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ORIGINAL

No. 68316-1-1
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KING COUNTY SUPERIOR COURT
CAUSE NO. 10-2-27795-1 SEA

PHILIP D. MCKIBBEN, individually and for and on behalf of LLC
EVERETT I, a Washington Limited Liability Company, and P.D. & M.K.
I, LLC, a Washington Limited Liability Company,

Plaintiffs and Respondents,

v.

LEROY CHRISTIANSEN and JUDY CHRISTIANSEN, husband and
wife and the marital community composed thereof; FRANK
COLACURCIO, JR. and "JANE DOE" COLACURCIO, husband and
wife and the marital community composed thereof; STEVEN M.
FUESTON and "JANE DOE" FUESTON, husband and wife and the
marital community composed thereof; and DAVID C. EBERT and
MICHELLE EBERT, husband and wife and the marital community
composed thereof,

Defendants and Petitioners.

2012 JUN 17 10:24:45
KING COUNTY SUPERIOR COURT
CLERK
[Signature]

REVIEW FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE SUZANNE M. BARNETT

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Plaintiffs respectfully request that this Court uphold the Trial Court's January 25, 2012 discovery order. Defendants failed to establish as a matter of fact that the communications requested by Plaintiffs were privileged. In the alternative, Plaintiffs respectfully request that the Court remand this matter to the Trial Court for an order compelling Defendants to disclose all communications and the basis for their asserted privilege, with specificity.

II. STATEMENT OF THE CASE

A. Plaintiff McKibben and Defendants Were Partners in a Legal and Profitable Business.

Plaintiff, Phil McKibben, and Defendants David Ebert, Leroy Christiansen and Steven Fueston (herein "Defendants") and Defendant Colacurcio Jr. are each member managers of LLC Everett I and PDMK LLC. CP 745. The purpose of PDMK LLC was to operate a strip club known as "Honey's" and the purpose of LLC Everett I was to own property. Id. Defendants collectively owned a majority interest in both LLCs. CP 675. At its inception and continuing until the acts committed by the Defendants through Talents West, Honey's was a legal and profitable business. CP 105; 133-134; 147-148; 162-163.

**B. Defendants Managed the Business as a Closed,
“Majority Rules” Oligarchy through Talents West.**

In addition to Honey’s, Defendants held majority interests in four other strip clubs, known as “Fox’s,” “Rick’s” and “Sugar’s”. Id.

Defendants managed all of the above clubs through Talents West, a Washington Corporation. Id. Through Talents West, Defendants were solely responsible for the hiring, firing and disciplining of club managers and dancers, paying the employees, producing work schedules for the managers, dancers and other employees, maintaining and reviewing dancer “rent” and loan payment records, and conducting the financial affairs of the strip clubs. Id. Defendants made all major management decisions for all the clubs through Talents West. Id.

Defendants ignored all corporate formalities of LLC Everett I and PDMK LLC in the management of “Honey’s.” No manager meetings or formal votes were held before April 7, 2010. CP 117.

In the operation of LCC Everett I and PDMK LLC Defendants did not seek Plaintiff McKibben’s agreement in the decision making process regarding matters relating to the LLC, including the operation of Honey’s. CP 750. Plaintiff McKibben was excluded from information and decision making. The information he did receive was limited and controlled. He had no access to information about the management and operations of Talents West or the other clubs.

C. Defendants, Through Their Control and Management of Talents West, Committed Secret Criminal Acts.

Apparently, through Talents West, Defendants managed the clubs and dancers in an illegal manner without the knowledge, involvement or consent of Plaintiff McKibben. CP 105; 133-134; 147-148; 162-163; 746. The crux of the Government's case was recorded conversations of Defendants at the Talents West office. These recording are under seal.

D. Defendants Were Indicted for this Criminal Activity.

On June 23, 2009 Defendants were indicted in the United States District Court for the Western District of Washington and charged with conspiracy to commit RICO, use of interstate facilities in aid of racketeering (prostitution), engaging in money laundering and engaging in mail fraud. CP 745-746. LLC Everett I was also indicted. Id. Plaintiff McKibben was not indicted, was not a target and was an innocent owner. Id.

Defendants each engaged individual criminal counsel to defend against the criminal charges. CP 751. Defendants did not seek to retain counsel for PDMK LLC. Defendants paid hundreds of thousands of dollars in fees from PDMK LLC's operating budget to support an aggressive defense to the charges. CP 751. Plaintiff McKibben retained legal counsel. CP 751-752. After the Indictment, Defendants refused to pay his legal fees from PDMK LLC. Id.

