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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION

FILED

September 30, 2020

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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re ) Case No. 20-10800-B-11  
)  
4-S RANCH PARTNERS, LLC, ) DCN: WJH-3  
)  
Debtor. )  
)  
\_\_\_\_\_) )  
In re ) Date: September 10, 2020  
) Time: 1:30 p.m.  
) Department B, Judge Lastreto  
STEPHEN WILLIAM SLOAN, ) Fifth Floor, Courtroom 13  
) 2500 Tulare Street, Fresno, CA  
Debtor. )  
\_\_\_\_\_) )

**RULING AFTER *IN CAMERA* REVIEW**

**INTRODUCTION**

Invoking the attorney-client privilege and work-product protection, a law firm resisted producing certain documents requested in a subpoena served by a creditor. The subpoena is part of discovery concerning a pending stay relief motion involving the creditor. After producing a Privilege Log, the law firm and the creditor reached an impasse on the appropriate extent of the documents protected. The creditor filed a motion to compel and the court issued an order including a provision requiring *in camera* review of those documents that remain in dispute. After that review, the court issues this ruling requiring production of certain documents and withholding of others.

1 BACKGROUND

2 About seven months ago, 4-S Ranch Partners and Stephen  
3 Sloan (collectively "4-S") filed voluntary chapter 11 cases.  
4 These debtors are seeking to reorganize large farming  
5 enterprises in a unique way. Rather than "farming their way out  
6 of it," these entities seek to continue their pre-petition  
7 efforts to capitalize on California's recently enacted  
8 groundwater management laws and become approved underground  
9 water storage providers. They also plan to sell water and  
10 divert it to other users. The future may be lucrative or not.  
11 The outcome largely depends on receipt of regulatory approvals  
12 and the legal establishment of entities authorized to store and  
13 divert water.

14 4-S's primary secured lender is Sandton Credit Solutions  
15 Master Fund IV, LP ("Sandton"). Sandton is owed over Fifty-  
16 Seven Million Dollars. The debt is secured by many parcels of  
17 real estate in Merced County. Pre-petition, Sandton negotiated  
18 with 4-S and entered into a few forbearance agreements. They  
19 were not performed. Foreclosure proceeded until the bankruptcies  
20 were filed.

21 Sandton promptly filed stay relief motions in these cases  
22 asserting § 362 (d) (2) supports the relief they request.  
23 Sandton contends their collateral is not protected by equity and  
24 is not necessary for a prospective reorganization within a  
25 reasonable time. 4-S disputes this claiming that Sandton's  
26 collateral is worth far more than Sandton alleges because 4-S is  
27 on the threshold of the necessary approvals to become an  
28

1 underground water storage provider.<sup>1</sup> 4-S also contends the  
2 collateral is critical for their proposed reorganization.

3 At the hearing on Sandton's motions in April 2020, the  
4 parties and the court noted there were issues of material fact  
5 requiring an evidentiary hearing. The parties agreed on a  
6 schedule for the evidentiary hearing. The court consolidated  
7 the motions in these two cases for purposes of discovery and the  
8 evidentiary hearing. Discovery began.

9 Among the issues involved is the status of 4-S's efforts to  
10 obtain necessary legal clearances and establishing necessary  
11 entities for the water storage/diversion proposals and the  
12 likelihood of that happening reasonably soon. This issue may be  
13 critical to the §362 (d) (2) inquiry on these motions. So,  
14 Sandton subpoenaed records from a law firm assisting 4-S with  
15 the numerous land use issues it faced. The law firm, O'Laughlin  
16 & Paris, LLP, and two of its lawyers, Valerie Kincaid, Esq., and  
17 Sarah Glatt, Esq., primarily communicated with 4-S's consultant,  
18 Bruce Marlow ("Marlow"), on the land use issues pre-petition.<sup>2</sup>

19 The law firm through Ms. Kincaid (collectively "Kincaid")  
20 responded and included a privilege log identifying 229 documents  
21 withheld from production on attorney client privilege and work  
22 product protection grounds. From June 2020 through August 2020,  
23 Sandton's and 4-S's counsel conferred about the documents  
24 withheld.<sup>3</sup> In the absence of what Sandton considered a

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25 <sup>1</sup> Sandton claims the collateral is worth about \$15 million.

26 <sup>2</sup> So far, neither Ms. Kincaid, Ms. Glatt nor the O'Laughlin & Paris law  
27 firm has been employed by either debtor to continue assisting on the land use  
28 issues.

