

privilege log entries that Ad Litem challenged and to explain his reasons for seeking AK's internal legal files. Exhibit A, Email from Corporate Trustee's counsel to Ad Litem's counsel. But instead of answering the Trustees' questions, Ad Litem responded the next day by repeating his demands and warning that he planned to file a motion to compel. Exhibit B, Email from Ad Litem's counsel to the Trustees' counsel. That same day—at nearly 6:00 p.m. on a Friday night—Ad Litem filed his motion to compel and set it for hearing barely a week later.

Glaringly absent from Ad Litem's motion is one single legal authority. This is because Ad Litem demands nothing *but* information that no authority would allow him to obtain—information that would reveal what legal advice AK gave to the Trustees. The Trustees ask that the Court deny Ad Litem's demand to disregard the attorney-client privilege.

II. Argument and Authorities

A. Ad Litem cannot discover AK's unredacted attorney fee invoices to the Trustees.

1. AK's fee invoices are privileged attorney-client communications.

Ad Litem claims that the attorney-client privilege covers only the invoice descriptions of AK's communications with the Trustees and not descriptions of any other legal services that AK performed, such as research or analysis. Ad Litem's Motion to Compel at 1-2. But the subject matter of the invoice descriptions is irrelevant because the invoice itself is a privileged attorney-client communication. Under Texas Rule of Evidence 503(b)(1)(A), “[a] client has a privilege to refuse to disclose...confidential communications made to facilitate the rendition of professional legal services to the client: (A) between the client...and the client's lawyer....” This privilege attaches to the *complete communication* between the attorney and client—both legal and factual information. *In re Seigel*, 198 S.W.3d 21, 27 (Tex. App.—El Paso 2006, no pet.). The subject matter of such communications is irrelevant: “[t]he privilege extends to all matters concerning

litigation or business transactions, regardless of whether the matters are pertinent to the matter for which the attorney was employed.” *Boales v. Brighton Builders, Inc.*, 29 S.W.3d 159, 168 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

Accordingly, billing invoice descriptions of the services that attorneys perform for their client are privileged *regardless of the type of service described in the invoice*. See *In re Estate of Johnson*, No., 04-11-00467-CV, 2012 WL 1940656, at *2 (Tex. App.—San Antonio May 30, 2012, no pet.) (redactions of the subject matter of tasks that lawyer performed in fee invoice “were required to protect the attorney-client and work product privileges”); *In re McIntyre*, 03-12-00134-CV, 2012 WL 3793159, at *3 (Tex. App.—Austin Aug. 31, 2012, no pet.) (holding that “billing and time records which also reveal litigation strategy or the specific nature of the services provided” are privileged); *In re Unitrin County Mut. Ins. Co.*, 03-10-00384-CV, 2010 WL 2867326, at *1 (Tex. App.—El Paso June 20, 2002, no pet.) (holding that billing invoices are privileged and non-clients could not discover them); see also *Suddarth v. Poor*, 546 S.W.2d 138, 141 (Tex. App.—Tyler 1977, writ ref’d n.r.e.) (“An instrument which itself constitutes a communication between an attorney and client and owes its existence to an effort to transmit information from one to the other is privileged to the same extent as any other communication between attorney and client and a court may neither require it to be produced nor compel the giving of evidence as to its contents.”). The attorney-client privilege shields the invoice entries from discovery, regardless of whether the entries describe communications or other legal services that AK performed, such as research or analysis.

2. Ad Litem’s blanket objection to unidentified redactions is insufficient to challenge specific redactions.

Even if some of the invoice redactions could be revised without revealing privileged

information, Ad Litem fails to challenge any redactions other than the few that he identifies in his motion. Ad Litem admits that he “does not dispute many of the redactions....” Rather, he objects to unidentified “other redactions” and gives a few “examples” of specific redactions he challenges. Ad Litem’s Motion to Compel at 1-2. But the Trustees have no burden to prove privilege with respect to redactions that Ad Litem does not specifically challenge. *In re Carbo Ceramics Inc.*, 81 S.W.3d 369, 375 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (“Absent a specific challenge to the privileged nature of any document other than the [single document that plaintiff objected to defendant’s claim of privilege], we hold that Carbo was not required to prove its privilege with respect to any document other than [that single document]”).

