

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS

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IN THE MATTER OF: * NO. 07-11862
RON WILSON AND LARHONDA WILSON, * SECTION "A"
DEBTORS. * CHAPTER 13

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Transcript of the proceedings taken in the above captioned matter on **Tuesday, July 28, 2009**, the Honorable Elizabeth W. Magner, United States Bankruptcy Judge, presiding.

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

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P R O C E E D I N G S

(Tuesday, July 28, 2009)

THE CLERK: 07-11862, Ron and LaRhonda Wilson.

THE COURT: Appearances, please.

MR. HAYNES: Your Honor, I'm Sean Haynes for the United States Trustee. My colleague is Amanda Burnette.

MR. EDWARDS: Jacob Edwards for the Boles Law Firm.

MS. DESMOND: Susan Desmond from Watkins Ludlam on behalf of Sand Canyon Corporation with Kurt Gwynne.

THE COURT: Okay. Can you spell your last name for me?

MS. DESMOND: Desmond -- D-E-S-M-O-N-D.

THE COURT: Thank you.

All right, Mr. Haynes, your motion.

MR. HAYNES: Thank you, Your Honor.

Your Honor, I want to make three basic points to start out with. First of all, when we filed the Motion to Compel there were four disputes and I believe we have reduced those down to one dispute. I've noted in our reply filed last week that we'd reserve the right if there's a flare up on those issues. For example I think Boles continues to assert in its general objections that certain documents contain a trade secret or commercially confidential information. We dispute that. But the salient point is the documents were produced. So, if we need to come back before Your Honor, we reserve that

1 right.

2 Secondly, Your Honor, it looks like we have
3 drastically reduced the number of documents that are in
4 dispute. And the sequence was Boles produced. We filed our
5 Motion to Compel. Option One Mortgage Corporation produced.
6 And then I guess that kind of carried over to Boles seeing that
7 they needed to true up what their production was to in essence
8 match what their client's production was. So, it's gratifying
9 to see that they have made that change.

10 But then that leads us then to the third point which
11 is we still have a dispute over the privilege log. And we've
12 reasserted our positions that were in Part 3 of our memorandum
13 supporting our Motion to Compel. In the reply that we filed
14 Thursday, Your Honor, I really emphasize two points. One
15 point, Your Honor, was that the privilege log, the format of
16 the privilege log is still problematic. Your Honor, and let me
17 look at that for just a minute.

18 What we see in the amended privilege log which was
19 attached was that there were -- were reduced from about 160
20 privilege documents now down to about 80. I think technically
21 it's 79 documents. And that's good to see there's been a
22 reduction of that. But it's a bit difficult to understand how
23 there could be even yet 80 communications, 80 documents that
24 would be privileged. We're talking about a Motion to Lift Stay
25 in a consumer bankruptcy case. And we know from what Option

1 has filed that they have not even claimed a privilege with
2 respect to communications between the client and the attorney
3 concerning the posting of payments. So, excluding those we
4 still have -- there still are about 80 communications that are
5 claimed as privilege. So, it's difficult to understand. It's
6 plausible, but it's difficult to understand.

7 And that ties into the next point which is the
8 amended privilege log just doesn't give us enough information
9 so that the Court and the U.S. Trustee can be assured that the
10 communication claimed as privileged really concerns either a
11 request for legal advice or a rendering of legal advice. And I
12 note in the response that the privilege log doesn't say the
13 word "advice" anywhere. And this is the second opportunity
14 Boles has taken to get this in the appropriate format. And we
15 contend, Your Honor, you know, the next point with respect to
16 the privilege log is basically an issue that was discussed in
17 the El Paso Company case, and that is that if you don't
18 particularize how a given communication is supposedly
19 privileged you've thrown a blanket over it. You've just
20 asserted, "Well, this is privileged" without the other parties
21 having the ability to assess this really could be attorney
22 client communication. So, again it's the format of the
23 privilege log.

24 The other issue that we emphasized in the response,
25 Your Honor, concerns the waiver because a third party is

1 involved. And of course we're referring to Lender Processing
2 Services formally known as Fidelity National Information
3 Services, Inc. In responding to our Motion to Compel Option
4 filed its papers and it seems that their position would be
5 this, is that Fidelity was a representative of both the Boles
6 Law Firm and a representative of Option One Mortgage
7 Corporation, and in our response we take on that contention.
8 And if I could, Your Honor, I'd just break that down into
9 really two paradigms.

10 What I understand Option One's argument to be is that
11 first of all with respect to Fidelity as Boles' representative
12 and that in that case then if Fidelity is included in a
13 communication there's no waiver, okay. Well, what we said in
14 our motion and I don't think Option has really overcome is the
15 basic law of agents. And it was discussed in the Kovel case
16 from the Second Circuit. And that's picked up on in the Davis
17 case in the Fifth Circuit, in the El Paso case, the Furco case
18 (phonetic), and that is, Your Honor, that in order for there
19 not to be a waiver the third party has to be an agent of the
20 attorney.

21 Now, let's look at I guess what I would call some
22 macro facts here that says Fidelity is not Boles' agent. Those
23 cases that I refer to talk about the attorney hiring the third
24 party. Well, we know from what was discussed on August 21st of
25 last year that it's Fidelity that requires the attorney to sign

1 the network agreement. It's not Boles' requiring Fidelity to
2 sign the agreement.