E. Counsel for LLC Everett I Entered into an Unauthorized Joint Defense Agreement.

Defendants hired criminal counsel to represent LLC Everett I and DCE Inc, another indicted corporation. This created a potential conflict of interest as Plaintiff McKibben held no interest in DCE Inc. CP 393. Defendants also apparently set up joint defense agreements with counsel for LLC Everett I without Plaintiff McKibben's knowledge or consent. There was no vote or discussions on the issue. CP 117.

F. Defendants Continued to Use a Closed Oligarchical Decision Making Process During the Criminal Matter.

Defendants shined on Plaintiff McKibben throughout the criminal matter and told him only what they deemed necessary. CP 752-753. They informed him that the Government's case was weak and assured him that there was nothing to worry about. They did not disclose to Plaintiff McKibben that they had taken part in the criminal conduct outlined in the indictment, and admitted to in their individual plea agreements. CP 746. They controlled all the information, the money and continued to control the club's operations.

G. Defendants Conducted Secret and Self Serving Global Plea Negotiations with the Government.

By the spring of 2010, Defendants began to recognize their individual peril and liability, which included jail time and loss of assets.

CP 129-141; 143-156; 158-170. The Government had extensive recording of conversations at the Talents West Office, which are the subject of a protective order. Without notice to Plaintiff McKibben or his consent, Defendants engaged in substantive plea negotiations with the Government as individuals (and as agents of the LLCs). Id. & CP 748. These discussions included the closure of Honey's and forfeiture of LLC assets. Id.

The negotiations were conducted in secret, and in sequence, with Defendants controlling the flow of all information. Id. Defendants had full access to the facts in discovery, their own criminal counsel and civil and criminal counsel for LLC Everett I. This allowed the Defendants to create a plea bargain that worked solely in their best interests. Id. Plaintiff McKibben had no privity or standing. When Plaintiff McKibben discovered the settlement talks he objected to any plea bargain that negatively impacted his financial interests. He also requested to be bought out.

The plea bargaining process involved a combination of individual legal concerns and business decisions. Id. Defendants agreed as part of their individual pleas to forfeit property owned by LLC Everett I and shut down Honey's, the business operated by PDMK LLC. Id. & CP 752-753. In exchange, Defendants sought and received a plea agreement with the

Government that allowed them all to avoid jail time. Id. The interests of Plaintiff McKibben, PDMK LLC and Defendant Colacurcio Jr. were not considered during this process at all. Id. & CP 752-753.

After the deal was finalized between each individual Defendant and the Government, the Government and LLC counsel engaged in plea discussions. These discussions were a formality as the Defendants had already agreed to admit liability and agency in their individual plea agreements, facilitate a vote the LLC formalities and vote in favor of the plea, and cooperate fully in the close of the Honey's business.

Defendants completely ignored their fiduciary duties and any and all attempts to mitigate their conflict of interest. Despite numerous ongoing objections by Plaintiff McKibben, Defendants did not cure their conflicts or breaches of their fiduciary duties. He had previously requested to be bought out. CP 34; 749.

H. Vote on the LLC Everett I Plea Agreement was a Sham.

On April 7, 2010, an LLC Everett I manager meeting was called to conduct a vote on whether to accept a global plea agreement on behalf of the LLC. CP 749. The purpose of the vote was to maintain the illusion of a non-conflicted process in attempt to circumvent their conflicts of interest. CP 749; 752-753. The vote was an exercise in corporate pageantry as it was guaranteed to pass as the majority interest in the company was held

by the conflicted Defendants. CP 675. Plaintiff McKibben objected to the vote on the plea agreement and voted “no.” CP 34; 749. As expected, Defendants’ majority interest allowed the vote to pass and Defendants plead LLC Everett I guilty. CP 129-141; 143-156; 158-170. As a direct result of the plea agreement, PDMK LLC closed down and the Honey’s building in Everett and its property were forfeited to the United States Government and destroyed. CP 136-137; 151-153; 166-167; 758-760.

I. No Vote On PDMK LLC.

Defendants did not hold a vote as members of PDMK LLC to authorize the Defendants’ and LLC Everett I’s plea agreements. This was in spite of the fact that the terms of the plea agreements would end the Honey’s business operated by PDMK LLC. CP 129-141; 143-156; 158-170.

J. Plaintiff McKibben Filed a Civil Suit Against Defendants.

On July 30, 2010, Plaintiff McKibben filed a Complaint for Injunctive Relief and Damages against Defendants alleging breaches of fiduciary duties, breaches of contract and negligence relating to their criminal conduct and their management of LLC Everett I and PDMK LLC. CP 1-17.