Regarding the few redacted invoice entries that Ad Litem specifically challenges, to the extent that the Court requires affidavit proof of privilege for those redactions, the Trustees request that the Court give them time to prepare affidavits. Ad Litem filed his motion to compel shortly before 6:00 p.m. on Friday night a week before the hearing, preventing the Trustees from timely filing affidavit proof. *See* Tex. R. Civ. P. 193.4(a) (requiring affidavits to be served at least seven days before hearing on objections to privilege claims). Alternatively, or in addition, the Trustees offer to submit to the Court the unredacted invoices that Ad Litem specifically challenges for the Court’s *in camera* inspection. *See In re BP Prods. N. Am., Inc.*, 263 S.W.3d 106, 115 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (in camera inspection is necessary when the documents themselves constitute the evidence substantiating the claim of privilege).

3. The general order Ad Litem wants would violate the attorney-client and work product privileges.

Ad Litem “suggests” that the Court issue a blanket order “that only the portion of attorney time entries reflecting specific attorney-client communications may be redacted and that

entries reflecting the particular analysis or work an attorney was doing that do not reflect a specific attorney-client communication shall not be redacted.” Ad Litem’s Motion to Compel at 4. Such an order would violate the work product doctrine because it is not limited to time entries for work that was performed before anticipation of litigation. *See* Tex. R. Civ. P. 192.5. And that order would violate the attorney-client privilege because it would reveal an attorney-client communication—the fee invoices. *See* Tex. R. Evid. 503.

That Ad Litem wants the unredacted fee invoices to invade the attorney-client privilege is obvious. AK produced its attorney fee invoices to prove up the amount of money charged for the legal services it performed for the Trustees. Ad Litem does not claim that AK overbilled the Trustees or billed the Trustees for services AK did not perform. Rather, Ad Litem wants the unredacted invoices in order to discover the information that the attorney-client privilege protects—what AK communicated to its clients. Ad Litem’s back-door attempt to force AK to reveal its legal advice to the Trustees should be denied.

B. Ad Litem cannot discover attachments to AK’s emails with the Trustees.

1. The attorney-client privilege protects the attachments to privileged communications between AK and the Trustees.

Ad Litem generally objects to privilege log entries for “attachments” to AK’s privileged emails with the Trustees. Ad Litem’s Motion to Compel at 4-5. As is the case with Ad Litem’s objection to unidentified fee invoice redactions, however, Ad Litem’s blanket objection to log entries for “attachments” places no burden on the Trustees to prove that such unspecified “attachments” are privileged. *See In re Carbo Ceramics Inc.*, 81 S.W.3d at 375.

But even if the Trustees had such a burden, Ad Litem admits facts demonstrating that the “attachments” are privileged. Ad Litem admits that “the log reflects emails between the Trustees

and AK, many of which have attachments.” Ad Litem’s Motion to Compel at 4 (emphasis added). No dispute exists that the emails between the Trustees and AK reflecting legal advice or created to facilitate the rendition of legal advice are privileged. The attachments to and discussed in those privileged emails are therefore “part of the privileged communication.” *See In re Monsanto Co.*, 998 S.W.2d 917, 931 n.19 (Tex. App.—Waco 1999, no pet.) (“Some communications [between attorneys and their client] have copies of other documents attached that appear otherwise discoverable. Because they are part of a privileged communication they are protected in this context.”).

2. The privilege log adequately describes the attachments to emails between AK and the Trustees.

Ad Litem complains that the Trustees’ privilege log does not identify the type, source, and content of attachments to privileged emails. Ad Litem’s Motion to Compel at 4-5. But under Texas Rule of Civil Procedure 193.3(b), the Trustees’ privilege log must provide only enough detail to “enable[] other parties to assess the applicability of the privilege....” Ad Litem concedes that the privilege log (1) specifies that each attachment was part of an email that Ad Litem does not dispute is a privileged communication between AK and the Trustees; (2) describes the general topic of the attachment; and (3) explains that the attachment provides information that was used to “assist in rendering legal advice.” Ad Litem’s Motion to Compel at 4. That is enough information to enable Ad Litem to determine that the attorney-client privilege protects attachments that are part of privileged communications.