<sup>3</sup> Though not at issue now, Sandton contends its early overtures to "meet  
and confer" were either ignored or unreasonably postponed by the debtors.  
The debtors disagree citing many reasons including the volume of documents

1 satisfactory resolution and with a looming trial date, Sandton  
2 brought this motion to compel.<sup>4</sup>

3 After the hearing on the motion, the court issued an order on  
4 September 14, 2020 (Doc. 234). As pertinent here, the order  
5 provided:

- 6 • the parties were to meet and confer and determine which  
7 documents truly remain in dispute as privileged or  
8 protected;
- 9 • the privilege log and copies of the documents in dispute  
10 were to be delivered to the court for *in camera* review;
- 11 • Sandton was permitted to provide a small exemplar of  
12 produced documents to assist the court in determining if  
13 any privilege or protection had been waived.
- 14 • Kincaid had concluded representation of debtors and any  
15 order requiring production of withheld documents would be  
16 directed to 4-S since it was provided all the disputed  
17 documents.

18 Through the parties' efforts, the 229 documents have been  
19 winnowed down to eight. The documents have been produced to the  
20 court. The court has reviewed the documents and the exemplars.

#### 21 22 **PARTIES' CONTENTIONS**

23 4-S contends the withheld documents are either privileged  
24 attorney-client communications or protected by the work product  
25 privilege. Most of the documents are emails between Kincaid or  
26 Glatt and Marlow. Marlow is a "de facto" high level employee of  
27 \_\_\_\_\_  
28 and difficulty in contacting their client so decisions could be made as  
reasons for delays.

<sup>4</sup> Before the hearing on the motion, the parties had reduced the number  
of documents subject to dispute substantially.

1 these debtors and so communications with he and counsel for the  
2 debtors should be protected.

3 Sandton originally contended Marlow was an independent  
4 consultant and a recipient of attorney-client communications,  
5 which was consistent with debtor's actions. At the hearing on  
6 the motion, debtors took the position Marlow was a "de facto"  
7 high level employee. Now, Sandton contends even so, the debtors  
8 have waived the attorney-client privilege, or any protection  
9 given the breadth of documents already produced.

### 10 11 JURISDICTION

12 The District Court has jurisdiction of this contested  
13 matter under 28 U.S.C. § 1334 (b) since this is a civil  
14 proceeding arising under title 11 of the United States Code.  
15 The District Court referred this matter to this court under 28  
16 U.S.C. § 157 (a). This court has authority to enter a final  
17 decision on this motion and the underlying relief from stay  
18 motion under 28 U.S.C. § 157 (b) (2) (G). The Federal Discovery  
19 Rules largely apply to contested matters under Fed. R. Bankr.  
20 Proc. 9014 (c).

### 21 22 ANALYSIS

#### 23 1. Application of Attorney-Client Privilege

24 Questions of evidentiary privilege arising in the course of  
25 the adjudication of federal rights is governed by principles of  
26 federal common law. U.S. v. Zolin, 491 U.S. 554, 562 (1989).  
27 Since privileges impede the discovery of truth, they are  
28 strictly construed. Branch v. Umphenour, 936 F. 3d 994, 1006

1 (9th Cir. 2019). Stay relief litigation is uniquely a federal  
2 issue, so federal common law concerning the attorney client  
3 privilege applies.

4 A party asserting the privilege has the burden of proof of  
5 each element of the privilege. U.S. v. Ruehle, 583 F. 3d 600,  
6 607 (9th Cir. 2009). There are eight elements:

- 7 1) Legal advice must be sought.
- 8 2) Advice sought must be from a professional legal advisor  
9 in the advisor's capacity as such.
- 10 3) The communication must be related to that purpose.
- 11 4) The advice or communication must be given in confidence.
- 12 5) The client must have wanted the communication in  
13 confidence.
- 14 6) At the client's insistence, the communication is  
15 permanently protected.
- 16 7) The client and the legal advisor may not disclose the  
17 communication.
- 18 8) The exception is if the protection is waived. U.S. v.  
19 Landorf, 591 F. 2d 36, 38 (9th Cir. 1978); U.S. v. Graf,  
20 610 F. 3d 1148, 1156 (9th Cir. 2010).

21 There is no real dispute here that the documents subject to  
22 *in camera* review are arguably privileged. Rather, Sandton  
23 contends that despite the privilege, the documents withheld  
24 should be disclosed because the documents already produced  
25 essentially waive the privilege. Fed. R. Evid. 502 (a)  
26 addresses waiver of the attorney-client privilege or work-  
27 product protection as to undisclosed communications or  
28 information when other privileged documents or information have

1 been produced. The waiver extends to undisclosed communication  
2 or information only if:

- 3 • The waiver is intentional;
- 4 • The disclosed and undisclosed communications or
- 5 information concern the same subject matter; and
- 6 • They ought in fairness to be considered together. Fed.
- 7 R. Evid. 502 (a).

8 Subject matter waiver is reserved for those unusual situations  
9 in which fairness requires a further disclosure of related,  
10 protected information, in order to prevent a selective and  
11 misleading presentation to the disadvantage of the adversary.  
12 Fed. R. Evid. 502 (a) advisory committee's note.

13 These elements of subject matter waiver are applicable to  
14 both the privilege and the procedural protection afforded work-  
15 product. Work-product protection is examined next.