3 Also, Your Honor, there was one point --

4 THE COURT: But why doesn't the Default Servicing
5 Agreement make Fidelity an agent of Option One?

6 MR. HAYNES: I don't know that, Your Honor. I don't
7 see that term in the --

8 THE COURT: Well, you don't have to use the term
9 "agent," and I don't have the Default Servicing Agreement here,
10 but as I appreciate the situation Option One signs a Default
11 Servicing Agreement with Fidelity and that agreement gives
12 Fidelity certain rights or powers including the right to
13 appoint certain individuals who are employees of Fidelity to
14 act on behalf of Option One and there are powers of attorney
15 that affect that particular outcome so that Fidelity employees
16 become Vice Presidents of Option and can sign documents for
17 Option One. It also allows Fidelity or requires Fidelity I
18 think to manage the defaulted file and to make certain
19 decisions -- I'm paraphrasing it, but to make certain decisions
20 that the lender would be called upon to make in lieu of Option
21 One itself being consulted and essentially it takes over the
22 administration of a defaulted loan. Why isn't the Default
23 Servicing Agreement in effect an employment consulting granting
24 of an agency relationship by Option One to Fidelity to perform
25 its administrative functions on its behalf?

1 MR. HAYNES: Well, Your Honor, let me address a
2 couple of things. I may need to get clarification on the
3 Court's question. But I do believe that Mr. Gwynne did attach
4 the Default Servicing Agreement as Exhibit D to his objection.

5 THE COURT: Okay.

6 MR. HAYNES: All right. Now, I'm not sure -- in a
7 moment I do want to address the contention that Fidelity is the
8 representative or in essence agent of Option. I will get into
9 that. But my point here is they're arguing that Fidelity is
10 the representative of Boles, of the attorney.

11 THE COURT: Well that I don't understand, to be
12 honest.

13 MR. HAYNES: Right. And again just a couple of other
14 points on the --

15 THE COURT: Well, I guess -- I agree with you. I
16 don't understand that --

17 MR. HAYNES: Okay.

18 THE COURT: -- particular -- but what I'm trying to
19 figure out is does it matter. Because if Fidelity in fact is
20 an agent of Option One for purposes of administering and
21 servicing this particular loan, then communications by Fidelity
22 to Boles or Boles back to Fidelity on a privileged
23 communication would be privileged, because Fidelity acting as a
24 representative for Option One it seems the case law is pretty
25 clear that they would be entitled to protection -- not

1 Fidelity, but Option One for any communications between
2 Fidelity and Boles. So, I'm not sure we have to get to the
3 issue of Boles and Fidelity's relationship the reverse, that
4 Boles retained Fidelity or Fidelity retained -- it's really
5 through Option One that the privilege is being asserted.

6 MR. HAYNES: And, Your Honor, if I could address
7 that?

8 THE COURT: Am I missing --

9 MR. HAYNES: Yes, Your Honor.

10 THE COURT: Okay.

11 MR. HAYNES: Because again as I see it they break it
12 down into, you know, Fidelity is Boles' agent and Fidelity is
13 Option's agent. And I think --

14 THE COURT: Okay, what document in particular if you
15 can tell is being claimed as privilege because Fidelity is the
16 agent of Boles?

17 MR. HAYNES: That I don't know. Again that's a
18 specific -- if the privilege log were more -- provided more
19 information that might help us, but I --

20 THE COURT: And you can tell from the substance of
21 any identification of these documents what that document would
22 be?

23 MR. HAYNES: I can't, Your Honor. I'd be willing --

24 THE COURT: All right, so then let's address it from
25 the standpoint of what's being claimed as a privilege as

1 Fidelity being the agent and representative of Option One.

2 MR. HAYNES: Okay, all right. Your Honor, this is
3 the argument as I understand it from Option. They cite the
4 Court to Supreme Court Standard 503. And of course, you know,
5 we noted the Fifth Circuit has cited authoritatively portions
6 of 503, but it's unclear and that's what we point out. I don't
7 think they've cited a Fifth Circuit level opinion that says
8 503(b) is the standard in the circuit.

9 One of the major cases they cite is the Bieter case.
10 And again as we noted in the footnote, the Fifth Circuit has
11 said for a different proposition they have positively cited the
12 Bieter case. Now, Bieter starts off discussing Standard
13 503(b), but as I read the case the ultimate conclusion is their
14 determination that the agent, or the representative, or the
15 third party consultant, whatever term we want to use is the
16 functional equivalent of the client. Now, I'm not sure if that
17 is really what Option is arguing the standard is. Are they
18 arguing it's Section 503? Again, there's no cite to a Fifth
19 Circuit opinion, but again the case law would seem to be --
20 maybe a seminal case would be the Bieter decision. And again
21 we don't have a Fifth Circuit level decision on that point, but
22 we see the Freeport McMoRan case that uses -- again cites
23 Section 503(b) but then ultimately does this test of the
24 functional equivalency. That's where I think that Option can't
25 meet its burden of showing --

1 THE COURT: But why can't it meet the burden? Why
2 do you believe that Fidelity is not the functional equivalent?

3 MR. HAYNES: Okay. All right, again looking at that
4 analysis in the Freeport McMoRan case the court discusses the
5 differences of the independent consultant there versus in
6 Bieter. One of the things the court pointed out was that in
7 Freeport McMoRan the consultant is never held out as the
8 representative or the main representative of the client;
9 whereas Mr. Klohs was in the Bieter case. He goes to meetings
10 that the principals don't even go to.

11 Well, Fidelity's role in this case is not even known
12 until June 26th after multiple settings on the Motion to Lift
13 Stay. So, I don't think there was any effort to hold out
14 Fidelity was the representative of Option here. And, indeed, I
15 think that Fidelity describes itself as only having a sole
16 connection with this case which was the signature of the
17 affidavit by Dory Goebel. Again, that's Fidelity's
18 description.

