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5-26-10

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

PRESENT: HON. RICHARD B. LOWE III PART 56

Justice

Donald P. Fenn

- v -

YFI Groups

INDEX NO. 601099/08

MOTION DATE 011

MOTION SEQ. NO. 3/29/10

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

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

RECEIVED
MAY 25 2010
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
MAY 26 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/21/10

HON. RICHARD B. LOWE, III
J.S.C.

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

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DONALD P. FEWER,

Plaintiff,

Index No. 601099/08

-against-

GFI GROUP INC. and JERSEY PARTNERS, INC.,

Defendants.

----------x

Hon. Richard B. Lowe, III:

This motion primarily concerns the question of whether a joint defense agreement, executed by plaintiff's counsel and certain other former employees of defendants' affiliate company, is considered a privileged document protected from discovery under the common interest privilege, a privilege that has its genesis in the attorney client privilege.

Defendants GFI Group Inc. (GFI) and Jersey Partners, Inc. (Jersey Partners), make this motion for an order: (1) directing two non-party attorneys at the law firm of Davis and Gilbert LLP (the Davis firm), Michael Lasky and Gregg Brochin, to produce the December 15, 2007 Joint Defense Agreement (JDA), pursuant to the subpoenas, dated July 16, 2009; (2) determining that plaintiff, Donald P. Fewer and the other signatories to the JDA may not interpose blanket objections to the discovery of communications or materials that they claim are protected under the JDA without establishing that all elements of the attorney-client privilege or work product doctrine are satisfied with respect to the particular communication in issue without regard to the JDA; (3) requiring that the depositions of the Davis firm's witnesses, i.e., Lasky and Brochin, be conducted before a referee or another appropriate court officer empowered to rule on objections and otherwise control the proceeding pursuant to CPLR 3104; and (4) and that the non-party signatories of the JDA should be precluded from attending the Lasky and Brochin

depositions.

Fewer, together with non-party signatories to the JDA, Michael Babcok, Robert Johnson, Michael McDevitt, Russell Wallack, Matthew Hannon, Michael Farinacci, Stephen Falletta and the entities Tradition (North America) Inc. and Tradition (Global Clearing) Inc. (together, the non-parties) oppose defendants' motion in its entirety. They also cross-move, for an order, permitting counsel for the non-party signatories to attend the Davis firm depositions and to assert privilege objections as appropriate.

For the reasons discussed below, defendants' motion is denied in all respects. The cross motion by the non-party signatories to attend the Lasky and Brochin EBTs is granted.

BACKGROUND

Reference is made to the prior decisions and orders in this case for a full recitation of the facts, familiarity with which is presumed.

On December 15, 2007, four months before Fewer's resignation, there was a meeting at the Embassy Suites Hotel in Manhattan which was attended by various employees of defendants' affiliate, GFI Securities LLC (GFIS), representatives from other entities, and lawyers representing each of them (the Embassy Suites Meeting). The JDA was signed at the Embassy Suites Meeting by Fewer and the non-party signatories and/or their attorneys. Brochin, an attorney at the Davis firm, attended the meeting with his client, Tyler Eddy (an employee of GFIS, who did *not* thereafter leave GFIS' employ).

GFI contends that the participants at the Embassy Suites Meeting discussed their plans to leave GFIS's employ, and to "take" GFIS' employees and its business with them. GFI submits that the JDA is damaging evidence showing that Fewer was actively involved in

planning and leading the "raid" in breach of his duties and obligations to GFIS.

In July 2009, defendants served subpoenas seeking documents and testimony from the Davis firm witnesses. Fewer, the non-parties and the Davis firm witnesses all objected to production of the JDA on privilege grounds.

DISCUSSION

Fewer and the non-parties contend that the JDA is privileged and need not be produced because it is protected by: (a) the attorney work-product doctrine; (b) the attorney-client privilege; (c) the common interest privilege; and/or (d) in any event, it is not relevant to this litigation. Defendants contend that the JDA must be produced as it is relevant to the issues in this action, and there is no basis to conclude that the document is privileged under any of the privilege rules or doctrines.

