at 35:5-6.⁸ BNYM's counsel

⁸ Counsel did not specify whether he was seeking protection from only the attorney work product doctrine, or both the attorney work product doctrine and the general work product doctrine. Out of

blocked the Steering Committee’s questioning about ETI’s factual analysis, including when the Steering Committee asked:

- [REDACTED] (*id.* at 42:16-43:4);
- [REDACTED] (*id.* at 74:4-75:14);
- [REDACTED] (*id.* at 41:23-42:7);
- [REDACTED] (*id.* at 42:2-43:4);
- [REDACTED] (*id.* at 45:21-46:8);
- [REDACTED] (*id.* at 47:25-48:4);
- [REDACTED] (*id.* at 49:4-17);
- [REDACTED] (*id.* at 49:21-50:4); and
- [REDACTED] (*id.* at 48:5-25).

Because ETI appeared as a fact witness and the Steering Committee questioned ETI about the factual investigation it conducted on behalf of BNYM, as Trustee for the 530 Covered Trusts, counsel’s objections to the Steering Committee’s questioning were improper.⁹

precaution, the Steering Committee addresses both work product doctrines in this brief. Under either theory, the ETI Documents and related testimony are discoverable.

⁹ Counsel for BNYM has blocked testimony regarding facts from other witnesses using the same groundless privilege objections. *See, e.g.*, Ex. 6 at 73:8-17; 78:7-22; 79:7-17; 134:21-135:23; 139:8-

LEGAL STANDARD

New York’s discovery rules require “full disclosure of all matter material and necessary in the prosecution or defense of an action,” CPLR § 3101(a), and are to be liberally construed. *Allen v. Crowell-Collier Publ’g Co.*, 21 N.Y.2d 403, 406 (1968). Although CPLR § 3101 establishes three categories of protected materials: (1) attorney-client privileged matter, (2) attorney’s work product, and (3) trial preparation materials, a party’s “[s]weeping assertions of privilege are unacceptable.” *Finkelman v. Klaus*, 856 N.Y.S.2d 23, 2007 WL 4303538, at *3 (Sup. Ct. Nassau Cnty. Nov. 28, 2007). “When a party claims that particular records or documents are exempt or immune from disclosure, the burden is on the party asserting such immunity.” *Cent. Buffalo Project Corp. v. Rainbow Salads, Inc.*, 140 A.D.2d 943, 944 (4th Dep’t 1988) (internal citation omitted). “This burden is so placed by virtue of the strong policy in favor of full disclosure[.]” and “the mere assertion that [a consultant’s reports] constitute an attorney’s work product or material prepared for litigation will not suffice.” *Zimmerman v. Nassau Hosp.*, 76 A.D.2d 921, 921-22 (2d Dep’t 1980) (citation omitted).

ARGUMENT

I. ETI Is a Fact Witness, Not a Litigation Consultant, and Therefore Its Testimony and Documents Cannot Be Shielded by BNYM’s Privilege Objections

BNYM’s counsel objected to questions during the deposition of Mr. Anthony as if ETI was a litigation consultant. At the same time, [REDACTED] and counsel repeatedly admitted that Mr. Anthony was testifying as a fact witness. Ex. 5 at 19:16, 35:8-10, 50:18-20. Under well-established law, any privilege afforded to litigation consultants “cannot be used to narrow or restrict the testimony or disclosures by [a]

141:11. At this time, the Steering Committee is not moving to reopen all depositions; however, the Steering Committee reserves the right to request to reopen additional depositions depending upon the information obtained from newly-discovered documents and additional depositions.

fact witness.” *City of Rochester v. E & L Piping, Inc.*, No. 1999/12094, 2001 WL 1263377, at *2 (Sup. Ct. Monroe Cnty. Aug. 29, 2001). This holds true because “[o]nly documents created or communicated by [the litigation consultant] to [counsel] within the litigation consultancy are protected and not subject to disclosure.” *Delta Fin. Corp. v. Morrison*, 14 Misc.3d 428, 431 (Sup. Ct. Nassau Cnty. 2006). BNYM cannot create a privilege where none exists. *See Spectrum Sys. Int’l Corp. v. Chemical Bank*, 157 A.D.2d 444, 449 (1st Dep’t 1990).

