STATE OF MAINE BUSINESS AND CONSUMER COURT

Cumberland, ss.

PEABODY LAND, LLC,	)	
	)	
Plaintiff	)	
	)	
v.	)	Docket No. BCD-RE-15-15
	)	
COFFEEPOT REALTY, LLC and ELIZABETH RENDEIRO, TRUSTEE OF THE FRANCES H. ELIOT TRUST a/k/a F.H. ELIOT TRUST,	)	
	)	
Defendants	)	

ORDER ON PLAINTIFF'S MOTION TO COMPEL AND DEFENDANT COFFEEPOT'S SECOND MOTION FOR PROTECTIVE ORDER

Plaintiff Peabody Land, LLC ["Peabody"] has filed a motion to compel Defendants Coffeepot Realty, LLC ["Coffeepot"] and Elizabeth Rendeiro, Trustee of the Frances H. Eliot Trust ["the Trust"], to produce certain documents withheld by the Defendants in their responses to Peabody's request for production of documents. Coffeepot has filed an opposition to Peabody's motion along with its second Motion for Protective Order (the first being directed to Peabody's requests for admissions). The Trust has filed an opposition to Peabody's motion to compel.

In keeping with the court's directive at a January 27, 2016 conference of counsel, both Defendants have filed the documents in question (with some redactions by Coffeepot of concededly privileged material) under seal for *in camera* review. Coffeepot's 167-page *in camera* submittal is numbered IC000001 through 000167, and the Trust's 25-page *in camera* submittal is numbered Trust Priv 1 through 25. The court has reviewed the documents filed *in camera* by Coffeepot and the Trust, which consist of copies of a series of e-mail messages and letters, the earliest of which is dated August 31, 2014.

The documents dated between August 2014 and September 2015, when the lawsuit was filed, mainly consist of e-mail messages and handwritten and typed notes generated by members of Coffeepot, mainly a four-person working group formed to deal with Peabody. Most of the Trust's withheld documents postdate the September 8, 2015 filing of Peabody's complaint.

There are certain documents that run between Coffeepot and the Trust that merit separate discussion. One set consists of a three-page e-mail exchange in November 2014, between Roger Pierce of Coffeepot and Beth Rendeiro of the Trust regarding use of the wharf and beach (Trust Priv 24-25). The second set consists of a May 17, 2015 e-mail message from Roger Pierce of Coffeepot to Beth Rendeiro of the Trust, forwarding Mr.

Pierce's May 15, 2015 e-mail message to members of Coffeepot summarizing the legal analysis performed by Coffeepot's attorneys, Murray-Plumb & Murray (Trust Priv 9-11). A third set consists of a letter with incorporated memorandum from Murray, Plumb & Murray to Coffeepot, dated in May 2015. On their face, the letter and memorandum address issues raised in the pleadings, and appear to be confidential attorney-client communications within the scope of the attorney-client privilege codified in Rule 502 of the Maine Rules of Evidence.

The issue regarding the November 2014 e-mail exchange is whether any protection that might have attached to the e-mail exchange as documents "prepared in anticipation of litigation" is dissipated because the documents went outside Coffeepot. The same issue arises as to the May 2015 e-mail message and the Murray, Plumb & Murray letter with regard both to the Rule 26(b)(3) work product privilege and the conceptually distinct attorney-client privilege. Defendants invoke the "common interest" exception to the rule that disclosure of otherwise protected documents to third parties can dispel any protection. Peabody asserts that if the shared documents would otherwise have been privileged—a proposition Peabody disputes—the documents shared between the Defendants are not privileged because the Defendants do not, in reality, have a common interest.

This Order focuses first on the Rule 26(b)(3) analysis and then on whether the shared documents remain privileged despite the sharing, under the "common interest" rule.

