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

BARBARA R. KAPNICK

PART 39

Index Number : 603766/2008

JPMORGAN CHASE

VS.

INDIAN HARBOR INSURANCE

SEQUENCE NUMBER : 003

COMPEL DISCLOSURE

INDEX NO. 603766/08

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 5/26/11

BARBARA R. KAPNICK J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 39

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JPMORGAN CHASE & CO., JP MORGAN CHASE BANK, N.A., and J.P. MORGAN SECURITIES INC.,

Plaintiffs,

- against -

INDIAN HARBOR INSURANCE COMPANY, HOUSTON CASUALTY COMPANY, TRAVELERS INDEMNITY COMPANY, ARCH INSURANCE COMPANY, ST. PAUL MERCURY INSURANCE COMPANY, TWIN CITY FIRE INSURANCE COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, and SWISS RE INTERNATIONAL SE,

Defendants.

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DECISION/ORDER
Index No. 603766/08
Motion Seq. No. 003

BARBARA R. KAPNICK, J.:

In this motion, defendants Indian Harbor Insurance Company ("Indian Harbor"), Houston Casualty Company ("Houston"), Gulf Insurance Company ("Gulf"), St. Paul Mercury Insurance Company ("St. Paul"), Arch Specialty Insurance Company ("Arch"), Twin City Fire Insurance Company ("Twin City"), Lumbermens Mutual Casualty Company ("Lumbermens"), and Swiss Re International SE ("Swiss Re") move, pursuant to CPLR 3124, to compel plaintiffs JP Morgan Chase & Co., JP Morgan Chase Bank, N.A., and J.P. Morgan Securities, Inc. (collectively, "JPMC") to produce documents and communications (Defendants' First Set of Requests for Production of Documents), which have been withheld from production by JPMC upon assertions of

attorney-client privilege and the work-product doctrine, as well as on relevance grounds.

The background of this case is discussed at length in the decision on motions sequence numbers 004-008 issued simultaneously herewith.

Defendants seek to compel JPMC to produce all files relating to Bank One's defense of litigation arising out of the insolvency of NCFE, an entity that securitized and sold healthcare receivables to investors ("NCFE Litigation"). Defendants' document requests include: (1) all defense-related documents and information generated by or in the possession of Bank One's in-house counsel, directors, officers and employees prior to the mergers with JPMC in 2004; (2) all defense-related documents and information generated by or in the possession of JPMC and its in-house counsel, directors, officers and employees relating to the defense of the Bank One Entities and JPMC named as defendants in the NCE Litigation; and (3) all defense-related documents and information generated or in the possession of Bank One's outside defense counsel.

Defendants argue that Illinois law applies to this dispute, and that pursuant to Illinois law, they are entitled to otherwise

privileged, but relevant, NCFE defense-related information. Defendants also assert that the document production will lessen, rather than increase, the parties' litigation burden.

None of the excess insurance policies has a choice of law provision. Defendants contend, therefore, that a "center of gravity" test or "grouping of contacts" test should be used to determine which state "has the most significant relationship to the transaction and the parties." (*Certain Underwriters at Lloyd's, London v Foster Wheeler Corp.*, 36 AD3d 17, 21 [1st Dep't 2006], *aff'd* 9 NY3d 928 [2007]). Accordingly, they argue, Illinois law is applicable, because this action involves insurance policies covering multi-state risks issued to an Illinois-based insured, and the principal place of business of the insureds, the Bank One Entities, is Chicago, Illinois.

However, this Court need not engage in a center of gravity or grouping of contacts analysis, given the recent decision of the Appellate Division, First Department in *People v Greenberg*, 50 AD3d 195, 198-99 (1st Dep't 2008), *lv dismissed* 10 NY3d 894 (2008), which holds that because the discovery is taking place in New York, for the purpose of preparing for trial in New York, New York law is controlling in determining the issue of privilege.