K. In Support of His Claims, Plaintiff McKibben Requested Communications Relating to Global Plea.

As part of Plaintiff McKibben's fiduciary duty claim, he has alleged that Defendants breached their duty through self-dealing in the global plea bargain process, voting to plead the company guilty with a conflict of interest and failing to disclose material facts known to them that were relevant to the vote on the plea agreement. *Id.*

On July 13, 2011 Plaintiffs served a request for production on Defendants, requesting the identity and production of all documents and communications between or among the individual defendants, their attorneys, their co-defendants and their attorneys, Defendant Colacurcio Jr., the civil and criminal attorneys for LLC Everett I and the Government attorneys regarding plea negotiations, the plea agreements and the global plea in *United States v. Colacurcio, et al*, Case No.09-209 RAJ. CP 42-98.

L. Prior to Litigation, Plaintiffs Suggested Numerous Option to Frame the Issues for Resolution by the Court – Defendants Resisted All Suggestions.

On August 30, 2011 Defendants responded to the discovery request, and produced some communications. CP 100-127; 209-211. Defendants' production included documents labeled as privileged communications. CP 209-211. Upon discovery, Plaintiffs stopped reviewing the documents and requested clarification of the scope of Defendants' privilege claims. *Id.* Defendants took an inconsistent position.

Id. They asserted that the documents were not privileged, but also stated that if they were privileged, the disclosure was inadvertent. Id.

Plaintiffs asked Defendants to speak with their prior criminal counsel and define the parameters of any joint defense agreement or common interest privilege. Id. When Defendants refused to do their due diligence, Plaintiffs returned the documents, unread, and requested that Defendants:

- Remove all privileged material; and
- Provide a privilege log describing each document and the basis for withholding it.

CP 209-211

On October 12, 2011 Plaintiffs attempted to clarify the issue of privilege directly with the Defendants' prior criminal counsel. Id. Plaintiffs requested that they advise whether the material contained privilege information and that they describe the contours of the privilege and any common interest relationship or agreement. Id. Plaintiffs did not receive a relevant response to this inquiry. Id.

On November 2, 2011 Plaintiffs sent Subpoena Duces Tecums to Defendants Criminal Counsel and Counsel for LLC Everett I requesting the aforementioned communications. CP 374-375; 377-378. In response, Defendants' prior criminal counsel claimed that:

- Communications between the Defendants and their individual counsel were protected by the attorney-client privilege;
- Communications between and among the Defendants' criminal counsel were protected by a joint defense or common interest privilege;
- Communications between the Defendants and Counsel for LLC Everett I were protected by a common interest or joint defense privilege, but that Plaintiff McKibben was entitled to see these communications as a members of the LLC if he signed a protective order; and
- Communication between the Defendants and the Government were non-privileged.

CP 198-199; 202-203; 209-211; 258.

Counsel for LLC Everett I took a different position on communications between the Defendants and himself and claimed that those communications were protected by a corporate privilege. CP 206; 209-211.

Plaintiffs disagreed with the above analysis. CP 33-213.

M. Parties Agreed to Litigate Privilege Claims with the Trial Court.

On December 8, 2011 at a discovery conference, the parties conferred on issues related to disclosure and privilege. CP 209-211; 696-697. The parties agreed that the impasse and complexity of the issues required court intervention. CP 209-211. Defendants rejected all suggestions to resolve this matter prior litigation (i.e. privilege log, in

camera inspection, discovery mater, etc.). Id. Counsel for Defendants requested that this matter be brought before the Court. Id.

On January 5, 2012 Plaintiffs filed a motion to compel, asserting that the communications were material, non-privileged and that Plaintiffs were entitled to the requested communications based on their fiduciary relationship with Defendants, their fiduciary duties and because all discussions involved LLC matters relevant to the vote on the plea agreement (closure of the business and forfeiture of property and assets). CP 33-213. Also, Plaintiffs claimed that Defendants' blanket assertion of privilege was insufficient to meet their burden regarding the existence of privilege or properly assert the scope of the privilege. Id. & 696-701.

N. Trial Court Granted Plaintiffs' Motion to Compel and Ordered Defendants and their Prior Criminal Counsel to Produce the Requested Communications Under a Protective Order and Reserved Ruling on Privilege.

On January 25, 2012 the Court granted Plaintiffs' motion and issued an order compelling the requested communications. CP 452-453. The Court noted the dispute on privilege and deferred ruling on the issue without prejudice to either party. Id. Finally, the Court prevented further disclosure of the provided communications by Plaintiffs. Id.

O. Defendants Moved for an Emergency Motion to Stay the Trial Court's Discovery Order.

Defendants filed a notice for discretionary review on February 14, 2012 and moved the Court of Appeals to grant an emergency stay of the Trial Court's January 25, 2012 discovery order. CP 454-459. The Court granted this stay.

P. Defendants Filed a Motion for Discretionary Review.

On February 29, 2012 Defendants filed a motion for Discretionary Review of the Trial Court's January 25, 2012 Discovery Order.

