

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

ERIC BAURLE, M.D., VIRAJ)
PARIKH, M.D., and DIVISION)
STREET LAND PARTNERS, LLC,)
Plaintiffs/Counter-Defendants,)
)
VS.) NO. 16-229-BC
)
TRAVIS J. KELTY,)
)
Defendant/Counter-Plaintiff.)
)
WITH)
)
TODD PRESNELL and)
BERTIL WESTIN,)
)
Interested Parties.)
_____)
)
TRAVIS J. KELTY and DIVISION)
STREET LAND PARTNERS, LLC,)
)
Counter-Plaintiffs,)
)
VS.)
)
TODD PRESNELL and)
BERTIL WESTIN,)
)
Third-Party Defendants.)

**MEMORANDUM AND ORDER DENYING DEFENDANT KELTY'S
MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

Filed on October 25, 2017 is the Motion of Defendant Kelty to compel production
of documents.

The Motion seeks

- production of a “document-by-document” privilege log, i.e. listing and describing each withheld document, and,
- as to documents withheld under the common interest privilege, production of the actual documents because the Defendant contends that the parties do not share a legal interest.

After considering oral argument, the record and the law, it is ORDERED that the Motion is denied for these reasons.

- The categorical privilege log provided to Defendant Kelty by the other parties satisfies the provisions of Tennessee Civil Procedure Rule 26.02(5) under the circumstances of this case.
- The common interest privilege applies to this case.

The facts and reasoning for this ruling are that the record shows that the Plaintiffs have identified for Defendant Kelty three broad categories of documents withheld based upon privilege. The Plaintiffs have not submitted a log which identifies and describes, document-by-document, each one withheld. The Plaintiffs’ justification is that the document-by-document information is not reasonably accessible because of burden and cost. Authority for this justification is Tennessee Civil Procedure Rule 26.02(1). The Court finds that the facts of the record support Plaintiffs’ position.

The pertinent facts are that Defendant Kelty has been represented by two previous sets of attorneys. The discovery in issue was propounded by Defendant’s previous Counsel over a year ago in August of 2016. Plaintiffs’ responses to the discovery were also provided over a year ago in September extending into December of 2016. No

privilege log was provided by Plaintiffs' Counsel nor was it sought by Defendant. To eliminate ongoing, unnecessary cost, Plaintiffs took down the platform of the third party vendor who had hosted the discovery. To reinstate the platform to provide Defendant Kelty the information he seeks in a document-by-document privilege log would cost all the other parties \$15,000. Additionally relevant is that to date Plaintiffs have incurred approximately \$366,000 in attorneys fees and expenses; Mr. Westin has incurred approximately \$140,000 in attorneys fees and expenses; and Mr. Presnell has incurred \$55,000 in attorneys fees and expenses in a case filed to resolve a dispute with Defendant Kelty concerning \$280,000 placed in escrow and ownership percentages in an LLC with unknown value. Also relevant is that Defendant Kelty's 3-times change of Counsel has caused significant delays in the completion of this case, explained and found in orders previously entered in this case which are incorporated herein by reference.

Tennessee Civil Procedure Rule 26.03 provides that a court may order that discovery not be had and that discovery may be had only on specified terms and conditions when there is undue burden or expense.

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons

designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37.01(4) apply to the award of expenses incurred in relation to the motion.

Because of Defendant Kelty's delay in seeking to compel production of a document-by-document privilege log, the Court finds that the cost to the Plaintiffs and Interested Parties to reestablish the third party vendor's discovery platform is disproportionate to the amount at stake and disproportionate to the discovery sought when considered against the remaining narrow claims in the lawsuit: (1) Plaintiffs and the Interested Parties prevented a deal Defendant Kelty was arranging with a third party; (2) Defendant Kelty was defrauded by the other parties before they made their capital contributions; and (3) the Plaintiffs ratified version 2 of the Operating Agreement.

Lastly, there is the Defendant's contention that the common interest privilege cannot apply to this case. The Defendant's argument is that the Plaintiffs and Interested Parties have conflicting positions. The details of the argument are that because Interested Parties Presnell and Westin indisputably have not executed Version 1 of the Operating Agreement, then, according to Defendant Kelty's position, Interested Parties, Presnell and Westin, are not members of the Plaintiff LLC. Presnell and Westin, however, disagree with that position, and contend that they are in fact members. Thus, the

Defendant asserts, Plaintiffs and Interested Parties do not share common legal interests, and because they are necessarily in conflict with one another, their communications cannot be shielded from discovery by the common interest privilege. *See Abrams v. First Tenn. Bank Nat. Ass'n*, No. 3:03-CV-428, 2006 WL 842980, at *2 (E.D. Tenn. Mar. 28, 2006) (common interest privilege does not apply to communications made between parties that “are fundamentally adverse to one another and do not share identical legal interests”). *Defendant/ Counter-Plaintiff Travis J. Kelty’s Motion to Compel Production of Documents*, October 25, 2017, at 16.

Adopted and incorporated herein by reference are the eight common legal interests of the Plaintiffs and Interested Parties contained on pages 15 and 16 of the *Investors’ Response in Opposition to Kelty’s Motion to Compel Production of Documents*, filed November 15, 2017. These common legal interests are sufficient grounds for application of the common interest privilege in this case.

/s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

cc by U.S. Mail, email, or e-filing as applicable to:

John Farringer IV
Ryan Holt
William B. Hawkins, III
Eric G. Evans
William J. Quinlan
Gaya Shanuganatha
Robert Boston

Samuel Funk
Gil Schuette
Charles Robert Bone