Further, the enormous burden and expense required to re-review each of the attachments and identify the type, source, and content of every attachment on the Trustees’ privilege log far outweighs any alleged benefit. *See* Tex. R. Civ. P. 192.4(b) (providing that discovery should be

limited by the court if it determines that “the burden or expense of the proposed discovery outweighs its likely benefit”). The Trustees’ privilege log—containing a total of 1,437 entries—contains hundreds of entries for attachments to privileged emails spanning a number of years—since 2007. In fact, there would be no benefit to undertaking that heavy and expensive burden because Ad Litem can determine from the privilege log that the attachments are protected as part of privileged communications between AK and the Trustees.

C. Ad Litem cannot discover AK’s internal documents.

1. AK is a third party that has no obligation to produce its documents to Ad Litem.

Ad Litem now demands that AK either produce or log on a privilege log all of its internal documents related to the legal work that it performed for the Trustees since 2007. Ad Litem’s Motion to Compel at 5. But AK is not a party to this case. Nor has Ad Litem served a subpoena on AK to produce any documents. Defining in a request for production a party to the lawsuit to include a third party—in this case defining the “Trustees” to include AK in Ad Litem’s request for production to the Trustees—does not obligate that third party to produce documents. *See Novelty, Inc. v. Mountain View Mktg., Inc.*, No. 1:07-cv-01229-SEB-JMS, 2010 U.S. Dist. LEXIS 35082, at *17 (S.D. Ind. Jan. 29, 2010) (“[T]rial counsel preparing the client’s response to a Rule 34 document request need not produce materials in counsel’s file that counsel created during the representation; a Rule 45 subpoena to counsel would be required to obtain them, if they are not otherwise privileged or exempt from discovery”).

Further, AK’s internal documents that Ad Litem seeks are not within the Trustees’ possession, custody, or control for purposes of responding to a Rule 196 request for production. “The issue of whether documents in the possession of a party’s attorney are under the control of

the party [for purposes of requests for production] is resolved by tracing their origin; if the items were originally produced by the party or the party's agents and then turned over to the attorney, they are considered under the party's control." *Novelty*, 2010 U.S. Dist. LEXIS 35082, at *18 (quoting John Kimpflen, *Federal Procedure, Lawyers Edition*, § 26:629 (Westlaw 2009)). Ad Litem does not seek documents that the Trustees gave to AK; Ad Litem wants documents that *originated from AK*. Those legal documents generated by and originating from AK are not within the Trustees' control. Therefore, the Trustees have no obligation to produce AK's internal documents in response to a Rule 196 request for production to the Trustees.

2. AK's internal documents related to its work for the Trustees are either privileged or irrelevant.

Allowing Ad Litem to discover AK's internal documents—documents created to communicate legal advice to the Trustees—would nullify the attorney-client privilege. The purpose of the attorney-client privilege is to “secure the free flow of information between attorney and client” on legal matters, without the fear that details of their communication will be disclosed. *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995). But AK's internal documents created to render legal advice—such as notes that AK took of meetings with the Trustees and memos analyzing facts and strategy—would reveal the content of AK's legal advice because such notes and memos were created to generate that legal advice. The work that AK performed that resulted in legal advice rendered to the Trustees is no less protected than the communications that rendered that legal advice. *See, e.g., In re Monsanto Co.*, 998 S.W.2d at 931 (accepting affiant's assertion that documents containing attorney's mental impressions, conclusions, and legal theories were “communications” for purposes of the attorney-client privilege).

And if any of AK's internal documents were *not* created to facilitate the rendition of legal advice to the Trustees, then they are undiscoverable because they are irrelevant. *See* Tex. R. Civ. P. 192.3(a) (a party may obtain discovery only of matter that is “not privileged and is relevant to the subject matter of the pending action”). For example, AK's subjective thoughts never communicated to the Trustees would be irrelevant to any issue in this lawsuit.

Logging on a privilege log all of AK's internal documents relating to its legal work for the Trustees would do nothing more than waste time and resources. *See* Tex. R. Civ. P. 192.4(b). Regardless of whether AK's internal documents are logged on a privilege log, Ad Litem is not entitled to discover them because they are either privileged or irrelevant. So forcing AK to log seven years' worth of legal documents—solely for the illegitimate purpose of revealing AK's legal advice to the Trustees—presents no benefit for discovery purposes. It would also substantially delay pretrial proceedings as well as the trial. If, however, the Court were inclined to grant Ad Litem's demand that AK produce such a privilege log, the Trustees ask that the Court order that the expense incurred to create that log be charged to the segregated Trust account.

