

IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE DISTRICT OF SOUTH CAROLINA

FILED

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U.S. BANKRUPTCY COURT
 DIST. OF SOUTH CAROLINA

IN RE:)
)
 TJN, Inc.,)
)
 Debtor,)
)
 TJN, Inc.,)
)
 Plaintiff,)
)
 vs.)
)
 Superior Container Corporation;)
 Cal Western, Inc.; California)
 State Bank; John T. Thompson;)
 Jimmy R. Phelps; Thompson)
 Leasing Co., LLC; and Phelps)
 Leasing, LLC,)
)
 Defendants.)

Chapter 11

Case No. 94-73386-W

Adv. Proceeding No.: 96-8108

JUDGMENT

ENTERED
 JAN 23 1997
 R. J. J.

Based upon the findings contained in the attached Order of the Court, the Motion to Compel filed by Superior Container Corporation and Cal Western, Inc. is granted in part and denied in part as stated in more detail in the attached Order. Additionally, the Motion for Protective Order filed by the Plaintiff is also granted in part and denied in part to the extent noted in the attached Order.

John E. Waite
 UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
January 22, 1997.

2/2/97

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

FILED
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JAN 22 1997
BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (10)

IN RE:)	Chapter 11
)	
TJN, Inc.,)	Case No. 94-73386-W
)	
Debtor,)	Adv. Proceeding No.: 96-8108
)	
TJN, Inc.,)	
)	
Plaintiff,)	
)	ORDER
vs.)	
)	
Superior Container Corporation;)	
Cal Western, Inc.; California)	
State Bank; John T. Thompson;)	
Jimmy R. Phelps; Thompson)	
Leasing Co., LLC; and Phelps)	
Leasing, LLC,)	
)	
Defendants.)	

ENTERED
JAN 23 1997
R. J. J.

This matter comes before the Court as a result of a Motion to Compel filed by the Defendants Superior Container Corporation and Cal Western, Inc. on December 16, 1996 and a Motion for Protective Order filed by the Plaintiff on January 3, 1997. This adversary proceeding involves a transaction that occurred in December, 1994 involving the sale to Superior Container Corporation ("Superior") of certain equipment from TJN, Inc., ("TJN") the Debtor-in-Possession. The sale occurred based upon Motions for Sale pursuant to 11 U.S.C. §363, and consisted of a sale of virtually all of the assets of the Debtor.

After considerable competitive bidding and modifications of offers, Superior's offer to purchase all of the equipment sold by TJN was approved. Payments to creditors in this bankruptcy case depend primarily on the collection of proceeds to be derived from a sale of the equipment. This

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litigation has resulted from Superior's failure to make the payments as outlined in the agreement and initially included causes of action against Superior and Cal Western, Inc. ("Cal West") which sought the entry of a declaratory judgement as to the non-occurrence of a contingency controlling payment, foreclosure of the security interest in all of the equipment sold by TJN to Superior, a deficiency judgment against Superior, and a judgment against Cal West as a guarantor. The Complaint was subsequently amended in order to add California State Bank (the "Bank") as a defendant, when TJN became aware that the Bank continued to assert a lien against the equipment.

After amendment of the Complaint to add the Bank as a new defendant, TJN contends that it first learned that in March of 1996, the Bank foreclosed on its lien on the equipment owned by Superior. Thereafter, some of the equipment was sold to Phelps Leasing, LLC ("PLC"), an entity owned by Jimmy R. Phelps ("Phelps") and allegedly formed specifically for the purpose of taking title to such equipment and some was sold to Thompson Leasing Co. ("TLC"), a company owned by John T. Thompson ("Thompson") and allegedly formed specifically for the purpose of taking title to such equipment. Phelps and Thompson are the sole officers, directors, and shareholders of Superior and Cal West. The Bill of Sale transferring title to such equipment is dated June 14, 1996 which is after the filing of this adversary proceeding and before the effective date of confirmation of the plan in this case. According to TJN, it was not informed of such sale and was unaware of the transfer until it received information from the Bank in August, 1996, documenting such transfer.

As a result of this additional information, TJN once again amended its complaint to add new causes of action and new defendants. Thompson, Phelps, TLC and PLC were added as defendants. The new causes of action included an action to avoid the transfer of the equipment; a cause of action against Thompson and TLC for conversion of the equipment; a cause of action against Superior and

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Cal West to pierce the corporate veil; a cause of action against Thompson, Phelps, TLC and PLC for intentional interference with a contract; a cause of action against Thompson and Phelps to pierce the corporate veil of Superior and Cal West; a cause of action against the Bank for failure to conduct a commercially reasonable sale; and a cause of action against the Bank for conversion.