19 Another point that the Freeport McMoRan case
20 discussed was is what this independent consultant working on,
21 the sine qua non, the essential purpose of this entity. So in
22 the Bieter case, the principal the Bieter Company, the client,
23 has one project. They're trying to develop a piece of property
24 I think for a Target Store and that's all it does.

25 Now, let's make a comparison in this case. Option

1 One has Fidelity providing default servicing services, okay,
2 but that's not the -- I can't imagine it will be Option's
3 argument. That's the sine qua non of what Option was doing
4 back then. As I understand, and we've alleged upon information
5 and belief, at that time Option One was a national servicer.
6 So, default servicing would just be a portion of --

7 THE COURT: So, your argument is the entire functions
8 of Option One have to be given to Fidelity in order for them to
9 be a functional equivalent, that they can't give a portion of
10 their operations to a company, or even a particular file?

11 MR. HAYNES: I think that -- right. It goes to the
12 basic proposition that, you know, obviously the attorney client
13 privilege is an important protection in our law. But it is
14 also a restraint on what can ordinarily be discovered and the
15 burden is on them. And if we start extending this privilege to
16 various entities, we have to be careful how far we extend that.
17 I dropped that footnote in about the discussion of many of
18 these cases that Option cites that seems to be an expansive
19 reading of the Upjohn decision because the word "agent" is used
20 there when the Supreme Court specifically says that the persons
21 involved in the communications before the court then and there
22 were employees and former employees of the client. And the
23 Supreme Court even goes so far as to say in a footnote, we're
24 not deciding today that if the communication concerned things
25 that happened when the employee was still employed that that's

1 going to be protected by the privilege.

2 My point I'm trying to make, Your Honor, just the
3 core point, because I want to make sure I'm not confusing the
4 Court, is you know the Court is going to have to determine what
5 is the standard. Is it 503(b) or is it as the case law seems
6 to be a functional equivalent standard? And again the notion
7 being that this third party is, just as in the Bieter case,
8 functionally the equivalent of the client.

9 Another point I wanted to make again on a macro level
10 is, well, that you know as I understand it LPS is a publicly
11 traded company and at the time that this Motion to Lift Stay
12 was filed Option was a major subsidiary of a distinct publicly
13 traded company. It's difficult to conceive how an argument can
14 be made that one publicly traded company is the functional
15 equivalent of another or of the subsidiary of a distinctly
16 other corporation. So, again I would ask the Court to look at
17 or to consider that Freeport McMoRan case.

18 Your Honor, the only other point I would make is
19 again besides being in the servicing business, I'm sure
20 Mr. Gwynne will correct me if I'm wrong, but I believe Option
21 One was also in the loan origination business, a sub-prime loan
22 origination. So, the default servicing that Fidelity provides
23 is just a portion of Option One's overall business.

24 THE COURT: Okay.

25 MR. HAYNES: All right, Your Honor, I'll be happy to

1 answer any other questions the Court has.

2 THE COURT: Well, let me hear the argument from
3 Mr. Gwynne. I assume he's going to take the position for Boles
4 as well?

5 MR. GWYNNE: Yes, Your Honor.

6 THE COURT: Okay.

7 MR. GWYNNE: Good morning, Your Honor; Kurt Gwynne
8 from Reed Smith on behalf of Sand Canyon Corporation formerly
9 known as Option One.

10 Your Honor, the Boles Law Firm initially produced 131
11 documents and at Option One's request asserted the attorney
12 client privilege with respect to documents on the initial
13 privilege log. And the reason it was done that way is because
14 the privilege is owned or held by the client --

15 THE COURT: I'm aware.

16 MR. GWYNNE: -- not the law firm. The Boles Law Firm
17 was the first party to respond to the UST's discovery request.
18 Option One, however, was in good faith making significant
19 efforts to gather documents including gathering documents from
20 third parties like the file that Mr. Simmons had when he was
21 testifying.

22 THE COURT: Well, but let's stick to what's being
23 requested, Mr. Gwynne.

24 MR. GWYNNE: Okay.

25 THE COURT: There were originally about 160 documents

1 that were claimed as privileged by the Boles Firm.

2 MR. GWYNNE: Correct.

3 THE COURT: Subsequent to that filing they've been
4 revised down to 80 I think, 83 maybe -- 85. Let's start with
5 when the 160-something documents were claimed had your client
6 or had you reviewed each of those documents and instructed
7 Boles to assert the privilege?

8 MR. GWYNNE: Yes, Your Honor.

9 THE COURT: Okay. And what changed between the time
10 that privilege log was filed and the subsequent privilege log
11 was filed?

12 MR. GWYNNE: Well, Your Honor, initially what my
13 thought was, and as counsel it was my decision really to
14 determine what fell within the attorney client privilege and
15 what didn't, and my initial thought was that because Fidelity
16 was a representative of Option One and in my opinion a
17 representative of Boles Law Firm, although I think you only
18 need to be one or the other, not both, but because it was in
19 that capacity it provided services to both parties under the
20 Default Services Agreement. In fact the Boles Law Firm paid
21 Fidelity for certain services.

22 THE COURT: Well, let's stick --

23 MR. GWYNNE: So, I --

24 THE COURT: Stop. Let's stick with Option One's
25 privilege, not Fidelity's privilege with relation to Boles,

1 Option One's privilege. As I understand it, Option One has a
2 Default Servicing Agreement with Fidelity and through that
3 agreement Fidelity selected and/or retained counsel that
4 represents Option One. That's the argument.