The Rule 26(b)(3) Analysis

Rule 26(b)(3) of the Maine Rules of Civil Procedure, which provides in pertinent part:

> Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

In *Springfield Terminal Railway Company v. Department of Transportation*, the Law Court noted that a trial court's first task in deciding whether to sustain or deny a claim that documents can be withheld under Rule 26(b)(3) is to conduct "a preliminary analysis [] to determine whether the party seeking to protect the material from disclosure has met its burden of establishing that the document is work product," 2000 ME 126, ¶15, 754 A.2d 353. Coffeepot and the Trust thus have the burden to demonstrate that the documents they have withheld from discovery were "prepared in anticipation of litigation . . ." for purposes of Rule 26(b)(3).

The court in *Springfield* said that the test of whether a given document qualifies as having been "prepared in anticipation of litigation" has both subjective and objective elements: "A document is protected as work product only if it was created because of the party's subjective anticipation of future litigation. Yet, subjective belief alone is not enough. The preparer's anticipation of litigation must also be 'objectively reasonable." 2000 ME 126, ¶16, *citing Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir. 1993) (other citations and internal quotes omitted).

Litigation need not be pending, as the phrase "in anticipation of" itself suggests, but must be more than a "remote possibility." *Springfield* at ¶19, 754 A.2d 353. The Law Court cited with approval the formulation contained in the Fourth Circuit decision in *National Union Fire Ins. Co. v. Murray Sheet Metal Company:* "The document must be prepared because of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation." 967 F.2d 980, 984 (4th Cir. 1992). The reference to "potential claim" indicates that litigation need not have been threatened or any claim actually asserted, so long as the documents at issue were generated in connection with a claim that the preparer believed would be asserted.

The last-mentioned point is important, because the earliest among the Coffeepot documents withheld from discovery do not specifically refer to any specific claim or threatened litigation. At some point, Peabody proposed to buy out Coffeepot, and the earliest among the withheld documents—those dated from August 31, 2014 and thereafter for the next few months—focus on Peabody's proposal and how Coffeepot should respond. Peabody at oral argument cited these exchanges as mere negotiations over a possible purchase. However, as Coffeepot points out, the documents were not created in isolation—the dispute between Peabody and the Defendant dates back to 2013 or earlier. In fact, Peabody's Second Amended Complaint at Paragraphs 55-59 recites the following:

- in 2011 Peabody replaced an older wharf[1] with a new one, at a substantial cost
- before, during and after building the new wharf, Peabody asked the Defendants to contribute to the cost
- in 2013, negotiations about the Defendants' contribution ended when the Defendants "flatly refused" to contribute anything
- Peabody "subsequently" told the Defendants they could not use the wharf.[2]

Thus, as of 2013, Peabody had made a claim for reimbursement that the Defendants supposedly refused, and an issue arose about the Defendants' ability to use the rebuilt wharf. Peabody's subsequent proposal to buy out Coffeepot cannot be considered separate and apart from the history that preceded it. Moreover, Peabody's Second Amended

[1] This Order, like the parties' pleadings, uses the term "wharf" to describe the structure in contention, rather than what might otherwise be more apt terms—such as "dock" or "pier"—for a structure built out over water and more or less perpendicular to the shore rather than along or parallel to the shore, mainly because operative deeds refer to a "wharf."

[2] Defendants have denied the allegations of paragraphs 58 and 59, although Coffeepot's answer acknowledges in its response to those paragraphs that there is a "real and substantial controversy" between the parties.

Complaint in fact asserts the very claims that Peabody acknowledges having raised sometime between 2011 and 2013.

For these reasons, the court concludes that the Defendants have met their burden to show that the withheld documents were prepared in anticipation of litigation. This conclusion applies to all of the Coffeepot documents (IC 1-167) and all of the Trust documents (Trust Priv 1-15). (Some of the documents consist of communications between Coffeepot and the Trust, raising a separate issue of joint or common interest, and that issue is discussed below).