On or about October 9, 1996, counsel for Superior and Cal West served Interrogatories, Requests for Production, and Requests to Admit ("Discovery Requests") on TJN. TJN filed objections to four of these seventy-three (73) Discovery Requests. These objections are to Interrogatory No. 12 and Requests to Produce Nos. 2, 4, and 9. On December 16, 1996, Superior and Cal West filed their Motion to Compel seeking information concerning communications between TJN and the creditors of TJN and information related to the sale of the equipment from TJN to Superior. TJN then filed its Motion for Protective Order.

Initially, TJN takes the position that all documents in its files relate in some way to the sale of the equipment and therefore the production of these documents would be overly burdensome as the files are too voluminous. TJN asserts that the estate's limited resources would be unnecessarily consumed by the expenses of such production, including the expense of its counsel's time. However, Superior and Cal West, through counsel, stipulated at the hearing that they would make all arrangements for the copying of the produced documents at their expense and at a time and place mutually agreeable with TJN, after counsel for TJN has an opportunity to withdraw from the files any documents that it considers unresponsive to the request or privileged. Under the factual situation of this case, the Defendants offer to assume the cost and expenses of the production mitigates against TJN's stated request for protective order and therefore, to the extent the Debtor's Motion for a Protective Order is based upon the voluminous nature of the files and costs of production, Superior

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and Cal West's Motion to Compel is granted and TJN's Motion for a Protective Order is denied. TJN is hereby directed to respond to the request by making available the files and documents it deems responsive within ten (10) days of the entry of this Order or at a mutually agreeable time and location and upon the conditions stipulated by the Defendants.

TJN also asks this Court for protection from the production of certain "correspondence" and takes the position that these documents contain confidential information. Upon stipulation of the parties, the Court conducted an *in camera* review of the applicable documents as submitted by counsel for TJN. The Court has numbered these documents #1 - # 61 consecutively according to their date and has attached a list of these documents hereto as "Exhibit A". TJN asserts that these documents are protected by the attorney-client and work-product privileges.

Wigmore says of the attorney-client privilege that: (1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) are made in confidence (5) by the client, (6) are at his instance permanently protect (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." 8 J.Wigmore, Evidence, § 2292, at 554 (McNaughton rev. ed. 1961).

...

However the definition is phrased, four elements are required to establish the existence of the attorney-client privilege:

- (1) A communication;
- (2) made between privileged persons;
- (3) in confidence;
- (4) for the purpose of seeking, obtaining, or providing legal assistance to the client.

Restatement, The Law Governing Lawyers § 118 (Tentative Draft No. 1, 1988). Besides the existence of these elements, the privilege must be affirmatively raised and cannot have been waived.

Epstein, Edna Selan, The Attorney-Client Privilege and the Work-Product Doctrine, American Bar Association, Section of Litigation, (3rd Ed.) at 34, 35.

The attorney-client privilege applies not only to communications from the lawyer to the client, but also extends "to protect communications by the lawyer . . . to other lawyers in the case of joint representation, if those communications reveal confidential client communications." Cameron v. General Motors Corp., 158 F.R.D. 581, 585 (D.S.C. 1994) citing United States v. (Under Seal), 748 F.2d 871. Confidential communications are those "not intended to be disclosed to third persons other than in the course of rendering legal services to the client or transmitting the communications by reasonably necessary means." Cameron, supra, 158 F.R.D. at 585.

Superior and Cal West take the position that even if certain documents are privileged, the applicable privilege has been waived by sending copies of this correspondence to other parties. TJN takes the position that any attorney-client privilege has not been waived based upon the common-interest doctrine and that additionally, any disclosure of the documents to creditors does not constitute a waiver of the work-product protection.