5 MR. GWYNNE: Yes.

6 THE COURT: All right, so let's talk about --

7 MR. GWYNNE: Your Honor, can --

8 THE COURT: Wait, let me get the question out.

9 MR. GWYNNE: Okay.

10 THE COURT: So let's talk about why upon further
11 review approximately 80 documents were taken off privilege log.

12 MR. GWYNNE: Your Honor, one of the points -- there
13 were two points that I thought -- the Trustee filed the Motion
14 to Compel on July 2nd, and we read that. And in fact we were
15 in the process of preparing documents and we had a fair number
16 of documents copied and redacted. We had a different privilege
17 log ourselves that was longer. I've looked at the Trustee's
18 motion and, unfortunately, I didn't have the opportunity to
19 talk specifically with the Trustee about what the issues were.
20 When it filed the motion it was dealing with the Boles Law
21 Firm, although it was our privilege. When I looked at the
22 motion I thought there were two points that the Trustee made
23 that, frankly, were correct.

24 THE COURT: Okay.

25 MR. GWYNNE: And the first point was that

1 communications not made in furtherance of legal advice even
2 if between an attorney and a client or the client's
3 representative are not privileged.

4 THE COURT: All right.

5 MR. GWYNNE: My initial thought was because all these
6 communications were between Option One or Fidelity as its
7 representative in the Boles Law Firm that they were all
8 privileged. Upon reading that and agreeing with it, I looked
9 at the cases and thought the Trustee is right and, therefore,
10 that was the most significant part of changing what Boles
11 produced consistent with what we produced, because we haven't
12 produced yet.

13 THE COURT: All right, what's the second, what's the
14 second one?

15 MR. GWYNNE: The second issue I thought the Trustee
16 was correct about was on I believe it was -- I'm not sure, I
17 think it was Page 16 of the objection where we dealt with the
18 issue of the waiver by Option One with respect to --

19 THE COURT: Waiver as to a particular subject matter
20 because of --

21 MR. GWYNNE: Correct.

22 THE COURT: -- advice of counsel --

23 MR. GWYNNE: Correct.

24 THE COURT: -- and/or the client has already
25 testified.

1 MR. GWYNNE: Right. And, Your Honor, before I told
2 this Court that Option One did waive the privilege with respect
3 to the issue of what to do with the payments and the fact that
4 they were instructed by the Boles Law Firm to send the payments
5 to the Boles Law Firm. That's what the witness testified.

6 THE COURT: Right.

7 MR. GWYNNE: We weren't claiming a privilege on that.
8 Initially when I had the initial discussions with Mr. Jacobs
9 they didn't claim a privilege on those documents either. And I
10 want to be clear there was no selective production. Anything
11 that related to where the payments should go was produced
12 initially by Boles and was in our production as well
13 subsequently. But the Trustee also said in his initial motion
14 or the brief that that waiver also covered the issue of whether
15 payments should be -- the payments should be applied or not.
16 In other words the law firm said, "Give me the payments." But
17 then the issue was -- and Mr. Simmons did testify. I read
18 their motion. I went back and looked and he did also testify
19 and say that the Boles Law Firm advised him not to apply the
20 payments. So, that was the second issue that I thought the
21 Trustee was right. And, therefore, we talked to the Boles Firm
22 about --

23 THE COURT: All right.

24 MR. GWYNNE: -- producing all those documents.

25 THE COURT: All right, so now let's talk about what's

1 left.

2 MR. GWYNNE: Okay. And, Your Honor, I have
3 highlighted the production, the privilege log, the second one
4 from the Boles Law Firm. May I approach?

5 THE COURT: Yes.

6 MR. GWYNNE: All of the documents highlighted in
7 yellow, Your Honor, were produced for one of the two reasons
8 that I just advised Your Honor about. There is one thing on
9 here though that's incorrect. It's Row 93. Row 93 is not
10 highlighted.

11 THE COURT: All right.

12 MR. GWYNNE: That document was in fact produced by
13 the Boles Law Firm. That row should be highlighted.

14 THE COURT: All right.

15 MR. GWYNNE: The rest of the documents on here,
16 Your Honor, I believe are specifically within the attorney
17 client privilege. But I think I answered your question. If I
18 could clarify one thing, and maybe this is what Your Honor
19 meant, but technically under the Default Servicing Agreement
20 Option One selects its counsel in Louisiana for example, and
21 maybe even New Orleans. It may have two or three firms, and
22 will tell Fidelity a case that ends in "9" choose this firm, or
23 maybe based on the alphabet choose this firm. There's some
24 mechanic that Option One whatever it is they created, Fidelity
25 administers it.

1 THE COURT: I remember testimony or representations
2 being that a firm had to be a member of the Fidelity network --

3 MR. GWYNNE: Correct.

4 THE COURT: -- in order to be employed by Option One.

5 MR. GWYNNE: Correct.

6 THE COURT: All right, so Option One is not free to
7 select any law firm that it wants to hire, is that correct?

8 MR. GWYNNE: They have ramifications I think it you
9 don't. The way I believe the Default Services worked is that
10 Option One said, "These are the firms that we would like to use
11 in New Orleans," and then they signed an agreement with
12 Fidelity and become a Fidelity network attorney. If they don't
13 sign one, the Default Services does have language in there
14 about what happens if you use a non-Fidelity attorney. And I
15 don't know, Your Honor, and I don't want to say for sure --

16 THE COURT: Why is it that the law firms have to pay
17 Fidelity? They're your lawyers. So why is it that the law --

18 MR. GWYNNE: Well, they are our lawyers and that's
19 sort of why I say they may be an agent of both, because under
20 the Default Services Agreement Schedule 2(a), I think it's on
21 Pages 22 and 23 -- and, Your Honor, I have a copy of the
22 Default Services Agreement.