Moreover, even if this Court were to consider other factors, under a center of gravity or a grouping of contacts analysis, the law of New York would still be applicable. Of paramount importance is the "jurisdiction in which the assertedly privileged communications were made" (*Lego v Stratos Lightwave, Inc.*, 224 FRD 576, 579 [SDNY 2004]; *see also Delta Fin. Corp. v Morrison*, 13 Misc 3d 1229[A], [Sup Ct, Nassau Co 2006]; *Brandman v Cross & Brown Co. of Florida*, 125 Misc 2d 185, 186 [Sup Ct, Kings Co 1984]).

The majority of sought-after communications involved lawyers situated in New York (*see e.g.* Affirmation of C. William Phillips, Esq., dated December 11, 2009; Affirmation of Nicolas J. Panarella, Esq., dated December 10, 2009). While attorneys of other states were also involved in these communications, none has a greater center of gravity and, thus, the situs of New York as the forum of this action tips the balance in favor of applying New York law to the discovery dispute.

Although rooted in the common law, the attorney-client privilege is codified in CPLR 4503 (*Madden v Creative Servs., Inc.*, 84 NY2d 738, 745 [1995]). For the privilege to apply when communications are made from client to attorney, they must be for the purpose of obtaining legal advice and directed to an attorney consulted for that purpose. For the privilege to apply when

communications are made from attorney to client, whether or not in response to a particular request, they must be to facilitate the rendering of legal advice or services, in the course of a professional relationship (*Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 593 [1989]. Defendants do not argue that either of these scenarios does not exist, or that any of the privileged communications have been waived. Although whether a particular document is protected requires a fact-specific determination (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371 [1991], defendants do not raise any such factual issues here.

Defendants do not argue that, under New York law, the privilege is not applicable to the documents sought. Instead, they argue that Illinois law applies and, therefore, that the privilege issues in this action are governed by *Waste Management, Inc. v International Surplus Lines Ins. Co.* (144 Ill 2d 178 [Sup Ct Ill 1991]).[1] Relying on that case, defendants argue that JPMC must produce the files of its legal counsel because of the cooperation clause in the policies. Under controlling New York law, however, an insurer is not entitled, under a cooperation clause, to learn of

[1] Defendants did not address the issue of privilege in the event that the court were to find that New York law applies. Instead, in their joint memorandum of law they "reserve the right" to argue their positions under New York law (FN 6), but failed to avail themselves of that "right" by omitting discussion of New York law from their motion papers.

"any and all legal advice that may have been obtained 'with a reasonable expectation of confidentiality'" (*Gulf Ins. Co. v Transatlantic Reins. Co.* (13 AD3d 278, 280 [1st Dep't 2004]). "So long as the insurer [in that case] produced all documents in its possession relevant to the underlying claim, its duty under the cooperation clause was fulfilled" (id. at 280, *citing North Riv. Ins. Co. v Philadelphia Reins. Corp.*, 799 FSupp 363 [D NJ 1992]).

Defendants also argue that an insured may not refuse to produce to its insurer privileged attorney-client communications between the insured and its attorneys regarding the underlying litigation, because the insured and the insurer have a common interest in defending the underlying action, again citing *Waste Management Inc. v. International Surplus Lines Ins. Co., supra.* However, "there is no automatic waiver of the attorney-client privilege merely because [the parties] have a 'common interest' in the outcome of a particular issue'" (*American Re-Insurance Co. v United States Fid. & Guar. Co.*, 40 AD3d 486, 491 [1st Dep't 2007], *citing North Riv. Ins. Co., v Philadelphia Reins. Corp., supra* at 367 and *Gulf Ins. Co. v. Transatlantic Reins. Co., supra* at 280).

Under New York Law, the attorney-client privilege seeks to foster "uninhibited dialogue between lawyers and clients in their professional engagements, thereby ultimately promoting the

administration of justice" (*Rossi v Blue Cross & Blue Shield of Greater N.Y., supra at 592)*. Defendants have not shown that the preference that may be accorded under Illinois law for the cooperation or common interest doctrines in the insurance context overrides the absolute privilege that JPMC asserts, and which under New York law, is paramount.

Accordingly, defendants' motion to compel is denied.

This constitutes the decision and order of this Court.

Dated: May 26, 2011

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.