Q. Plaintiffs Filed a Motion to Address the Issue of Privilege with the Trial Court Prior to the Acceptance of Discretionary Review.

On March 9, 2012 Plaintiffs filed a motion to stay the disclosure requirements and requested that the Trial Court rule on the issue of privilege. CP 460-479. Defendants opposed this motion vigorously. CP 580-594. Instead, Defendants have requested that the Court of Appeals rule on the issue of privilege without an adequate record from the Trial Court.

R. Discretionary Review is Granted.

On March 23, 2012 the Court of Appeals Commissioner Mary S. Neel granted discretionary review of this matter.

III. ARGUMENT

A. Summary

The narrow issue on review is whether the Trial Court erred in directing disclosure of material when a claim of privilege had been tendered.

If the Trial Court erred, it was limited not requiring the Defendants to meet their burden regarding claims of privilege. In hindsight, the Trial Court should have ordered Defendants to list all communications and state with specificity the nature of the privilege asserted, if any.

B. Standard of Review

The Trial Court's exercise of its discretion in ordering pretrial discovery is reviewed for manifest abuse of discretion, which occurs only if its decision is manifestly unreasonable or based on untenable grounds. *Gillett v. Conner*, 132 Wash. App. 818, 822 (2006)(citing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 339 (1993))The inherent power to permit pretrial discovery is a matter soundly within the discretion of the Trial Court. *State v. Mecca Twin Theater & Film Exch., Inc.*, 82 Wash. 2d 87, 90 (1973)(citing *State v. Mesaros*, 62 Wash.2d 579 (1963)). In order to enhance the search for truth, "trial courts

are encouraged to exercise this discretion...” *State v. Mecca Twin Theater & Film Exch., Inc.*, 82 Wash. 2d 87, 90 (1973)(citing *State v. Boehme*, 71 Wash.2d 621 (1967)). This discretion includes the management of the discovery process in a fashion that will implement the goal of full disclosure of relevant information, and at the same time afford the participants protection against harmful side effects. *Penberthy Electromelt Int'l Inc. v. U.S. Gypsum Co.*, 38 Wash. App. 514, 521(1984)(citing *Rhinehart v. The Seattle Times Co.*, 98 Wash.2d 226 (1982)).

C. The Issue Before this Court is the Trial Court’s Discovery Order.

The Defendants incorrectly cite the standard of review of the Trial Court’s interpretation of the attorney-client privilege statute. The Trial Court did not rule on the issue of privilege and there was no such interpretation. CP 452-453.

D. Communications Regarding the LLCs are Material to Plaintiffs’ Claims

Key evidence supporting Plaintiffs’ claims has been obscured by Defendants’ construction of plea negotiations and asserting a blanket claim of attorney-client privilege. Plaintiffs claim that Defendants used unfair business practices and breached their fiduciary duties to Plaintiffs. CP 742-761. These breaches included failure to disclose material information to all LLC members and refraining from self-dealing and

acting with a conflict of interest. Id. It is anticipated that the requested communications will show that:

1. Defendants' "majority rules" business strategy, as outlined above, mirrors the methods they employed during their plea negotiations.
2. Defendants made no attempt to honor their fiduciary duties to Plaintiff McKibben or include him in the negotiation process.
3. Defendants improperly treated Plaintiff McKibben as adversary despite their fiduciary duties and relationships.
4. The LLC Everett I Plea Agreement was fashioned after their own interests and not the LLC.

E. Communications are Not Privileged and Plaintiffs Have Made No Concessions on Privilege.

Plaintiffs have not stipulated to the application of any privilege, made no other concessions and been consistent on requiring Defendants to meet their burden of proof. Defendants have repeatedly pointed to language requesting materials covered by a "Joint Defense Agreement" in Plaintiffs' request for production and claim that this shifts the burden of proof to Plaintiffs. However, as outlined below, Defendants have provided no basis for the Court to find that compliance with the requests for production would actually result in the production of communications covered by that privilege.

Plaintiffs were willing to litigate the dispute in an efficient manner, offering Defendants a non-exclusive list of options, which included:

- Production of a privilege log;
- In-camera inspection of the communications;
- Review of the communications by a discovery master; and
- Alternatives suggestions.

In response, Defendants refused to participate in any process to resolve the dispute, other than an agreement that the communications are non-discoverable and that the burden is entirely on Plaintiffs to prove otherwise.

F. The Trial Court Was Correct to Order Disclosure.

The Trial Court issued the discovery order after Plaintiffs outlined Defendants' failure to engage in resolving this discovery dispute. CP 33-213; 418-451; 452-453. The discovery order recognized that Defendants "delayed compliance" with Plaintiffs' requests for production and that there was a disagreement between the parties as to privilege. CP 452-453. The discovery order placed pressure squarely on Defendants to find a resolution to this matter to, presumably to disclose, assert and protect privileges as deemed necessary. *Id.* The Trial Court failed to recognize

how recalcitrant and uncooperative Defendants would be in complying with their discovery obligations.