D. Ad Litem cannot force the Trustees to choose whether to plead a defense before the scheduling order's deadline to respond to Ad Litem's amended pleadings.

Ad Litem asks the Court to set an artificial deadline by which the Trustees must decide whether to plead advice of counsel as a defense and must “describe the particular advice upon which they base such a defense.” Ad Litem's Motion to Compel at 6. Ad Litem's attempt to force the Trustees to, in effect, reveal their defense strategy now is premature.

The Court has not entered a scheduling order yet. In fact, a proposed scheduling order is not due until October 14th. When the Court enters a scheduling order, the scheduling order will

set (1) a deadline to file all amended pleadings seeking affirmative relief; and (2) a deadline to respond to those amended pleadings. The Trustees will comply with the scheduling order deadlines entered by the Court. Nothing in the Texas Rules of Civil Procedure requires the Trustees to decide whether to plead a particular defense—and further to explain the specific basis for a defense—at this stage.

III. Conclusion

The Trustees ask that the Court enter an order (1) denying Ad Litem's motion to compel; or (2) alternatively continuing the hearing on Ad Litem's motion to compel to make Ad Litem identify specific challenges to the Trustees' privilege claims and allow the Trustees time to file affidavits supporting their privilege claims and/or to submit the documents at issue to the Court for *in camera* inspection.

Respectfully submitted,

/s/ Craig A. Haynes

Craig A. Haynes
State Bar No. 09284020
craig.haynes@tklaw.com

Rachelle H. Glazer
State Bar No. 09785900
rachelle.glazer@tklaw.com

THOMPSON & KNIGHT LLP
One Arts Plaza
1722 Routh Street, Suite 1500
Dallas, TX 75201
Telephone: (214) 969-1700
Facsimile: (214) 969-1751

James E. Cousar
State Bar No. 04898700
James.Cousar@tklaw.com

THOMPSON & KNIGHT LLP
98 San Jacinto Blvd., Suite 1900
Austin, TX 78701
Telephone: (512) 469-6100
Facsimile: (512) 469-6180

ATTORNEYS FOR THE BANK OF NEW YORK
MELLON TRUST COMPANY, N.A., as
CORPORATE TRUSTEE OF THE TEL
OFFSHORE TRUST

ANDREWS KURTH KENYON LLP

Georgia L. Lucier
State Bar No. 24043523

M. Kaylan Dunn
State Bar No. 24076359

600 Travis, Suite 4200
Houston, Texas 77002
Telephone: (713) 220-4177
Facsimile: (713) 238-7349

georgialucier@andrewskurth.com
kaylandunn@andrewskurth.com

WITHDRAWING ATTORNEYS FOR THE
BANK OF NEW YORK MELLON TRUST
COMPANY, N.A., AS CORPORATE TRUSTEE

Respectfully submitted,

NORTON ROSE FULBRIGHT US, L.L.P.

/s/ Paul Trahan

Paul Trahan (Texas Bar No. 24003075)
Paul.trahan@nortonrosefulbright.com
Peter Stokes (Texas Bar No. 24028017)
Peter.stokes@nortonrosefulbright.com
98 San Jacinto Boulevard, Suite 1100
Austin, Texas 78701-4255
Telephone: (512) 474-5201
Facsimile: (512) 536-4598

Daniel M. McClure (Texas Bar No. 13427400)
Dan.mcclure@nortonrosefulbright.com
1301 McKinney, Suite 5100
Houston, Texas 77010
Telephone: (713) 651-5159
Facsimile: (713) 651-5246

ATTORNEYS FOR INDIVIDUAL TRUSTEES
GARY C. EVANS, JEFFREY S. SWANSON,
AND THOMAS H. OWENS, JR.

CERTIFICATE OF SERVICE

I hereby certify that, on September 30, 2016, a true and correct copy of the foregoing has been served via Texas e-filing and email on Ad Litem, counsel for Ad Litem, Albert Speisman, counsel for RNR Production Land and Cattle, and counsel for Individual Trustees Gary C. Evans, Jeffrey S. Swanson, and Thomas H. Owen, Jr.. I hereby certify that, on September 30, 2016, all other interested parties in this matter will be served in accordance with the Court's Order Directing Method of Service dated January 21, 2016.