23 THE COURT: That's okay, just keep going.

24 MR. GWYNNE: Okay. In the Default Services Agreement
25 it lists services that Fidelity provides for the law firm and

1 specifically uses the phrase "assist counsel," like assisting
2 in the preparation and submission of proofs of claim, review of
3 bankruptcy plans, objections thereto.

4 THE COURT: Okay, if they were your agent, if
5 Fidelity was your agent of course that's what they would be
6 doing. You're directing that they assist the law firm with all
7 those documents. What does that have to do with them being an
8 agent for the law firm? You don't become an agent for a law
9 firm simply because you represent a client and you're helping
10 the law firm prepare documents that the client wants filed.

11 MR. GWYNNE: Right, Your Honor, but when you say
12 "agent" too, I also think the proper term is representative.
13 Let me give you an example of something I think that falls
14 within that. Let's say a law firm hires Icon Office Solutions
15 to make copies and gives Icon privileged documents. Well,
16 they're not the agent of the law firm in terms of they don't
17 have authority to do anything to bind the law firm. But for
18 purposes of the privilege the fact that Icon has the documents
19 doesn't waive the privilege because they're providing services
20 that are important to providing the legal advice.

21 THE COURT: But this is a different situation. This
22 is a situation where Fidelity was actually retained by Option
23 One and Option One has instructed Fidelity to do certain
24 things. And you would have to identify something outside of
25 Fidelity's obligations to Option One that it was performing for

1 the law firm.

2 MR. GWYNNE: And, Your Honor, there are some things
3 under the agreement, under the Default Services Agreement that
4 it says that Option One is supposed to pay for, and then there
5 are other services that it says the Boles Law Firm is supposed
6 to pay for. And I presume that the way that was determined was
7 based on who they were providing the services for. In other
8 words everything is being done for Option One because even the
9 law firm is providing services for Option One. So, even the
10 example I gave where you go to Icon Office Solutions, they're
11 ultimately doing something for the benefit of the client, but
12 they're also doing it for the law firm and the law firm pays
13 them, although in that instance turns around and then bills it
14 to the client.

15 THE COURT: Right.

16 MR. GWYNNE: Right.

17 THE COURT: And what I don't understand is what
18 functions was Fidelity performing that were independent of its
19 obligations to Option One?

20 MR. GWYNNE: Well, I don't think that any of it is
21 independent because I don't think anything that Boles did was
22 independent of an obligation to Option One.

23 THE COURT: All right, so then why would Fidelity be
24 an agent of the firm? It's an agent of the client.

25 MR. GWYNNE: I agree with that a hundred percent,

1 Your Honor, that it's an agent of the client, but also an
2 example I would give would be a secretary at a law firm.

3 THE COURT: But it's not the same thing at all. The
4 secretary at the law firm is an employee of the firm. Clearly
5 whatever function she's performing have to do with what her
6 employer wants her to do for the client. This is a completely
7 different situation. You've got a direct contract between
8 Option One and Fidelity --

9 MR. GWYNNE: Right.

10 THE COURT: -- that requires Fidelity to perform
11 certain tasks. I don't understand the relationship, I'll be
12 honest, between Boles and Fidelity, but I don't think that it
13 has anything to do with an agency relationship, because so far
14 I haven't heard a single thing that is being performed by
15 Fidelity that it wouldn't have been obligated to perform under
16 the contract with Option One.

17 MR. GWYNNE: I agree with Your Honor just said a
18 hundred percent. To me it's just a matter of -- I don't want
19 to say semantics, but one of the cases deals with a linguist.

20 THE COURT: Are there documents on this privilege log
21 in which a privilege is being asserted on the basis that there
22 is an agency relationship between Boles and Fidelity?

23 MR. GWYNNE: And not an agency relationship -- all of
24 these documents would fall within the agency relationship of
25 Fidelity to Option One.

1 THE COURT: All right, so let's stick with that.

2 MR. GWYNNE: Okay.

3 THE COURT: We don't need to overcomplicate this.

4 MR. GWYNNE: Okay.

5 THE COURT: So what's being asserted is the garden
6 variety privilege that Option One has retained Fidelity as its
7 agent, that the agent has performed services that make it a
8 functional equivalent of the client Option One, that any
9 communications between Fidelity and Boles are privileged
10 because they were either requesting legal advice or receiving
11 legal advice from counsel.

12 MR. GWYNNE: I agree with everything Your Honor said,
13 but would add to the end of that that -- and I think this is
14 one of the significant reasons why we had this issue with the
15 U.S. Trustee today, that when the U.S. Trustee for example
16 challenges the privilege log, I think it's on Page 9 of the
17 reply brief, he complains that it doesn't use the word
18 "advice." In Upjohn the Supreme Court very clearly said that
19 the privilege "exists to protect not only the giving of
20 professional advice to those who can act on it, but also the
21 giving of information to the lawyer to enable him to give sound
22 and informed advice."

23 THE COURT: Provided that the information is not
24 otherwise discoverable.

25 MR. GWYNNE: Correct. And, Your Honor, the court did

1 say in Upjohn the underlying facts are discoverable. In
2 other words just because a document is communicated to an
3 attorney --

4 THE COURT: I understand.

5 MR. GWYNNE: Okay, I'm just making sure you know that
6 we understand.

7 THE COURT: All right.

8 MR. GWYNNE: And that we're not withholding --

9 THE COURT: So, one more time --

10 MR. GWYNNE: -- factual backgrounds.

11 THE COURT: -- everything on this privilege log is
12 either a request for advice or a response with legal advice,
13 yes or no?