G. Defendants Did Not Carry Their Burden.

As mentioned above, Defendants did not participate in the process and therefore did not carry their burden. The Trial Court considers the existence of privilege as a question of fact, and the burden to produce such facts is on the party asserting privilege. *Dietz v. Doe*, 131 Wash. 2d 835, 844 (1997). *See also United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010)(“A party asserting the attorney-client privilege has the burden of establishing the existence of an attorney-client relationship *and* the privileged nature of the communication.”). In other words, the party claiming a privilege must make a factual showing before they can claim that the requested communications are protected. In order to meet this burden, the party must identify specific communications and the grounds supporting the privilege as to each piece of evidence over which privilege is asserted. *United States v. Martin*, 278 F.3d 988, 1000 (9th Cir. 2002). In this regard, “blanket assertions” of privilege are “extremely disfavored.” *Id.* *See also Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1148 (9th Cir. 2005)(citing Rebecca A. Cochran, *Evaluating Federal Rule of Civil Procedure 26(B)(5) as a Response to Silent and Functionally Silent Privilege Claims*, 13 REV. LITIG. 219

(1994))("privilege problems ... more frequently arise from blanket or generalized privilege claims ... Blanket claims appear to be express, but reveal so little about the basis for withholding the materials that they are 'functionally silent.'").

Defendants have failed to meet their burden to show that privilege applies to the requested communications. Defendants have not applied their asserted privileges with any degree of specificity to the range of communications requested by Plaintiffs. They have asserted only a blanket claim that all of Defendants' communications are covered by an attorney-client privilege. In addition, where Plaintiffs have requested communications, which on their face show a waiver of confidentiality (communications among Defendants) they have made a blanket joint defense or common interest assertion, without attempting to meet their factual burden to prove either of these exceptions. CP 214-224.

H. Defendants Can Not Carry Their Burden.

Defendants have declared all communications at issue in this matter privileged and the matter closed. They have listed privileges and have not stated how they apply. They also take a contrary position on this issue than counsel for LLC Everett I.

a. Attorney-Client and Work Product Privileges are Not Absolute.

The attorney-client privilege will sometimes result in the exclusion of evidence otherwise relevant and material, which may be contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts. *Doe*, 131 Wash. 2d at 843. For this reason, Washington Courts have determined that the privilege is not absolute and limited to the purpose for which it exists. *Id.* This analysis cannot be done without the participation of Defendants. Defendants must present all communication, the privilege and the purpose. They have not done so.

The work-product privilege is likewise not absolute and may be overcome in some circumstances with a showing of substantial need and inability to obtain the substantial equivalent without undue hardship. CR 26(b)(4); *Heidebrink v. Moriwaki*, 104 Wash. 2d 392, 395 (1985); *Soter v. Cowles Pub. Co.*, 131 Wash. App. 882, 899 (2006). Employing privilege to prohibit testimony must be balanced against the benefits to the administration of justice stemming from the general duty to “give what testimony one is capable of giving.” *Doe*, 131 Wash. 2d at 843. The Courts are often required to reconcile the party’s right to confidentiality with the opposing party’s right to material information that supports their claims. *Id.*

Finally, the corporate privilege is not absolute and can be waived through LLC formalities.

- b. At the time the Communications Were Made, the Parties Were Not in an Adversarial Relationship with Plaintiff McKibben.

Defendants have alleged that compliance with the Discovery order would allow communications to fall into the hands of their adversary. However, at the time, all parties in this matter were members of LLC Everett I and PDMK LLC. Defendants had a fiduciary duty to make sure that all communications on this subject matter were designed to further the interest of the LLCs and their members in tandem with their own. Defendants' refusal to define the scope of these communications, and insistence that such communications would benefit their adversary, implies that their contents will reflect the position that Plaintiffs have been asserting since March of 2010. Specifically, that Defendants were not acting in the interest of Plaintiffs, operating with a conflict of interest and breached their fiduciary duties. While Defendants have an absolute right to defend themselves from criminal charges, in matters where they acted as members of the LLC by discussing the forfeiture of its resources and closure operations there should have been no adversarial relationship with

Plaintiff McKibben. In that they were adversarial, they are per se in breach of their fiduciary duties.

c. Defendants' Commingling of Their Roles as Individuals and Fiduciaries Waived Privilege.