In *EOS Partners v Levine* (2007 WL 2175590, NY Slip Op 31853[U], Sup Ct, NY County, June 21, 2007, Fried, J., Index No. 601530/05), the court discussed both the attorney-client privilege and the common interest privilege, and the interplay between the two. Addressing the attorney-client privilege first, the court staetd:

> The attorney-client privilege, codified in CPLR § 4503(a), generally prohibits counsel from disclosing confidential communications from a client seeking legal advice. The party invoking the privilege has the burden of showing that it applies (*People v Osorio,* 75 NY2d 80, 84 [1989]). Because the privilege has the effect of withholding relevant information from the fact finder, it applies only where necessary to achieve its purpose and protect from disclosure confidential communications between client and counsel (*e.g., Stenovich v Wachtell*, 195 Misc2d 99, 106 [Sup Ct NY County 2003]). Courts have recognized that at times "the public interest is served by shielding certain communications ... from litigation, rather than risk stifling them altogether." The privilege requires that the communications are made for "the purpose of facilitating the rendition of legal advice or services in the course of a professional relationship and have been primarily or predominantly of a *legal* rather than a

commercial nature" (*U.S. Bank Natl. Assn. v APP Intl. Finance Co.*, 33 AD3d 430, 430 [1st Dept 2006] [emphasis in original]).

The court, in *EOS,* then proceeded to explain the common interest privilege, stating:

> New York courts have recognized a "conditional, or qualified, privilege to a communication made by one person to another upon a subject in which both have an interest known as the common interest privilege" (*U.S. Bank Natl. Assn.*, 33 AD3d at 430). The common interest privilege protects certain communications to third parties who would otherwise waive the attorney-client privilege (*See US v Schwimmer,* 892 F2d 237, 243 [2nd Cir 1989]; *Strougo v Bea Assoc.*, 199 FRD 515, 520 [SD NY, 2001]). The rationale is that as long as "the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded" (*Liberman v Gelstein,* 80 NY2d 429,437 [1992]).

The leading First Department case on the common interest privilege is *U.S. Bank Natl. Assn. v APP Intl. Fin. Co.* (33 AD3d 430 [1st Dept 2006]), which states:

> In New York, we recognize that "the public interest is served by shielding certain communications . . . from litigation, rather than risk stifling them altogether," and have afforded a conditional, or qualified, privilege to a communication made by one person to another upon a subject in which both have an interest, known as a common interest privilege (*Liberman v Gelstein*, 80 NY2d 429, 437 [1992]). While we have addressed the availability of the common interest doctrine in the context of an attorney-client communication (*see e.g. 330 Acquisition Co., LLC v Regency Sav. Bank, F.S.B.*, 12 AD3d 214 [2004]; *Feygin v Martell*, 283 AD2d 304 [2001]), the federal courts have been instructive in its applicability (*see e.g. United States v Schwimmer*, 892 F2d 237, 243-244 [2d Cir 1989]; *Gulf Is. Leasing, Inc. v Bombardier Capital, Inc.*, 215 FRD 466, 470 [SD NY 2003]; *Lugosch v Congel*, 219 FRD 220, 236 [ND NY 2003], *vacated and remanded on other grounds* 435 F3d 110 [2d Cir 2006]). Before a communication can be protected under the common interest rule, the communication must satisfy the requirements of the attorney-client privilege; that is, the communication must have been made for the purpose of facilitating the rendition of legal advice or services in the course of a professional relationship and have been primarily or predominantly of a *legal* rather than a *commercial* nature (*see Gulf Is. Leasing*, 215 FRD at 470-471; *see also Matter of Nassau County Grand Jury Subpoena Duces Tecum Dated June 24, 2003*, 4 NY3d 665, 678 [2005]).

(33 AD3d at 431; *see also GUS Consulting GMBH v Chadbourne & Parke LLP*, 70 Misc 3d 539

[Sup Ct, NY County 2008]).