/s/ Rachele H. Glazer
Rachele H. Glazer

Abernethy, Julie

From: Haynes, Craig
Sent: Thursday, September 22, 2016 11:15 AM
To: Dan Bitting; Paul Trahan (paul.trahan@nortonrosefulbright.com); Lucier, Georgia L. (GeorgiaLucier@andrewskurth.com); Daniel M. McClure (dan.mcclure@nortonrosefulbright.com); Glazer, Rachele (Shelley) H
Cc: Cindy Saiter; Lin Martel; Abernethy, Julie
Subject: RE: conferring on privilege issues

Dan,

Thanks for your email. I have discussed it with Paul Trahan at Norton Rose, and he has authorized me to send you this response on behalf of both of our firms.

With regard to your first question, we will each look at the fee redactions and see if we think they are proper or if they need to be revised. We will then either revise them, or, if we believe no revision is necessary, we will give you our reasoning for that. As you know, we are both new to the case and did not participate in the production your e-mail concerns, so we need a bit of time to get a handle on it.

The same is true of your second question about whether more specificity is needed in describing attachments on the log. Also, our understanding is that the log is a fairly long document and that there are descriptions of attachments provided, so our question to you is whether there are particular ones you are concerned with? Any narrowing of this review task would be appreciated and would probably speed things up.

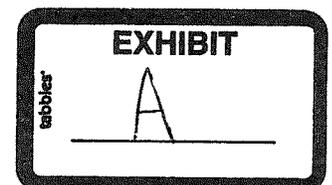
On your third question, we are not sure what you are asking about, so we need more information. When you talk about AK's "internal" documents not sent to clients, which specific RFPs are you referencing? Is there anything in particular you are trying to get at? Are you really asking AK to log internal documents it created but did not provide to its clients? If so, please explain why. If these documents were created to assist AK in giving legal advice to its clients, then aren't they all privileged on their face? If these documents were not created for that purpose, then how are they relevant? In other words, what difference would AK's subjective thoughts make to anything in this case? I don't think I have ever seen someone ask for internal attorney files in a case where the law firm was not a party (like a legal malpractice case), so I am just not sure what you are wanting exactly and why. Do you have any authorities you are relying upon for the proposition that such documents are within the scope of discovery and are supposed to be logged, assuming that is what you want? If you could provide us with some more information on this one, as outlined, we may be able to respond more directly once we understand what you are after and why.

Thanks much

Craig

From: Dan Bitting [mailto:dbitting@scottdoug.com]
Sent: Monday, September 19, 2016 8:18 PM
To: Haynes, Craig; Paul Trahan (paul.trahan@nortonrosefulbright.com); Lucier, Georgia L. (GeorgiaLucier@andrewskurth.com); Daniel M. McClure (dan.mcclure@nortonrosefulbright.com)
Cc: Cindy Saiter; Lin Martel
Subject: conferring on privilege issues

All,



I'm writing to confer on certain privilege claims reflected on the Andrews Kurth fee invoice privilege log and the Trustees' privilege log, both dated 8/10/2016.

First, there are many redactions in the fee invoices that do not appear to reflect the substance of a communication to the client. For example, on the invoice dated April 23, 2008, the redactions pertain to: (1) reviewing TEL offshore trust's business and structure for some analysis; and (2) researching several topics. Although, obviously, I don't know what was redacted, I do not believe the description of the analysis or research would reveal the substance of an attorney-client communication. I need to understand why you think that these type time entries are protected by the attorney-client privilege.

Second, the Trustees' privilege log does not describe the attachments with enough specificity to allow us to determine whether we contest the privilege asserted. Will you agree to describe generally the type and content of the attachments?

Third, with perhaps a few exceptions on the Trustees' privilege log, it does not appear that any memos, emails, notes or other documents reflecting AK's research, analysis or other work for the Trustees have been logged. Nor have I seen anything of this nature in the production. My guess is that you only logged documents that were sent to the Trustees but did not log AK's internal documents. Is that correct? If so, since all of AK's files belong to—and thus are in the custody and control of—the Trustees, I think the AK's internal documents need to be logged. Will you agree to do this?