Defendants owe Plaintiffs fiduciary duties as joint member managers of LLCs. *Bishop of Victoria Corp. Sole v. Corporate Bus. Park, LLC*, 138 Wash. App. 443, 458 (2007). A fiduciary is “a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking.” *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wash. 2d 784, 798 (2001)(citing J. Dennis Hynes, *Freedom of Contract, Fiduciary Duties, and Partnerships*, 54 Wash. & Lee L.Rev. 439, 441-42 (1997)). In a fiduciary relationship, a fiduciary is bound to act in the highest good faith toward his beneficiary and he may never seek to gain an advantage over his beneficiary by any means. *Id.* (citing Douglas R. Richmond, *Trust Me: Insurers Are Not Fiduciaries to Their Insureds*, 88 Ky. L.J. 1, 2 (2000)). A fiduciary must give priority to his beneficiary's best interest whenever he acts on the beneficiary's behalf. *Id.* A fiduciary owes his beneficiary a duty of undivided loyalty, meaning that a fiduciary cannot abandon or stray from this relationship to further his own interests. *Id.*

While trading LLC assets for relief on their criminal judgment, Defendants' fiduciary duties prevented them from putting their own interests ahead of their duties to Plaintiffs. They cannot declare themselves individual defendants when discussing LLC property as part of their individual plea bargains, and then declare themselves members of the LLC when it came time to plead the LLC guilty. Defendants were at all times fiduciaries to the LLC and Plaintiff McKibben when discussing the forfeiture and destruction of LLC assets. As fiduciaries, Defendants have a duty of good faith to disclose material communications related to their fiduciary relationship to Plaintiff McKibben and counsel for LLC Everett I, even at the expense of their own interests in confidentiality. These communications along with their conflict of interest were material to the vote on the plea agreement, the capital call and the matter currently before this Court.

d. Defendants' Joint Defense Agreement was Not Authorized.

A joint defense agreement can permit an implied attorney-client relationship with a co-defendant by acting as an exception to waiver of the attorney-client privilege. *United States v. Henke*, 222 F.3d 633, 637 (2000); *Sharbono v. Universal Underwriters Ins. Co.*, 162 Wash. App. 1050 (2011). Washington Courts have not developed the requirements for entering into a joint defense agreement. Division II of the Court of

Appeals has previously looked to local federal precedent as a guideline. In *Sharbono*, the Washington Court of Appeals considered how the United States District Court for the Western District of Washington outlined the parameters of such an agreement. The Court cited *Avocent Redmond Corp. v. Rose Elec., Inc.*, 516 F.Supp.2d 1199, 1202 (W.D.Wash.2007), which held that for a joint defense agreement to apply, the invoking party has the burden to show that the communication was made by separate parties in the course of joint defense and that the communication was designed to further that effort. *Sharbono*, 162 Wash. App. 1050. (citing *Avocent*, 516 F.Supp.2d at 1202). The Court also noted that while a written agreement regarding a joint defense agreement is not required, the parties must still invoke the privilege and intend and agree to undertake a joint defense or common interest effort. *Id.*

In this case, Defendants have not met their burden to show that all parties agreed to enter into a joint defense agreement, and that this agreement should apply to all requested communications. No party has been able or willing to state when the joint defense agreement was entered into or the parameters, limitations or parties to this agreement. Also, Defendants have not summarized how each of the requested communications was meant to further an effort of joint defense.

e. Defendants Did Not and Should Not Have a Common Interest Against Plaintiff McKibben.

The common interest doctrine is not a unique privilege, or an expansion of the attorney-client privilege, but is instead an exception to waiver of the privilege. *Sanders v. State*, 169 Wash. 2d 827, 853-54 (2010). Under the common interest doctrine, communications exchanged between multiple parties engaged sharing a common interest remain privileged under the attorney-client privilege. *Broyles v. Thurston County*, 147 Wash. App. 409, 442-43 (2008)(citing *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wash.2d 699, 716 (1999)). The fact that the parties may share a common interest in the outcome of the litigation does not satisfy this requirement. *Shamis v. Ambassador Factors Corp.*, 34 F. Supp. 2d 879,893 (S.D.N.Y. 1993). As with a joint defense agreement, the invoking party has the burden to show that the communication was made by separate parties in the course of a common interest and that the communication was designed to further that effort. *Sharbono*, 162 Wash. App. 1050. (citing *Avocent*, 516 F.Supp.2d at 1202).

Defendants have not met their burden to establish a common interest between themselves or show how each withheld communication was meant to further that interest. If Defendants cannot meet these burdens then all applicable attorney-client privileges should be considered waived.

f. There is a Fiduciary Exception to the Attorney-Client Privilege.