To determine whether a third-party consultant was retained as a litigation consultant, courts will consider the nature of the retention. *See Delta*, 14 Misc. 3d at 432 (“A review of the retention letter . . . indicates that [the consultant] was retained as a litigation consultant[.]”). For example, in *Delta*, the court found that only documents and communications prepared by a consultant during the time it served as a litigation consultant were protected from disclosure by the attorney-client privilege, whereas materials prepared by the consultant prior to its engagement as a litigation consultant were properly discoverable because the consultant was merely a fact witness. *Id.* at 436-37.

Here, the ETI Documents and testimony are not entitled to any protection because ETI [REDACTED]. First, as BNYM’s counsel conceded multiple times during the deposition, ETI was and is “a fact witness.” Ex. 5 at 19:16, 35:8-10, 50:18-20. Second, the evidence shows that [REDACTED] [REDACTED] Ex. 7; *see also* Ex. 5 at 40:12-17 [REDACTED] [REDACTED] [REDACTED] Ex. 8. Finally, Mr. Anthony agreed that all of the services ETI provided to BNYM were [REDACTED]

Ex. 5 at 37:17-20, and

Id. at 39:20-23.

ETI, as a fact witness, is not afforded the same protections as a litigation consultant.¹⁰ *See City of Rochester*, 2001 WL 1263377, at *2-3. Therefore, the ETI Documents and testimony regarding the work ETI performed for BNYM are properly discoverable.

II. ETI's Testimony And Documents Are Neither Attorney-Client Privileged Nor Attorney Work Product Protected

The undisputed fact that Mr. Anthony is a fact witness and not an expert witness ends the inquiry. The information he and others at ETI conveyed to BNYM and the information BNYM conveyed to ETI cannot enjoy privilege protections because ETI is a third party. However, even if BNYM changes course and now attempts to argue that ETI was hired as an expert, it still does not give rise to a blanket privilege claim over all ETI work product and information. “The attorney-client privilege extends only to communications and not facts.” *Spectrum Sys.*, 157 A.D.2d at 449 (citing *Upjohn v. United States*, 449 U.S. 383, 395-96 (1981)). “It has long been settled that information received by the attorney from other persons and sources while acting on behalf of a client does not come within the attorney-client privilege.” *Id.* at 449. Similarly, only “interviews, statements, memoranda, correspondence, briefs, mental impressions, and personal beliefs that were held, prepared, or conducted by the attorney” are protected from disclosure as attorney work product. *Cent. Buffalo*, 140 A.D.2d at 944 (internal quotations omitted; emphasis added).

“With reference to an attorney’s dealings with an expert, it is only the information and

¹⁰ Even if the Court determines that BNYM’s counsel hired ETI as a litigation consultant (which it did not), counsel waived the protections generally afforded to litigation consultants by allowing ETI to testify rather than moving to quash the deposition and seeking a protective order from this Court. *See Beller v. William Penn Life Ins. Co.*, 15 Misc. 3d 350, 353 (Sup. Ct. Nassau Cnty. 2007) (rejecting an argument that expert retained as both a litigation consultant and a testifying expert is entitled to protections afforded to litigation consultants).

observations disclosed by the attorney and conveyed to the expert which are subject to exclusion.” *Zimmerman*, 76 A.D.2d at 922 (citing *People v. Edney*, 39 N.Y.2d 620, 625 (1976)); *Beach v. Touradji Capital Mgmt.*, 949 N.Y.S.2d 666, 669 (1st Dep’t 2012) (holding that the “[t]he only portion of the analyst’s reports that could be attorney work product would be impressions, directions, etc., of counsel”). Notably, consultant reports “prepared by a third party and thereafter conveyed to the attorney . . . do[] not come within the exclusion.” *Cent. Buffalo*, 140 A.D.2d at 944 (finding that CPA’s report regarding financial records prepared for settlement negotiations was not attorney work product protected because it was prepared by a third-party for the attorney).