Please let me know your position on these issues. I'd like to see what, if any, issues we need to present to the court so we can do that at our next hearing on October 3.

Thanks,

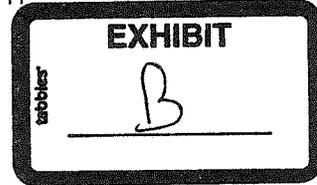
Dan

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Abernethy, Julie

From: Dan Bitting <dbitting@scottdoug.com>
Sent: Friday, September 23, 2016 4:49 PM
To: Haynes, Craig; Paul Trahan (paul.trahan@nortonrosefulbright.com); Lucier, Georgia L. (GeorgiaLucier@andrewskurth.com); Daniel M. McClure (dan.mcclure@nortonrosefulbright.com); Glazer, Rachele (Shelley) H
Cc: Cindy Saiter; Lin Martel; Abernethy, Julie
Subject: RE: conferring on privilege issues

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FilingDocumentID: !nrtdms:0:!session:DMS.TKLAW.CORP:!database:Active:!document:18586886,1:
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FilingOriginalClass: IPM.Note
FilingStatus: Filed
FilingStatusCode: 2
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Craig,

Thanks for your reply. I am certainly willing to keep conferring to minimize the issues in dispute. But based on your email it seems likely we will have some issues to present to Judge Herman. So that we can take advantage of the October 3rd hearing date, I plan to file a Motion to Compel Unredacted Attorney's Fees Statements and Additional Information About Materials Withheld as Privileged and set it for October 3. To the extent we can reach agreements between now and then, obviously we will not have to present issues to the court.

One thing that we need to know is whether the Trustees are going to rely on an advice of counsel defense. That will obviously affect the privilege claims. Let me know—and Paul, you too let me know— if you both will agree to a deadline by which the Trustees will assert any advice of counsel defense.

Now let me respond to your questions.

The problem with the attachments is that the log doesn't describe their general content or their source. Many times it simply refers to a spreadsheet or "other." If the source of a spreadsheet or "other" attachment is a third party like Chevron or Deloitte or some public source, it is not privileged. But with the current log there is no way for us to know whether we contest a claim that a particular attachment is privileged.

As for AK's internal documents, I think it is quite likely that AK has documents in its files that are responsive to our requests. For instance, we know that AK lawyers attended the quarterly Trustee meetings that were also attended by Chevron representatives. I assume that the AK lawyers took notes and perhaps drafted emails and/or memos about those discussions. I don't think those would be privileged (except possibly for emails and memos to the Trustees), and they are certainly responsive to a number of our requests. But even if you disagree, any such documents they should be logged. We also asked for documents concerning various allegations in the Trustees' petition, including the Trustees' consideration of options and advice of experts. If AK analyzed the options available to the Trustees I do not believe that that analysis is privileged, even if their communication to the Trustees about the options may be. Regardless, any documentation of that analysis should be logged so we can decide if we have a fight or not. And AK may have other documents in its files responsive to any number of our requests, including forecasts or estimates of operating costs,

income, trustee compensation, trust expenses, distributions, oil and gas production, valuation of the royalty interest, and reserves and copies, drafts and executive summaries of the partnership agreement, plan, and/or trust agreement.

Not knowing what is in AK's files makes it hard for me to say just what responsive documents there are, but I assume that over the many years of working for the Trustees AK has some. And, as you know, an attorney's file belongs to the client, so a request to the Trustees encompasses responsive documents in AK's files.

I hope that this clarifies our position. I'm happy to discuss this with you further.

Thanks,

Dan

Daniel C. Bitting
Scott, Douglass & McConnico, LLP
303 Colorado, Suite 2400
Austin, Texas 78701
(512) 495-6300
FAX: (512) 495-6399
dbitting@scottdoug.com

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From: Haynes, Craig [mailto:Craig.Haynes@tklaw.com]

Sent: Thursday, September 22, 2016 11:15 AM

To: Dan Bitting; Paul Trahan (paul.trahan@nortonrosefulbright.com); Lucier, Georgia L. (GeorgiaLucier@andrewskurth.com); Daniel M. McClure (dan.mcclure@nortonrosefulbright.com); Glazer, Rachelle (Shelley) H

Cc: Cindy Saiter; Lin Martel; Abernethy, Julie

Subject: RE: conferring on privilege issues

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