14 MR. GWYNNE: If you're saying the same thing as I
15 did, yes, Your Honor. I just want to be clear that some of
16 this is specifically legal advice or opinions about what can
17 happen in court, this, that, and the other, but others of these
18 things is information being communicated to the attorney for
19 the purpose of giving that advice.

20 THE COURT: But is not otherwise discoverable?

21 MR. GWYNNE: No. If the underlying information is
22 otherwise discoverable it was produced.

23 THE COURT: All right.

24 MR. GWYNNE: But it's the --

25 THE COURT: But the point is that the information

1 being given is not otherwise discoverable, and was requesting
2 advice, or was to assist the counsel in making advice, or the
3 communication is actual legal advice from the lawyer back to
4 the client.

5 MR. GWYNNE: Yes, and, Your Honor --

6 THE COURT: Wait, wait, we're going to go through
7 them one at a time.

8 Number 2, document list, how does a document fall
9 within the privilege?

10 MR. GWYNNE: Your Honor, the document list is the
11 communication from Fidelity to the firm. It's the initial
12 referral packet. That is information sent to the attorney for
13 purposes of providing legal advice. Now, the documents on that
14 list by the way, Your Honor, I don't believe -- I think all of
15 them have been produced. And I think that's where I'm saying
16 the underlying information is discoverable and was produced,
17 but -- and I have that here. Can I just take a look at that
18 with counsel to confirm what I just said?

19 THE COURT: Okay.

20 MR. GWYNNE: But it's the communication of
21 information to the counsel that makes that privileged even
22 though the documents on the list themselves are not.

23 THE COURT: I don't know that that's true,
24 Mr. Gwynne. If it's just a list of documents like "Enclosed
25 please find," I don't see how that's asking for legal advice.

1 MR. GWYNNE: Well, Your Honor, the referral is --
2 and when Your Honor said earlier about asking for legal advice,
3 it's not just that. Under the Supreme Court's words it's
4 giving of info to the lawyer --

5 THE COURT: Yeah, but it has to be something that
6 would otherwise be critical to the determination and would be
7 privileged. Sending a letter, "Dear Mr. A: Enclosed please
8 find the following documents," which are all discoverable, "one
9 through 20. This is to confirm that you will be retained to
10 represent us in connection with a Motion for Relief from the
11 Stay." Nothing in that is privileged.

12 MR. GWYNNE: Well, Your Honor, I think that's a close
13 call. I disagree. For example the Trustee cites the case
14 about --

15 THE COURT: I need to know --

16 MR. GWYNNE: -- a fax cover sheet --

17 THE COURT: -- in this document what you've claimed
18 is privileged. And you're going to take up a lot of time
19 because we're going to go through these line by line. If
20 anybody wants to take a break and go get something, I'm just
21 telling you all we're not moving until I go through all these
22 documents one at a time.

23 MR. GWYNNE: I have the documents, Your Honor. This
24 is the entirety of what was not produced.

25 THE COURT: Take a minute and read it.

1 MR. GWYNNE: Row Number 3, Your Honor?

2 THE COURT: No.

3 MR. GWYNNE: Row Number 2?

4 THE COURT: No, Row Number 2.

5 MR. GWYNNE: Okay, Bates Stamp Number 1. And that
6 document, Your Honor, is basically just what I said. It's the
7 referral package. It lists the documents that are being sent
8 to the attorney for legal advice and that is all that document
9 does.

10 THE COURT: Okay, produce it. I don't believe that
11 that's privileged.

12 Number 3, Motion for Relief referral.

13 MR. GWYNNE: Your Honor, I think that's actually part
14 of the first document, the same thing.

15 THE COURT: All right, produce it.

16 Number 4, it just says "Issue." I don't know what
17 issue means.

18 MR. EDWARDS: Your Honor, if I may clarify something
19 for the Court?

20 THE COURT: State your name for the record.

21 MR. EDWARDS: Jacob Edwards for the Boles Law Firm.

22 The way I understand Fidelity's system, you see
23 "Issue," "Intercom" and "Notes" in Column A of the privilege
24 log and the amended privilege log. Those are just different
25 ways of communicating with Fidelity, either Option One to

1 Fidelity, or Boles to Fidelity, kind of like an e-mail that
2 they --

3 THE COURT: Okay, Mr. Edwards, that does not satisfy
4 the privilege log determination.

5 MR. GWYNNE: The description --

6 THE COURT: The descriptions need to be clear so that
7 a normal person, and I consider myself a normal person, can
8 tell whether this is a letter, an e-mail, whether it is some
9 other type of transmission between the parties, a telephone
10 call, notes, logs. And to start with that's going to have to
11 be corrected.

12 All right, let's go with what is the "Issue"?

13 MR. GWYNNE: Okay, and Your Honor the issue or the
14 general description or the subject matter is in Column F.

15 THE COURT: All right, it just says "Document request
16 payment history." What does that mean, an e-mail requesting
17 the payment history?

18 MR. GWYNNE: Your Honor, I believe and Mr. Boles can
19 confirm this, the issues, intercoms, those things are all --
20 they're types of communications in the Fidelity system, but
21 they're all in essence like e-mails.