The next question is whether Peabody has met its burden to show both a substantial need for the materials and an inability to obtain the equivalent without undue hardship, for purposes of Rule 26(b)(3). The issue here is not so much with "substantial need"—a party likely can show "substantial need" for any material that contains admissible evidence. Peabody claims it needs access to the documents to prepare for depositions, and to decide whom to depose, so it meets the "substantial need" aspect.

However, Peabody has not shown that it cannot obtain the equivalent of access to the documents through the normal discovery process. Through interrogatories and depositions upon oral examination, Peabody is free to inquire into the communications reflected in most of the withheld documents (i.e., those not involving communications to or from attorneys), among the various members of Coffeepot and the Trust. In fact, at Peabody's request, the usual five-deposition limit applicable to civil cases has been more than doubled to 11 depositions, specifically to enable Peabody to depose widely. *See* M.R. Civ. P. 30(a).

Admittedly, having access to the documents themselves would facilitate Peabody's efforts, but this is true in every case as to almost any document prepared by a party in anticipation of litigation.[3] To be a meaningful limitation, a showing of "substantial need" and "undue hardship" must require more than a showing that having access to withheld documents would be helpful.

For these reasons, the court concludes that Peabody has not met its burden to show substantial need and an inability to obtain the substantial equivalent of access to the documents by other means, without undue hardship. *See* 8 C. A. Wright, A. R. Miller, & R. L. Marcus, FEDERAL PRACTICE AND PROCEDURE § 2025 at 538 (3d ed. 2010) ("discovery of work product will be denied if the party seeking discovery can obtain the desired

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[3] The instances in which courts have decided that the substantial need/undue hardship burden has been met often involve the results of tests or observations or investigations conducted by one party that are not ascertainable through normal discovery means, and cannot be replicated, at all or at least without undue burden and expense. *See, e.g.*, Irving Oil, Ltd. v. Ace INA Ins., 2015 Me. Super. LEXIS 72 (Me. Bus. & Cons. Ct. Mar. 17, 2015) (plaintiff insured met its burden under Rule 26(b)(3) to obtain defendant insurer's investigative report because plaintiff was claiming the insurer's inadequate investigation constituted an unfair claims settlement practice, and no equivalent evidence was obtainable by other means). Here, the documents at issue simply contain people's thoughts and ideas about Peabody's claims regarding the wharf and beach, and those are readily discoverable through normal means.

information by taking the deposition of witnesses"). This conclusion applies to all of the documents filed *in camera* by the Trust and Coffeepot.

However, there remains the separate issue as to whether the documents that were shared between Coffeepot and the Trust lose protection from discovery because they were shared.

The Common Interest Issue

The following documents filed *in camera* consist of communications between representatives of Coffeepot and representatives of the Trust:

- the November 2014 exchange between Roger Pierce of Coffeepot and Beth Rendeiro of the Trust (Trust Priv 24-25)
- the May 2015 e-mail from Mr. Pierce to Ms. Rendeiro (Trust Priv 9-11)
- e-mail communications between Coffeepot and the Trust after Peabody filed its complaint in September 2015 (Trust Priv 3-13)
- the May 2015 Murray, Plumb & Murray letter and memorandum, which evidently was sent by Coffeepot to the Trust at some point (Trust Priv 14-21).

Of these documents, only the Murray, Plumb & Murray letter and memoranda are clearly subject to the attorney-client privilege codified at M.R. Evid. 502 as well as the Rule 26(b)(3) work product privilege. The other documents were all prepared in anticipation of litigation and are within the work product protection afforded by Rule 26(b)(3), but do not consist of communications between an attorney and a client. This distinction matters because M.R. Evid. 502 expressly provides that the attorney-client privilege is not affected when privileged matter is shared among attorneys and clients with a "common interest," whereas Rule 26(b)(3) is silent on the effect of sharing work product material.

