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Order on Plaintiff's Motion to Compel Production of Documents Withheld on the basis of Attorney-Client Privilege (Etowah Environmental Group)

Melvin K. Westmoreland

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ETOWAH ENVIRONMENTAL GROUP, LLC,)

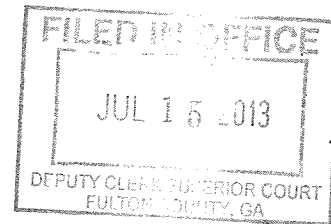
Plaintiff,)

v.)

MICHAEL WALSH, CHRISTOPHER BEALL,)
ADSTAR WASTE HOLDINGS CORP., and)
HIGHSTAR CAPITAL FUND II, L.P.,)

Defendants.)

CIVIL ACTION NO. 2012-CV-211149



**ORDER ON PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS
WITHHELD ON THE BASIS OF ATTORNEY-CLIENT PRIVILEGE**

This matter is before the Court on the Plaintiffs' Motion to Compel Production of Documents Withheld on the Basis of Attorney-Client Privilege. Upon consideration of the briefs and materials submitted on the motion, the Court's review *in camera* of the documents at issue, and the record of the case, this Court finds as follows:

Plaintiff Etowah Environmental Group, LLC ("Etowah" or "Plaintiff") seeks an order compelling the production of twelve redacted email chains, claiming that such documents are not entitled to the attorney-client privilege. Plaintiff alleges that all of the documents were used in furtherance of the purported scheme to defraud Etowah and therefore are subject to the fraud exception to the attorney-client privilege. Additionally, as to some documents, Plaintiff argues that they are not entitled to the privilege in the first place because the communications do not amount to legal advice.

"There are certain admissions and communications excluded from evidence on grounds of public policy, including... communications between attorney and client." O.C.G.A. § 24-5-501.

In addition to the requirement that an attorney-client relationship exists, relevant factors generally include, but are not limited to, the nature and purpose of the communication and how and to whom the communication was made.... In addition, the attorney-client privilege extends only to confidential communications made for the purpose of facilitating the rendition of legal services to the client. Thus, where the attorney acts merely as a business adviser, the privilege is inapplicable. The privilege would never be available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure. It seems well settled that the requisite professional relationship is not established when the client seeks business or personal advice, as opposed to legal assistance.

Ga. Cash Am., Inc. v. Strong, 286 Ga. App. 405, 412 (2007) (citations omitted).

Even when a communication amounts to legal advice, Georgia courts recognize an exception to the privilege when the advice was “made for the purpose of furthering a crime, fraud, perjury, or other unlawful end.” Southern Guaranty Ins. Co. v. Ash, 192 Ga. App. 24, 28 (1989). A party must satisfy a two-part test when seeking the application of the crime-fraud exception:

First, there must be a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel or that he committed a crime or fraud subsequent to receiving the benefit of counsel’s advice. Second, there must be a showing that the attorney’s assistance was obtained in furtherance of the criminal or fraudulent activity.

Tindall v. H&S Homes, LLC, 757 F. Supp. 2d 1339, 1351-52 (M.D. Ga. 2011).

Plaintiff claims that the crime fraud exception applies here to justify full disclosure of the documents, some of which, according to Plaintiffs, do not appropriately qualify for the attorney-client privilege anyway. In the alternative, Plaintiff requests that the Court conduct an *in camera* review of the unredacted version of the documents at issue to determine whether full disclosure is warranted.

“*In camera* proceedings are appropriate, for example, when the underlying facts demonstrating the existence of the privilege may be presented only by revealing the very information to the court that is sought to be protected by the privilege.” S. Guar. Ins. Co. v. Ash, 192 Ga. App. 24, 29 (1989). In the context of a crime fraud analysis, “to warrant an *in camera* review of attorney-client communications the party opposing privilege need only make a preliminary showing that ‘the communication was made in furtherance of illegal or fraudulent activity.’” Tindall, 757 F. Supp. 2d at 1353 (M.D. Ga. 2011).

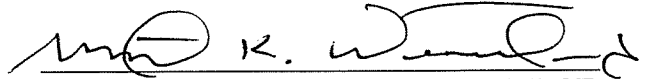
Here, the Court finds that Plaintiff has satisfied the low threshold required for an *in camera* review. Plaintiff’s claims in this case are based on Defendants’ alleged conduct in colluding with Plaintiff’s former business partner, Advanced Disposal Services, Inc. (“ADS”), to deliberately undervalue Federal Road, LLC, an entity jointly owned by Plaintiff (with a 25% interest) and ADS (with a 75% interest), with the result being ADS received a disproportionate amount of the proceeds generated by the sale of its assets. Further, Plaintiff contends it was damaged due to Defendants’ failure to produce documents and alleged false testimony to the arbitration panel.

While a plaintiff must do more than simply allege fraud to warrant an *in camera* review, the Court finds Plaintiff has “presented a factual basis adequate to support a reasonable, good faith belief that an *in camera* review may reveal evidence to establish the exception.” Id. Here, Plaintiff has pointed to letters from Defendants that suspiciously reduce by a large margin the valuation afforded to Federal Road, LLC, while the value attributed to ADS continued to increase. As a result, it is feasible the communications at issue, exchanged around the time that the negotiations with Plaintiff were taking place, might show Defendants’ part in the scheme to induce Plaintiff to forego the “tag-along” rights provided in the underlying operating agreement.

Likewise, the communications regarding Defendants' subpoena in connection with the arbitration could disclose Defendants' plans to withhold evidence from the arbitration.

However, upon review of the unredacted version of the emails at issue, the Court finds the materials all warrant application of the attorney-client privilege and the crime fraud exception is not met here. Accordingly, Plaintiff's motion to compel is **DENIED**.

SO ORDERED this 15th day of July, 2013.



MELVIN K. WESTMORELAND, JUDGE
 Superior Court of Fulton County
 Atlanta Judicial Circuit

Copies to:

Attorneys for Plaintiffs	Attorneys for Defendants
H. Wayne Phears, Esq. David J. Forestner, Esq. Jack C. Lundstedt, Jr., Esq. MCGUIRE WOODS, LLP 1230 Peachtree Street, NE Suite 2100 Atlanta, GA 30309 wphears@mcguirewoods.com dforestner@mcguirewoods.com jlundstedt@mcguirewoods.com	David L. Balsler, Esq. Lawrence A. Slovensky, Esq. Kathleen A. Sacks, Esq. Katherine E. Grayson, Esq. KING & SPALDING LLP 1180 Peachtree Street N.E. Atlanta, GA 30309 (404) 572-4600 dbalsler@kslaw.com lslovensky@kslaw.com ksacks@kslaw.com kgrayson@kslaw.com Bruce P. Brown, Esq. BRUCE P. BROWN LAW LLC 309 N. Highland Ave. NE, Suite A Atlanta, GA 30307 (404) 584-0400 bbrown@brucebrownlaw.com Amy R. Foote, Esq. (admitted <i>pro hac vice</i>) Irene Ricci, Esq. FOOTE LAW FIRM 399 Park Avenue New York, NY 10022

	<u>afoote@foote-lawfirm.com</u> <u>iricci@foote-lawfirm.com</u>
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