The common-interest defense to waiver of the attorney-client privilege has been stated as follows:

Because "[t]he need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common-interest about a legal matter," United States v. Schwimmer, 892 F.2d 237, 243-44 (2d Cir.1989), courts have extended the joint defense privilege to civil co-defendants, Western Fuels Ass'n. Inc. v. Burlington Northern R.R. Co., 102 F.R.D. 201 (D.Wyo.1984); companies that had been individually summoned before a grand jury who shared information before any indictment was returned, Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir.1964); potential co-parties to prospective litigation, In Re LTV Securities Litigation, 89 F.R.D. 595 (N.D.Tex.1981); plaintiffs who were pursuing separate actions in different states, Schachar v. American Academy of Ophthalmology, 106 F.R.D. 187 (N.D.Ill.1985); and civil defendants who were sued in separate actions, Transmirra Products Corp. v. Monsanto Chemical Co., 26 F.R.D. 572

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(S.D.N.Y.1960). Thus, as the cases cited above indicate, today the joint defense privilege is "more properly identified as the 'common-interest rule.' " Schwimmer, 892 F.2d at 243. Finally, as an exception to waiver, the joint defense or common-interest rule presupposes the existence of an otherwise valid privilege, and the rule applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work-product doctrine. Transmirra, 26 F.R.D. at 578.

...

Whether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common-interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.

In re Grand Jury Subpoenas, 89-3 and 89-4, 902 F.2d 244 (4th Cir. 1990). Also see Epstein, Edna Selan, The Attorney-Client Privilege and the Work-Product Doctrine, American Bar Association, Section of Litigation, (3rd Ed.) at 132, 133.

A review of the documents indicate that many of them represent communications relating to legal advice and strategy, some of which are between the counsel for the Debtor and the Debtor, were prepared in anticipation of litigation or for trial and between parties who share a commonality of interest at the time the documents were created.

While this Court could not locate cases in which the common-interest doctrine has been recognized in communications to creditors in a bankruptcy case, there are several particular factors present in this case that seem to fit within the policy of that exception to waiver. The communications were made to a discrete and limited number of large creditors who have a special knowledge of the canning business and who were greatly involved in the drafting and approval of the agreements with Superior and Cal West. Since the plan in this case does not provide for a 100%

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distribution to creditors and therefore ultimately any payment to the Debtor or its principals, the creditors with whom TJN communicated stand as the beneficial interest holders of the litigation before the Court. Absent the Debtor's commencement of this action, these creditors may be authorized to undertake this litigation as parties. Sharing among parties who have a common litigation adversary but are not co-parties in the same litigation has also been upheld as to some protections against discovery requests. 8 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2016.2, citing U.S. v. American Tel. & Tel. Co., C.A.D.C. , 1980 642 F.2d 1285, also see Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, (1975) at 1176.

However, this Court need not rely upon the common-interest doctrine because the same documents clearly fall within the work-product rule, which has been timely asserted by the Plaintiff.

Clearly "the work-product doctrine is distinct from and broader than the attorney-client privilege". Cameron, supra at 587, citing United States v. Nobles, 422 U.S. 225, 239, 95 S.Ct. 2160, 2170, 45 L.Ed.2d 141 (1975). The application of the work-product privilege was created and is governed by Rule 26(b)(3) of the Federal Rules of Civil Procedure. Cameron, supra, at 586.

Rule 26(b)(3) states in pertinent parts:

Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or

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other representative of a party concerning the litigation.

Within the 4th Circuit, opinion work-product is seen to enjoy an absolute immunity from disclosure while non-opinion work-product is protected only by a qualified immunity and must be disclosed only upon a showing that the party seeking disclosure has a substantial need of the materials and is unable, without undue hardship, to obtain their equivalent by other means. Cameron, supra, at 588.

In this case, without distinguishing which portions of the documents are opinion as opposed to nonopinion work-products, there has been no showing that Superior or Cal West has a substantial need for the documents. Therefore it appears that documents numbered 8, 11-15, 17-20, 23, 25-30, 32-49, 51, 55, and 60 are protected from disclosure in this proceeding pursuant to the work-product doctrine.

Furthermore, disclosure of work-product to others, particularly litigation allies, does not necessarily amount to a waiver unless the disclosure is intended or even highly likely to also be made to the opposing party.

The attorney-client privilege has its basis in the confidential nature of the communication and the reason for the privilege ordinarily ceases to exist if confidentiality is destroyed by voluntary disclosure to a third person. But the purpose of the work-product rule is not to protect the evidence from disclosure to the outside world, but rather to protect it only from the knowledge of opposing counsel and his client, thereby preventing its use against the lawyer gathering the materials.

Gardner, Agency Problems in the Law of Attorney-Client Privilege: Privilege and "Work-product" under Open Discovery (Part II), 1965, 42 U.Det. L.J. 253,290.

8 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2024.