## 16 17 2. Application of work-product protection.

18 The procedural immunity of the work product doctrine is not  
19 a privilege. So, the scope of the work-product doctrine is  
20 determined by federal law even if the federal court must apply  
21 state substantive law. Holliday v. Extex, 447 F. Supp. 2d 1138  
22 (D. Haw. 2006) citing Baker v. General Motors Corp., 209 F. 3d  
23 1051, 1053 (8th Cir. 2000). There is very little or no  
24 protection surrounding work product dealing with an expert who  
25 will testify. See, Fed. R. Civ. Proc 26 (a) (2); (b) (4) (A).  
26 Marlow is slated to testify at the trial of the stay relief  
27 motion. He is a consultant but also a "de facto" employee of  
28 the debtors. Thus, the court looks at work-product protection

1 claims dealing with documents related to subjects Marlow will  
2 testify about with a "gimlet eye."

3 Some documents may have been prepared by Marlow or counsel  
4 for a business purpose unrelated to litigation. Others may have  
5 a dual purpose-both business and litigation relevance. In the  
6 ninth circuit, those documents must be carefully considered. The  
7 court should consider facts surrounding the creation of the  
8 documents. If their litigation purpose "so permeates any non-  
9 litigation purpose that the two purposes cannot be discretely  
10 separated from the factual nexus as a whole," the documents can  
11 be within the ambit of work product. U.S. v. Torf (In re Grand  
12 Jury Subpoena), 357 F. 3d 900, 910 (9th Cir. 2003).

13 The court now turns to the remaining eight documents described  
14 in the privilege log which are in dispute.

15  
16 3. Rulings on document production

17 The following rulings on the disclosure of disputed  
18 documents will follow the numbers set forth in the privilege  
19 log.

20 **#40 - Documents should be produced.**

21 The documents do not contain a legal analysis or  
22 discussion. They do represent a list of tasks, but the list  
23 does not reflect legal opinions or analysis. The documents also  
24 cover the same subjects as the exemplars, and it is fair to  
25 review these together with the documents produced.

26 **#41 - Documents should be produced.**

27 Same as #40 above.

28 **#53 - Documents to remain privileged.**



1        These documents contain discussions of matters to be  
2 analyzed or considered in the future. The documents also  
3 include a strategic discussion concerning timing of submissions  
4 to various agencies. These documents also contain information  
5 that is not the same subject matter as those documents already  
6 produced. The documents reflect counsel's opinions and  
7 considerations.

8        **#56 - Documents to remain privileged.**

9        Same as # 53 above.

10       **#62 - Documents to remain privileged except pages 3-8,**  
11 **which are public records. Those pages (3-8) should be produced.**

12       It is not fair to consider these documents together with  
13 those already produced. These documents cover other topics  
14 besides the Owens Creek diversions. They also contain attorney  
15 opinions and conclusions.

16       **#98 - Documents to remain privileged.**

17       These documents reflect strategic discussions concerning  
18 the content and form of a LAFCO application. They are legal  
19 opinions and conclusions, which have an expectation of being  
20 privileged. The court has reviewed the exemplars which include  
21 an interlineated copy of a LAFCO application. But production of  
22 that document does not "open up" all discussions concerning the  
23 LAFCO application.

24       **#135 - Documents should be produced.**

25       This is a checklist of actions Mr. Marlow is to take. It  
26 is a data checklist without any legal analysis. The  
27 communication only contains information. It is not protected by  
28

1 work product because the subjects covered in this document are  
2 included in the documents already produced.

3 **#136 - Documents should be produced.**

4 Same as # 135 above.

5  
6 **CONCLUSION**

7 For the foregoing reasons, the listed documents should be  
8 produced or withheld as stated. The court will issue a  
9 contemporaneous order.

1                                    **Instructions to Clerk of Court**  
2                                    **Service List - Not Part of Order/Judgment**

3                    The Clerk of Court is instructed to send the Order/Judgment  
4 or other court generated document transmitted herewith to the  
5 parties below. The Clerk of Court will send the Order via the  
6 BNC or, if checked   X  , via the U.S. mail.

7                    4-S Ranch Partners, LLC  
8                    264 I Street  
9                    Los Banos CA 93635-9363

10                   Stephen William Sloan  
11                   317 Kingsbury  
                    Aptos CA 95003

12                   Office of the U.S. Trustee  
13                   United States Courthouse  
14                   2500 Tulare Street, Room 1401  
                    Fresno CA 93721

15                   Alexander K. Lee  
16                   221 Sansome Street, Third Floor  
17                   San Francisco CA 94104

18                   Kurt F. Vote  
19                   265 E. River Park Circle, Suite 310  
                    Fresno CA 93720

20                   Peter L. Fear  
21                   7650 N. Palm Ave., Suite 101  
22                   Fresno CA 93711

23                   Valerie Kincaid  
24                   2617 K Street, Suite 101  
                    Sacramento, CA 95816