

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION
Civil Action No: 1:13-cv-1036

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

ROBERT A. HELMS, ET AL.,

Defendants,

and

WILLIAM L. BARLOW, and GLOBAL
CAPITAL VENTURES, LLC,

Relief Defendants, solely for the
purposes of equitable relief.

**INTERVENOR CLOVIS CAPITAL
VENTURES, LLC'S
MOTION IN LIMINE AND
INCORPORATED MEMORANDUM
OF LAW**

Intervenor, Clovis Capital Ventures, LLC (“Clovis”), in an effort to resolve foreseeable legal issues before hearing, submits this Motion *in Limine* and Incorporated Memorandum of Law. Specifically, Clovis hereby moves this Court *in limine*, on the basis of the attorney-client privilege and work product doctrine, to exclude testimony of Clovis’ former attorney, Avery Chapman (“Chapman”), concerning legal advice and counsel he provided to his clients Clovis and Messrs. Philip Gaucher (“Gaucher”) and Douglas Smith (“Smith”) in connection with the formation, due diligence and business of Clovis and its investment in Vendetta Royalty Partners, Ltd (“Vendetta”).

ARGUMENT

For the reasons explained in Clovis' Opposition to the Receiver's Motion to Compel (*see* Doc. No. 165, *infra*) ("Clovis' Opposition"), which reasons and arguments are incorporated herein and made a part of this Motion as if stated fully, Chapman was Clovis' attorney at all times during the period that is the subject of the Receiver's Motion for Entry of An Order (1) Rejecting Secured Claim of Clovis Capital Ventures, LLC; and (2) Authorizing the Sale of Certain Royalty Interests Fee and Clear of All Liens, Claims and Encumbrances ("Receiver's Motion") which is now before the Court. As such, certain communications between Clovis and Chapman (including communication between Chapman and Gaucher or Smith, acting as representatives of Clovis) are privileged under the common-law attorney-client privilege.

The purpose of the attorney-client privilege is to "encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389, (1981). Although the privilege does not protect the disclosure of underlying facts, it does protect "confidential communications between the attorney and client." *Id.*, 449 U.S. at 395-396. As the Fifth Circuit has recognized, to establish the privilege, the party asserting the privilege must establish:

(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose

of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

In re Grand Jury Proceedings, 517 F.2d 666, 670 (5th Cir.1975).

As set forth more fully in Clovis' Opposition, Chapman, a member of the Florida and other state bars, served as legal counsel for Clovis and, although indirectly a member of Clovis itself, acted in that capacity with respect to the Vendetta transaction and also as an attorney for Messrs Smith and Gaucher. Moreover, although Chapman, was subpoenaed for deposition by the Receiver and provided testimony, Clovis has vigorously asserted the attorney—client privilege as to his statements. Only Clovis, and not Chapman, as the attorney for Clovis, may waive a privilege that belongs to Clovis. *See Apex Mun. Fund v. N-Grp. Sec.*, 841 F. Supp. 1423, 1429-30 (S.D. Tex. 1993) (“In general the attorney-client privilege belongs to the client, and an attorney cannot unilaterally waive it.”).

Chapman provided the Clovis principals Gaucher and Smith legal advice regarding many aspects of the Vendetta transaction and negotiated and drafted documents securing both Clovis' membership interest and the collateral that the Receiver is attempting to set aside. These communications were not disclosed to third parties and were intended to be confidential. The fact that Chapman was himself indirectly a member of Clovis and had a business interest in the transaction does not negate the availability of the privilege to Clovis itself. *See Picard Chemical Inc. Profit Sharing Plan v. Perrigo Co.*, 951 F.Supp. 679, 685–86 (W.D.Mich.1996) (legal and business considerations may frequently be inextricably intertwined when legal advice is rendered in the corporate context, but the fact that business considerations are weighed in the rendering of

legal advice will not vitiate the attorney-client privilege.). Furthermore, the attorney-client privilege encompasses factual investigations by counsel. *Upjohn*, 449 U.S. at 390-91. Thus, due diligence investigations and reports and information Chapman obtained in investigating the Vendetta would also be privileged communications. Allowing the Receiver to call Chapman as a witness or to introduce testimony regarding such communications, or the communications themselves, would violate the attorney-client privilege and be highly prejudicial to Clovis.

CONCLUSION

For the foregoing reasons, Clovis respectfully requests that the Court exclude any (i) testimony of Avery Chapman regarding confidential communications between him and Clovis and its members and their representatives and (ii) any written communications, including letters and e-mails, between such parties.

WHEREFORE, Clovis requests that the Court grant its Motion *in Limine*.

Respectfully submitted, this the 6th day of February, 2015.

/s/ William R. Terpening
William R. Terpening
Admitted Pro Hac Vice

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CERTIFICATE OF SERVICE

I certify that I served the foregoing INTERVENOR CLOVIS CAPITAL VENTURES, LLC'S MOTION IN LIMINE via the Court's CM/ECF System, which will serve all registered counsel and parties of record as follows:

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I further certify that I served the foregoing INTERVENOR CLOVIS CAPITAL VENTURES, LLC'S MOTION IN LIMINE upon the unrepresented parties via US Mail as follows:

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This the 6th day of Februaryy, 2015.

/s/ William R. Terpening