22 MR. EDWARDS: Yes, Your Honor.

23 THE COURT: All right, so they're all electronic e-
24 mail type --

25 MR. EDWARDS: Yes, Your Honor.

1 THE COURT: -- requests.

2 MR. EDWARDS: Yes, Your Honor.

3 THE COURT: All right, so that is the representation,
4 Mr. Haynes.

5 All right, so four is a document request payment
6 history. Why is that privileged?

7 MR. GWYNNE: Your Honor, this is a document that was
8 prepared by the Boles Law Firm requesting information from its
9 client for purposes of providing legal advice.

10 THE COURT: What type of information?

11 MR. GWYNNE: Information regarding the payment
12 history.

13 THE COURT: Why is that not -- if they're just asking
14 for "Give me a payment history on how payments were applied,"
15 that's discoverable. That's not legal advice.

16 MR. GWYNNE: Your Honor, it's not legal advice, but
17 it's a communication requesting information to provide legal
18 advice. Those are absolutely privileged under the law.

19 THE COURT: Why type of information is being
20 requested? A payment history, that's discoverable.

21 MR. GWYNNE: Right, and the payment histories were
22 produced, but the communication from the attorney to the client
23 is not discoverable. Absolutely all the underlying data like
24 that was produced. We're not withholding payment histories.

25 THE COURT: Put that one to the side. I'm probably

1 going to take a look at it in camera.

2 Number 5, Document request payoff.

3 MR. GWYNNE: I believe that's the one we just did,
4 Your Honor.

5 THE COURT: No, we did the payment history one.

6 MR. EDWARDS: We did Bates 8. Now we're on Bates 12.

7 MR. GWYNNE: Okay, you're on Row 7, Your Honor?

8 THE COURT: No, Row 5.

9 MR. GWYNNE: Okay, that is the one we just did, Bates
10 Page --

11 THE COURT: No, we did four which was --

12 MR. GWYNNE: Four we produced. It's highlighted.

13 THE COURT: Okay, well I have page -- the one that
14 was attached to your latest reply, that's what I'm going down.

15 MR. GWYNNE: Oh, no, Your Honor, if you could use the
16 yellow one that I handed up to Your Honor.

17 THE COURT: Okay.

18 MR. GWYNNE: That way you can see if it's yellow --

19 THE COURT: Okay.

20 MR. GWYNNE: -- it's been produced.

21 THE COURT: All right.

22 MR. HAYNES: Your Honor, what happened was when Boles
23 supplemented they produced two privilege logs. In my argument
24 I refer to the main privilege log which is attached to our
25 response, and then they additionally produced to us and I think

1 Mr. Gwynne has handed up to Your Honor the highlighted --

2 THE COURT: All right.

3 MR. HAYNES: -- which is --

4 THE COURT: All right, I'm going to go down the
5 highlighted. If you see a document --

6 MR. HAYNES: Yes, Your Honor.

7 THE COURT: All right.

8 MR. HAYNES: I understood that the last discussion
9 concerned --

10 THE COURT: All right.

11 MR. HAYNES: -- Row 5.

12 THE COURT: Okay, Row 5.

13 MR. GWYNNE: Anything not highlighted has not been
14 produced.

15 THE COURT: All right, seven.

16 MR. GWYNNE: Your Honor, this is another
17 communication from the Boles Law Firm to the client requesting
18 information, not just the payoff but also providing information
19 regarding fees. Your Honor, this type of analysis if I could
20 say respectfully, I think is requiring me to in essence
21 describe the subject matter so much that we are getting into
22 the privileged communications and think --

23 THE COURT: Okay.

24 MR. GWYNNE: -- it would be best to do in camera
25 without the adversary hearing about documents some of which are

1 certainly going to be privileged.

2 MR. HAYNES: Your Honor, if Your Honor finds that
3 that's the appropriate way to go, we did actually request that
4 in a footnote in our first motion.

5 MR. GWYNNE: Because, Your Honor, this is still a sua
6 sponte proceeding --

7 THE COURT: My concern is that the descriptions in
8 "F" are not sufficient to determine that the privilege is being
9 properly asserted. For example when I see "Document request
10 payoff," that to me means give me a payoff on the loan. I
11 don't consider that a privileged communication. Now, if
12 there's a discussion in that letter that says something more,
13 than maybe it is, but I don't think that the description is
14 sufficient, so I'm going to look at each and every one of
15 these. If you want to do it in camera, I'll do it in camera,
16 but I'm going to do it today.

17 MR. GWYNNE: That's fine, Your Honor. I think we'd
18 be prepared to do it.

19 THE COURT: All right, let's jump to a couple of more
20 to see if there's a common thread in these. Sixteen,
21 "Intercom, process management update request, plan confirmed."

22 MR. GWYNNE: Your Honor, this also has information in
23 particular not just about requesting information, but about the
24 Court in particular in the Eastern District of Louisiana.

25 THE COURT: About the Court?

1 MR. GWYNNE: About the Court and it's information
2 being communicated to the client regarding why something --

3 THE COURT: About the result of a hearing or
4 something --

5 MR. GWYNNE: Or why something should or shouldn't
6 happen.

7 THE COURT: Okay. What about process management --
8 excuse me, down at 25, "Issue resolution payoff"?

9 MR. GWYNNE: Your Honor, this document talks about
10 why an issue, which again an issue is something that you create
11 an issue --

12 THE COURT: Right.

13 MR. GWYNNE: -- track, why the issue has been closed.

14 THE COURT: Okay.

15 MR. GWYNNE: Your Honor?

16 THE COURT: I'm going down the list.

17 MR. GWYNNE: May I have one second just to get
18 something out of my bag right here?

19 THE COURT: Yes.

20 MR. GWYNNE: Thank you.

21 THE COURT: Look at --

22 MR. GWYNNE: Your Honor, can I make a proposal that
23 may --

24 THE COURT: Yes.

25 MR. GWYNNE: -- expedite this process? It's

1 something I did propose to the U.S. Trustee that they
2 rejected, but I think in light of some of Your Honor's comments
3 today maybe now they'd reconsider and it would work.