The fiduciary exception to the attorney-client privilege provides that in the presence of a fiduciary relationship, an attorney-client privilege cannot be invoked against a beneficiary of the relationship, with respect to issues concerning that relationship. *Seattle Nw. Sec. Corp. v. SDG Holding Co., Inc.*, 61 Wash. App. 725, 737 (1991) (citing *Quintel Corp., N.V. v. Citibank, N.A.*, 567 F. Supp. 1357, 1360 (S.D.N.Y. 1983)). In *Quintel*, the United States District Court for the Southern District of New York considered whether a fiduciary to the plaintiff could assert the attorney-client privilege with respect to communications made during the course of their relationship, where the information was important to plaintiff's case against the fiduciary and its only source was the testimony of the fiduciary's attorney. The Court applied the fiduciary exception rule created by the Fifth Circuit Court of Appeals in *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir.1970). The Court in *Garner* held that:

A corporation's right to assert the attorney-client privilege against its shareholders "where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests" is "subject to the right of the stockholders to show cause why it should not be invoked in the particular instance." The court reasoned that management and shareholders have a "mutuality of interest" in management's "freely seeking advice when needed and putting it to use when received," and that management does not manage for itself—"the beneficiaries

of its actions are the stockholders.” Thus, “management judgment must stand on its merits, not behind an ironclad veil of secrecy which under all circumstances preserves it from being questioned by those for whom it is, at least in part, exercised.” *Quintel*, 567F.Supp. at 1360(citing *Garner*, 430 F.2d at 1103).

The *Quintel* Court held that in light of the rationale in *Garner* the fiduciary was not permitted to assert the attorney-client privilege.

The parties’ fiduciary relationship should prevent Defendants from asserting an attorney client-privilege as to any matter that relates to the administration of their relationship. In this context, the administration of their fiduciary relationship should include discussions between LLC Everett I and between and amongst Defendants regarding the negotiations for the global plea agreement, indemnification and capital call.

g. Communications Material to a Fiduciary Relationship Are Not Confidential.

In a similar vein as above, Defendants fiduciary relationship with Plaintiff McKibben abdicates the confidentiality requirements of the attorney-client privilege. The attorney-client privilege only applies to communications that are intended by the party to be confidential. *Seattle Nw. Sec. Corp*, 61 Wash. App. At 742. If the communication is intended to be disclosed to others, it is not protected by the attorney-client privilege. *State v. Sullivan*, 60 Wash.2d 214, 217 (1962)).

Defendants cannot claim that communications regarding LLC matters were confidential if they were acting in a dual role as individual defendants and LLC members. Since they had a duty to disclose these communications to Plaintiffs and not to self-deal, there is no basis to believe that these communications were confidential.

h. Communications Regarding Business Advice are Not Confidential.

An attorney does not imbue all confidential communications with the protections of the attorney-client privilege. *Great Plains Mut. Ins. Co., Inc. v. Mut. Reinsurance Bureau*, 150 F.R.D. 193, 197 (D. Kan. 1993). To qualify for the privilege the confidential communications must be made in the attorney's professional capacity as an attorney. *Id.* In determining whether an attorney acted in this capacity, the Court should consider whether the communication enabled the giving of "legal advice" and if the task could have been readily performed by a non-lawyer—as when facts are gathered for business decisions. *Oil Chem. & Atomic Workers Int'l Union (OCAWIU) v. Am. Home Products*, 790 F. Supp. 39, 41 (D.P.R. 1992)("there is a distinction between a conference with counsel, and a business conference at which counsel was present. Documents which do not ordinarily qualify for the privilege are: business correspondence; inter-office reports; file memoranda; and minutes of business meetings.") *See*

also *Ferko v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 218 F.R.D. 125, 135 (E.D. Tex. 2003).

Defendants cannot claim that the “business advice”, as opposed to “legal advice”, communicated between their counsel and among themselves is protected by the attorney-client privilege. It is anticipated that the Defendants’ communicated on business matters relating to LLC governance, the destruction of the Honey’s business, and the forfeiture of property owned by LLC Everett I. All communications extending into the sphere of business advice should qualify for disclosure.

I. Defendants Ignore Their Burden and Improperly Shift it to Plaintiffs.

Defendants continue to ignore and confuse their burden to prove their asserted privileges and exceptions. Defendants insist that asserting the Joint Defense and Common Interest Privileges is sufficient to shift the burden of proof to Plaintiffs to prove waiver. In support of this argument, Defendants have cited the analysis in *Cedell v. Farmers Ins. Co. of Washington*, 157 Wash. App. 267 (2010) *review granted*, 171 Wash. 2d 1005 (2011) that a party asserting an exception or waiver to a privilege has the burden to prove that exception or waiver. However, the Joint Defense and Common Interest privileges asserted by Defendants are both exceptions themselves. Defendants have made no showing that this

exception applies to each of the requested communications before requesting that the burden be shifted to Plaintiffs.