GUS Consulting GMBH v Chadbourne & Parke LLP, supra, like the instant matter, concerned the issue of whether a joint defense agreement was privileged. There, the court applied the standard set forth in the *U.S. Bank Natl. Assn.* case, and conducted an in camera review of the joint defense agreement. Upon review, the court ruled "that all of the documents at issue fall within the common interest privilege . . . and are thus protected from disclosure . . . ." In so holding, the court further determined that a total identity of interests among the participants is not required. Rather "the privilege applies where an 'interlocking relationship' or a 'limited common purpose' necessitates disclosure to certain parties" (*id.*, quoting *330 Acquisition Co., LLC v Regency Savings Bank, FSB*, 12 AD3d 214 [1st Dept 2004]).

Here, Fewer and the non-parties assert that the JDA was entered into in furtherance of a common legal purpose – to defend against legal action on the part of defendants. Defendants' argument that the JDA is not protected from disclosure because it was entered into not for a legal purpose, but for a business or commercial purpose, to wit, the creation of a competing credit brokerage business, is rejected. There is no basis for defendants' argument that the JDA was entered into for merely a business purpose. Rather the facts support the conclusion that the JDA was entered into "for the purpose of facilitating the rendition of legal advice or services" (*U.S. Bank Natl. Assn. v APP Intl. Fin. Co., supra,* 33 AD3d at 431).

The court has conducted an in camera review of the JDA. It contains standard language that parties typically include in joint defense agreements to protect from discovery privileged information revealed to a third party (*see e.g., Ford Motor Co. v Edgewood Properties, Inc.* , 257 FRD 418, 428-429 [D NJ 2009). Upon review, except for the sharing of

information, Fewer and the non-party signatories have established all of the elements necessary to conclude that the JDA is protected by the attorney client privilege. The court is satisfied that the JDA falls within the common interest privilege and is thus protected from disclosure (*see GUS Consulting GMBH v Chadbourne & Parke LLP*, *supra*).

Accordingly, the court holds that the JDA is protected from disclosure by the common interest privilege, and all of the underlying requirements of the attorney-client privilege have been established. Accordingly, the motion to compel is denied. Defendants' additional requests for relief are likewise denied. Among other things, defendants' attempt to restrict objections at the Lasky and Brochin depositions is premature and an impermissible request for an advisory ruling. Nor have defendants presented a basis to warrant the appointment of a referee or to require that these depositions take place at the courthouse.

Furthermore, there is no basis for defendants' claim that the non-parties or their attorneys should be precluded from attending the Lasky and Brochin depositions. The non-parties may attend the Lasky and Brochin depositions in order to protect their independent interests as signatories to the JDA, including the right to assert objections based on their common interest privilege and related privileges to the production or disclosure of documents, communications or other information protected by such privileges. New York courts generally permit persons who have a privilege which may be violated by disclosure sought in a subpoena directed to others to seek appropriate judicial relief concerning such subpoena and to ensure that their privilege is not violated. Since the non-parties each have potentially different interests at stake, counsel for each is permitted to attend these depositions and to assert privilege objections as each may deem appropriate in order to protect their particular clients' interests. Having said

that, counsel are cautioned to every extent possible, to coordinate and join their efforts, in order to streamline the deposition process.

CONCLUSION

Accordingly, based on the foregoing, it is hereby

ORDERED that the motion to compel and for related relief by defendants GFI Group Inc. and Jersey Partners, Inc. is denied in all respects; and it is further

ORDERED that cross motion by plaintiff Donald P. Fewer and non-parties Michael Babcok, Robert Johnson, Michael McDevitt, Russell Wallack, Matthew Hannon, Michael Farinacci, Stephen Falletta, Tradition (North America) Inc. and Tradition (Global Clearing) Inc. permitting counsel for the non-party signatories to attend the Davis firm depositions and to assert privilege objections as appropriate, is granted.

Dated: May 21 , 2010

ENTER:

J.S.C.