Likewise, here, the ETI Documents and related testimony are neither attorney-client privileged communications nor attorney work product. As discussed in Part I, *supra*, [REDACTED]

[REDACTED] During ETI’s deposition, the Steering Committee sought to elicit testimony from ETI as “a fact witness” by asking questions regarding [REDACTED]

[REDACTED] Ex. 5 at 42:8-15 (emphasis added); *see also* Procedural Background, *supra* (listing factual questions BNYM’s counsel improperly objected to on privilege grounds). Counsel’s objections were clearly improper as counsel used them to block the underlying facts, which are not subject to the attorney-client privilege.

Furthermore, [REDACTED] Ex. 5 at 73:17-18, 20-23 (agreeing that ETI’s only [REDACTED] The ETI Documents could not (and did not) contain legal advice or attorney work product, as the documents were not prepared by an attorney, do not reflect counsel’s legal research and analysis,

and were not “made for the purpose of facilitating the rendition of legal advice or services in the course of a professional relationship.” *Spectrum Sys.*, 157 A.D.2d at 447. That the results of ETI’s factual investigation may have been shared with BNYM’s counsel does not make ETI’s factual analysis privileged. *Id.* at 447-448. The Court should order production of the ETI Documents and compel testimony regarding the work ETI performed for BNYM.

III. ETI’s Work Was Not Performed in Anticipation of Litigation or for Trial

A. BNYM hired ETI

Work prepared in anticipation of litigation is distinguishable from work prepared [REDACTED]. While the former is entitled to limited work product protection, the latter merely aids a client in making a business decision and is thus not entitled to any work product protection. *See, e.g., Mold Maint. Serv. v. Gen. Accident Fire & Life Assurance Corp.*, 56 A.D.2d 134, 135 (4th Dep’t 1977) (finding consulting expert’s report not protected because it was prepared in the “normal course of business”); *Chemical Bank v. Nat’l Union Fire Ins. Co.*, 70 A.D.2d 837 (1st Dep’t 1979) (finding that a financial report prepared “for possible use in litigation,” and for other purposes as well, including “to help assess defendant’s liability,” was not privileged, and ordering production of the report pursuant to CPLR § 3124). Indeed, the Appellate Division has expressly held that a report prepared in connection with advising the client “whether to approve or ratify [a] settlement proposal,” is not a report prepared in anticipation of litigation and therefore is not exempt from discovery. *Cent. Buffalo*, 140 A.D.2d at 944.

BNYM’s primary, if not only, motivation in hiring ETI was to [REDACTED]

[REDACTED] BNYM has made no showing that the ETI Documents were prepared in

anticipation of litigation or for trial. [REDACTED]

[REDACTED] Ex. 8; *see also* Ex. 5 at 37:12-16 [REDACTED]

[REDACTED] BNYM conducted an investigation to make a *business* determination concerning [REDACTED]

[REDACTED] The ETI Documents and related testimony are properly discoverable.

B. Even if prepared in anticipation of litigation, the ETI Documents are discoverable because they are necessary for the Court to understand how the settlement will affect Certificateholders

Should the Court find that ETI's Documents fall within trial preparation materials as defined in CPLR § 3101(d), these materials nonetheless are discoverable because (1) Intervenors have "substantial need of the materials in the preparation of the case," and (2) they are "unable without undue hardship to obtain the substantial equivalent of the materials by other means." CPLR § 3101(d)(2). [REDACTED]

[REDACTED] and, to date, BNYM has not disclosed how the settlement proceeds will be distributed to Certificateholders in the Covered Trusts.

In addition, Intervenors' hiring of a consultant to perform similar analysis would be insufficient because that analysis would not show what BNYM, as Trustee, relied upon in deciding whether to enter the Settlement Agreement. Without knowing the information BNYM considered when it evaluated the settlement, the Court cannot determine whether the Trustee conducted an adequate factual investigation, whether the Trustee appropriately evaluated the benefits and consequences of the settlement, whether the Trustee acted within the bounds of reasonableness, whether the settlement should be approved in all respects, and how the

settlement will affect all Certificateholders in the 530 Covered Trusts.

CONCLUSION

For the above reasons and pursuant to CPLR § 3101(a), the Steering Committee respectfully request that this Court issue an order requiring (1) production of the ETI Documents; (2) responses to deposition questions regarding the work ETI performed for BNYM; and (3) the resumption of ETI's deposition.

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