4 Under Federal Rule of Evidence 502 the Court can make
5 an order that the privilege or protection is not waived by
6 disclosure connected with the litigation pending before the
7 Court. There are a number of documents that are on the
8 privilege log that I believe are privileged because they're
9 communications requesting information, but that in and of
10 themselves --

11 THE COURT: Are innocuous.

12 MR. GWYNNE: Right. But we don't want to produce
13 them, because I asked Mr. Haynes specifically, "If I give you
14 these documents will you agree that just my giving them to you
15 is not a waiver" --

16 THE COURT: All right.

17 MR. GWYNNE: -- "that you don't waive any of your
18 other arguments." But he said, "No." But if he's willing to
19 do that now, I think we may be able to save Your Honor's time.
20 I mean I don't have anywhere else to be today. I know
21 Your Honor is busy. But that may --

22 THE COURT: I have plenty to do today, thank you very
23 much.

24 Mr. Haynes?

25 MR. GWYNNE: Maybe if we went through this an hour

1 with ourselves we may be able to knock out a lot of what
2 Your Honor has to review.

3 MR. HAYNES: Your Honor, I would agree that that was
4 one of the proposals that Mr. Gwynne discussed. I'm not sure
5 that we ever flat out said, no, we wouldn't consider that. I'm
6 not sure that -- I don't think I've gotten back with him with
7 an answer yes or no.

8 The primary concern I would have with that is an
9 argument in the future, well, hey, we turned these over to you
10 and that tainted your review. And so we're bound by the
11 commitment.

12 THE COURT: All right, let's do this: Why don't you
13 all go through the 84 documents that are here. Mr. Gwynne,
14 find the ones that you believe are innocuous. "Enclosed please
15 find," you know, "Please give us a copy of your latest payout
16 number on this." "Send us an invoice for this," whatever. And
17 my suspicion is that you and the U.S. Trustee's Office can come
18 to terms on the delivery of those documents will not constitute
19 a waiver of the privilege because those documents themselves
20 are probably not going to help the U.S. Trustee's Office out
21 and they're not going to hurt your client.

22 MR. GWYNNE: And they can use them if we produce
23 them, it's just not --

24 THE COURT: Right, but the point is that they're
25 something that I would term innocuous -- the cover letter

1 essentially to something, or a request for just a record that
2 exists with the client. Boil down to the ones that you think
3 were the real nut is. I mean you obviously don't have to
4 produce them to him, but in the next hour or so boil down to
5 that, and then let's get through those.

6 MR. GWYNNE: Right.

7 THE COURT: And maybe we won't have as many to
8 discuss.

9 MR. GWYNNE: That's what --

10 THE COURT: Because I think, Mr. Haynes, I understand
11 and I agree with your concern that you could be tainted, but I
12 think if it's an innocuous document, then that's going to be an
13 argument that won't exist in favor of Option One. And I would
14 ask if he says "Here's the stack" before you say, "Okay, I
15 agree," just flip through it and presumably it's going to be
16 something fairly short that you can look at pretty quickly and
17 say -- or if it isn't give it back to him and say, "No, I want
18 to have a fight about this one."

19 MR. GWYNNE: And, Your Honor, would you agree that my
20 giving him that stack and him reviewing it that you're ordering
21 now that that's not a waiver of the privilege?

22 THE COURT: Yes, I will agree with that. Until the
23 two of you agree, there is no waiver.

24 MR. HAYNES: And again, Your Honor, just a concern I
25 have, --

1 THE COURT: I understand.

2 MR. HAYNES: Yes.

3 -- is that like this issue of, well, when Mr. Wirtz
4 gave instructions about whether to post the payment or not,
5 well that really doesn't relate to the Motion to Lift Stay --

6 THE COURT: That's what we're going to fight about.
7 You're going to give me the list at the end of the ones that
8 you really don't think the privilege applies to and that you
9 want to substantively use and that you don't believe you should
10 be bound by the privilege on. I want to pare off first the
11 stuff that doesn't matter so that I'm not spending a lot of
12 time looking at things that clearly no one cares about, you
13 don't care about them and they don't care about them. Okay?
14 Let's get down to the ones that are as they say, "the smoking
15 guns."

16 MR. HAYNES: All right, thank you, Your Honor. I'm
17 reluctant to look at these. My first approach would be to kind
18 of discuss it, what the category says.

19 THE COURT: That's fine.

20 MR. GWYNNE: That's fine.

21 THE COURT: Discuss them in categories. If you don't
22 want to look at them he can hand them up to me and I'll look at
23 them quickly and we'll do them in groups. And you'll have to
24 take my word for it --

25 MR. HAYNES: Yes, Your Honor.

1 THE COURT: -- at that point --

2 MR. HAYNES: Yes.

3 THE COURT: -- that I think they're innocuous enough
4 that they're not going to make any difference. But as I say,
5 let's try to identify the smoking guns.

6 MR. GWYNNE: Your Honor, the stack is only this big
7 (indicating). We could do it in an hour -- may be able to do
8 it in a half hour, whatever Your Honor wants.

9 THE COURT: All right, one o'clock.

10 MR. GWYNNE: One o'clock.

11 MR. HAYNES: Thank you, Your Honor.

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceeding in the above-entitled matter.

/S/Ann B. Schleismann
ANN B. SCHLEISMANN

9/2/09
Date