Does the "common interest" rule apply to Rule 26(b)(3) material even though the rule, unlike M.R. Evid. 502, does not say that it does? The Maine Law Court apparently has not addressed the issue, but at least one Superior Court decision has, concluding that "[c]ase law indicates that the common interest doctrine applies equally, and perhaps with greater effect, to work product as it does to confidential communications when there is a common interest." *Kohl's Dep't Stores v. Liberty Mut. Ins. Co.*, 2012 Me. Super. LEXIS 153 (Cum. Cty., Humphrey, C.J.), *citing In re Lindsey*, 158 F.3d 1263, 1282 (D.C. Cir. 1998); *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (2d Cir. 1990); *Griffith v. Davis*, 161 F.R.D. 687, 692-94 (CD. Cal. 1995); 2 Epstein, ATTORNEY-CLIENT PRIVILEGE, pt. 2, § VII(C)(2) ("disclosure between parties that have common financial interests are sufficient to protect the work-product privilege, even if such would not be sufficient to protect the attorney-client privilege"). This court agrees, and concludes as a matter of law that the disclosure of work product materials among persons with a "common interest" in the same anticipated or pending litigation does not remove the protection afforded by Rule 26(b)(3).[4]

[4] Rule 501 of the Maine Rules of Evidence abolishes all common law privileges. However, the common interest doctrine is not an independent privilege, but an exception to the general rule that disclosure of an otherwise protected or privileged document can eliminate the privilege or protection.

Thus, the analysis turns to whether Coffeepot and the Trust shared a common interest sufficient to extend the work product protection to the e-mail messages and documents shared between them, between November 2014 and late 2015. Coffeepot and the Trust assert that they are mounting a defense against essentially the same claims by Peabody, namely claims that Coffeepot and the Trust do not have rights of access or use to Peabody's wharf and beach. Peabody disputes the existence of a common interest, noting that the legal bases for its claims differ between Coffeepot and the Trust, because the chains of title are different and the patterns of usage are different.

Coffeepot and the Trust have the better side of the argument. First, as Peabody's Second Amended Complaint at paragraph 9 alleges, all of the properties at issue were once owned by Charles W. Eliot, so the chains of title converge on him. Moreover, with regard to Coffeepot's and the Trust's counterclaims regarding prescriptive rights, differences in deeds and express easements do not matter. Under Maine law, a "class of persons" can acquire prescriptive rights, *see* 14 M.R.S. § 812, meaning that, in this case, Coffeepot and the Trust, by virtue of each having multiple members or beneficiaries, could each be deemed to constitute a "class of persons," and together, could claim to be a single "class of persons" with respect to rights of use of the wharf and beach.

Moreover, the existence of a common interest in defeating Peabody's claims is apparent from the communications between Coffeepot and the Trust beginning in November 2014 and continuing to, and after, the point at which Peabody filed suit.

On this basis, the court concludes that Coffeepot and the Trust shared matters of common interest with respect to all of the documents shared between them, meaning that the fact that the documents were shared did not affect their work product status under Rule 26(b)(3). Interestingly, the Murray, Plumb & Murray letter and memoranda may not be protected under M.R. Evid. 502(b)(3) because Coffeepot appears to have shared them with the Trust before the lawsuit was commenced, and Rule 502(b)(3) protects shared material of common interest "in a pending action". Because the Murray, Plumb & Murray materials are clearly work product for purposes of Rule 26(b)(3), and because that rule applies to material prepared in both anticipated and pending litigation, they remain protected.

IT IS ORDERED: Plaintiff's Motion to Compel is denied. Defendant Coffeepot Realty, LLC's Motion for Protective Order is granted.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Order by reference in the docket.

Dated February 17, 2016 _____/s_____
A. M. Horton, Justice

See Irving Oil, Ltd. v. Ace INA Ins., 2015 Me. Super. LEXIS 72 (Me. Bus. & Cons. Ct. Mar. 17, 2015), *citing Cavallaro v. United States*, 284 F.3d 236, 250 (1st Cir. 2002).