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In the instant case, any disclosure to other parties of documents numbered 8, 11-15, 17-20, 23, 25-30, 32-49, 51, 55, and 60 does not appear to have been made with an intention or likelihood that the disclosure would reach the Defendants and therefore there is no waiver of the work-product protection.

However, certain of the documents submitted, numbers 1-7, 9, 10, 16, 21, 22, 24, 31, 50, 52-54 and 61 are correspondence which either does not appear to contain privileged information or constitute work-product, and, if so, such protection has been waived by disclosure. Included in this group are certain correspondence which were copied to Defendants' counsel, copied to the Court and therefore placed within the public record, or represent cover letters transmitting documents which were filed with the Court.

In summary, this Court agrees with TJN that the documents numbered 8, 11-15, 17-20, 23, 25-30, 32-49, 51, 55, and 60 contain information protected by the attorney-client privilege or work-product doctrine which has not been waived. Therefore TJN's Motion for a Protective Order is granted and Superior and Cal West's Motion to Compel is denied to that extent.

Documents numbered 1-7, 9, 10, 16, 21, 22, 24, 31, 50, 52-54 and 61 do not appear to contain privileged information or, if so, such protections have been waived by disclosure, and therefore are discoverable by Superior and Cal Western. TJN's Motion for a Protective Order as it relates to these documents is therefore denied and Superior and Cal West's Motion to Compel is therefore granted to that extent.

For all of these reasons, the Motion to Compel filed by Superior and Cal West and the Motion for a Protective Order filed by TJN are therefore granted in part and denied in part accordingly.

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AND IT IS SO ORDERED.

Columbia, South Carolina,
January 22, 1997.

John E. White
UNITED STATES BANKRUPTCY JUDGE

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Exhibit A

Document Number	Type	Date
1	Correspondence with attachment	December 13, 1995
2	Correspondence	December 14, 1995
3	Correspondence	December 18, 1995
4	Facsimile	December 19, 1995
5	Correspondence with attachments (Affidavit of Jim Phelps and 11/20/95 letter from John Thompson to McCarthy)	December 20, 1995
6	Correspondence	December 21, 1995
7	Correspondence	December 22, 1995
8	Correspondence	December 22, 1995
9	Facsimile	December 26, 1995
10	Facsimile	December 27, 1995
11	Correspondence	December 28, 1995
12	Correspondence	January 8, 1996
13	Correspondence	January 11, 1996
14	Correspondence with attachment	January 12, 1996
15	Correspondence	January 12, 1996
16	Correspondence	February 19, 1996
17	Correspondence	March 5, 1996
18	Correspondence	March 5, 1996
19	Correspondence	March 11, 1996
20	Correspondence	March 12, 1996
21	Correspondence with attachment (96-8108 complaint)	April 10, 1996
22	Correspondence	April 24, 1996
23	Correspondence	June 10, 1996
24	Correspondence with attachments (proposed affidavits)	July 18, 1996

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25	Correspondence	July 25, 1996
26	Correspondence	July 25, 1996
27	Correspondence	July 26, 1996
28	Correspondence	August 7, 1996
29	Correspondence	August 7, 1996
30	Correspondence	August 8, 1996
31	Correspondence with attachment (scheduling order)	August 9, 1996
32	Correspondence	August 13, 1996
33	Correspondence	August 16, 1996
34	Correspondence	August 19, 1996
35	Correspondence	August 22, 1996
36	Correspondence	August 22, 1996
37	Correspondence	August 22, 1996
38	Correspondence	August 30, 1996
39	Correspondence	August 30, 1996
40	Correspondence	September 6, 1996
41	Correspondence	September 9, 1996
42	Correspondence	September 10, 1996
43	Correspondence	September 11, 1996
44	Correspondence	September 16, 1996
45	Facsimile	September 23, 1996
46	Correspondence	September 23, 1996
47	Correspondence	September 25, 1996
48	Correspondence	September 25, 1996
49	Correspondence re: conference call	October 9, 1996
50	Facsimile	October 9, 1996
51	Response correspondence re: conference call	October 9, 1996
52	Correspondence re: 10/14/96 conference call	October 11, 1996

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53	Response correspondence re: conference call	October 11, 1996
54	Response correspondence re: conference call	October 11, 1996
55	Correspondence	October 16, 1996
56	Facsimile	October 16, 1996
57	Correspondence	October 17, 1996
58	Correspondence with attached facsimiles	October 17, 1996
59	Facsimile	October 18, 1996
60	Correspondence	November 7, 1996
61	Facsimile	November 12, 1996

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