J. Defendants are Improperly Trying to Reframe the Issue.

This matter involves the narrow question of whether the Trial Court erred by ordering disclosure of communications that the Defendants claims are privileged. The Trial Court's determination of the existence of a privileged relationship is not at issue. *See Section C.*

K. The Record is Not Complete.

The Trial Court did not rule on the issue of privilege and made no finding of fact or conclusions of law regarding the Defendants' position. *See Section C.*

L. The Validity of Privilege Claims are in the Purview of the Trial Court.

The determination of whether a privilege relationship exists is ultimately for the Trial Court to decide. *Broyles*, 147 Wash. App. At 443. Even in instances where the appellate Courts has been faced with an issue of privilege without a ruling on privilege or an adequate record from the Trial Court, it has decided that determination of a valid attorney-client or work product privilege should still rest with the Trial Court. *See Doe*, 131 Wash. 2d at 839. (“because the record is inadequate to determine the

nature of Doe's consultation of counsel and whether Doe waived any privilege, we remand the case to the Clallam County Superior Court for appropriate factual findings on these questions.”).

In the current matter, all roads lead to the Trial Court making the ultimate determination on privilege. If Defendants prevail on appeal their relief should be limited to the vacation of the portions of the discovery order related to disclosure of the requested communications. Afterwards, Plaintiffs will bring the issue of privilege before the Trial Court for resolution. If Plaintiffs prevail on appeal, they will also need to bring this matter before the Trial Court for a substantive ruling on privilege before the documents can be used at Trial. When either of these two events occurs, Plaintiffs will request that the Trial Court order Defendants to participate in substantive litigation of this issue to allow it to be put to rest. Specifically, ordering the following:

a. Full Disclosure and Cooperation.

Defendants will need to provide the Court additional information about the requested communications. Without this information, the Trial Court will be forced to either disclose communications within the scope of Defendants' privilege or restrict communications that Plaintiffs are entitled to see. While restricting information is in the best interest of Defendants, as it allows them keep the Court from drawing distinctions

between the multitudes of communications in their criminal matter, it is not in the interest of justice or judicial economy.

b. Defendants Must Participate in the Fact Finding Process.

In addition to availing themselves to a discovery framework, Defendants must also be required to assist in the fact finding process. Since September of 2011, Defendants have obfuscated and avoided assisting Plaintiffs and the Court in creating a framework to resolve this dispute.

c. Defendants' Blanket Assertions of Privilege is Not Acceptable.

Defendants will need to move away from their assertion of a blanket privilege if this matter is to be resolved. Defendants will have to participate in some framework to deal with the requested communications with some form of specificity.

d. Legal Analysis.

As referenced in section H, Defendants have outlined the legal authority that would authorize compelled disclosure of the requested communications.

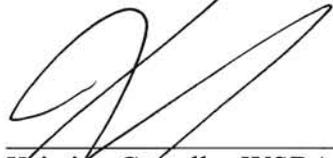
IV. CONCLUSION

Plaintiffs respectfully request that this Court uphold the Discovery Order on the grounds that Defendants have failed to meet their burden to show privilege, as a matter of fact, to each of the requested communications. In the alternative, Plaintiffs respectfully request that the Court remand this matter to the Trial Court for an order compelling Defendants to disclose all communications and the basis for their asserted privilege, with specificity.

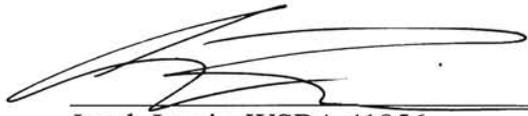
DATED this 16th day of July, 2012.

Respectfully submitted,

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No. 68316-1-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KING COUNTY SUPERIOR COURT
CAUSE NO. 10-2-27795-1 SEA

PHILIP D. MCKIBBEN, individually and for and on behalf of LLC
EVERETT I, a Washington Limited Liability Company, and P.D. & M.K.
I, LLC, a Washington Limited Liability Company,

Plaintiffs and Respondents,

v.

LEROY CHRISTIANSEN and JUDY CHRISTIANSEN, husband and
wife and the marital community composed thereof; FRANK
COLACURCIO, JR. and "JANE DOE" COLACURCIO, husband and
wife and the marital community composed thereof; STEVEN M.
FUESTON and "JANE DOE" FUESTON, husband and wife and the
marital community composed thereof; and DAVID C. EBERT and
MICHELLE EBERT, husband and wife and the marital community
composed thereof,

Defendants and Petitioners.

REVIEW FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE SUZANNE M. BARNETT

PROOF OF SERVICE

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I, Amy Birk, declare under penalty of perjury that on Tuesday, July 17, 2012, I served via U.S. mail, with postage prepaid, a true and correct copy of Respondents' *Brief in Response to Appellants Christiansen, Fueston, and Ebert's Opening Brief* on the following:

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DATED this 17th day of July, 2012.

Respectfully submitted,

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