

STATE OF MICHIGAN
IN THE 20th CIRCUIT COURT FOR THE COUNTY OF OTTAWA

414 Washington Street
Grand Haven, MI 49417
616-846-8315

LJ&S DEVELOPMENT, LLC,
Plaintiff,

v

BOAR'S HEAD PROVISIONS COMPANY, INC.,
Defendant.

OPINION AND ORDER
RE: PROTECTIVE ORDER
File No. 13-03511-CZ
Hon. Jon A. Van Allsburg

At a session of said Court, held in the Ottawa County
Building, in the City of Grand Haven, Michigan,
on the 19th day of March, 2014:

PRESENT: THE HON. JON A. VAN ALLSBURG, Circuit Judge

Plaintiff filed an action for declaratory relief pertaining to a purchase option contained in a lease agreement for a refrigerated warehouse (the "Project"), constructed for and leased by plaintiff to defendant. Defendant has filed a counterclaim seeking declaratory relief and alleging breach of contract for failure to perform the terms of the purchase option contained in said lease. Defendant seeks a protective order to prohibit discovery as to communications between defendant's counsel and an appraisal company, on grounds of attorney-client privilege and the work-product doctrine. Following a hearing held on March 10, 2014, the court has reviewed *in camera* the documents for which defendant seeks protection.

The court concludes that although the work-product doctrine applies to the key documents for which defendant seeks protection, plaintiff has shown a substantial need for them and has shown that they are not available from alternative sources. A protective order pursuant to the work-product doctrine is therefore denied. However, the documents for which protection are protected by the attorney-client privilege. Although assertion of the attorney-client privilege as to documents which are reasonably necessary to provide detail as to the basis of defendant's proffered appraisal may violate the parties' contract (a determination reserved for a later hearing), defendant is entitled to assert it. Defendant's motion for protective order is therefore granted.



"13003511CZ"

The Attorney-Client Privilege

Like all privileged communications, communications made by a client to his attorney are not subject to discovery. "Parties may obtain discovery regarding any matter, *not privileged*" MCR 2.302(B)(1) (emphasis added). There is a clear protection provided for privileged matters in the context of civil discovery. Whether the attorney-client privilege may be asserted presents a question of law. *Reed Dairy Farm v Consumers Power*, 227 Mich App 614, 618; 576 NW2d 709, lv den 459 Mich 977 (1999).

The attorney-client privilege attaches to communications made by a client to the attorney acting as a legal adviser and made for the purpose of obtaining legal advice on some right or privilege. *Grubbs v K-mart Corp*, 161 Mich App 584, 589; 411 NW2d 477 (1987). "The purpose of the privilege is to allow a client to confide in his attorney, secure in the knowledge that the communication will not be disturbed." *Id.* Recording, transcribing, writing down, or otherwise preserving in a tangible medium communications between a client and his attorney does not waive the attorney-client privilege. *Id.*, at 589-590.

The scope of the attorney-client privilege is narrow, attaching only to confidential communications by the client to his advisor that are made for the purpose of obtaining legal advice. *Reed Dairy, supra*, at 618-619. The attorney-client privilege attaches to direct communications between client and attorney as well as to communications made through their respective agents, but the scope of the privilege remains narrow. *In re Costs & Attorney Fees*, 250 Mich App 89; 645 NW2d 697 (2002).

Where an attorney's client is an organization, the privilege extends to those communications between attorneys and all agents or employees of the organization authorized to speak on its behalf in relation to the subject matter of the communication. *Reed Dairy Farm, supra*, at 619. It has sometimes been held that, in certain circumstances, the attorney-client privilege applies to communications made by the agent of the client to the client's attorney. See *Grubbs, supra, Koster v June's Trucking, Inc*, 244 Mich App 162, 167; 625 NW2d 82 (2000), and cases cited therein.

The Work-Product Doctrine

The work product doctrine is a limitation on the scope of discovery. 2 Longhofer, Michigan Court Rules Practice (5th ed), section 2302.9, p 206 (MCRP). To come within the confines of the work product doctrine, the material sought to be protected from discovery must be: (1) documents and tangible things; (2) otherwise discoverable under MCR 2.302(B)(1); (3) prepared in anticipation of litigation or for trial;¹ and (4) prepared by a party or a party's representative, including an attorney, consultant, surety, indemnitor, insurer, or agent. MCR

¹ It is generally understood that litigation need not actually have been commenced, or threatened, before it may be stated that materials were prepared in anticipation of litigation. *Great Lakes Concrete Pole Corp v Esch*, 148 Mich App 649, 654 n2; 385 NW2d 296 (1986) (quoting from *United States v Davis*, 636 F 2d 1028 (CA 5, 1981), cert den 454 US 862; 102 S Ct 320; 70 L Ed 2d 162 (1981)). It is generally sufficient if the prospect of litigation is identifiable, either because of the facts of the situation or the fact that claims have already arisen. *Id.* See also *Leibel v General Motors Corp*, 250 Mich App 229; 646 NW2d 179 (2002).

2.302(B)(3)²; MCRP, *supra*.

Work product has only qualified immunity from discovery. MCRP, *supra*, section 2302.8, p 206. Under the clear language of MCR 2.302(B)(3)(a), documents and tangible things prepared in anticipation of litigation by a party are not discoverable absent a showing that the party seeking discovery has 1) a substantial need for the materials and 2) is unable without undue hardship to obtain the substantial equivalent of the materials by other means. “If the information desired ... is available elsewhere, a substantial showing of necessity has not been made.” *Id.* Whether documents may be protected by the work-product doctrine is an issue of law. *Koster v June's Trucking*, 244 Mich App 162, 168; 625 NW2d 82 (2001). MCR 2.303(B)(3)(a) is virtually identical with its federal counterpart, FR Civ P 26(b)(3). As a result, it is appropriate to rely on federal cases for guidance in determining the scope of the work-product doctrine. *Id.*, at 170 (footnote omitted).

The file of a party's attorney is not the only file that is protected by the work-product doctrine. Files prepared by a party's "representatives," such as insurers and other nonlawyers, are also protected by the work-product doctrine. *Koster, supra*, p 171. However, the statements of witnesses, even if taken down by a party's representative or agent, such as an attorney or insurance agent, are not work product and are not protected from discovery by the work-product doctrine. *Lynd v Chocolate Twp*, 153 Mich App 188, 193-196; 395 NW2d 281, lv den 426 Mich 878 (1986).

Before discovery of discoverable work product commences, the trial court must remove those portions of the documents disclosing the subjective mental impressions, conclusions, opinions or legal theories of the party's attorneys, or other representatives. Where documents evidence both objective and subjective impressions, the court shall excise those portions of the documents which represent such subjective impressions. *Great Lakes Concrete Pole Corp v Esch*, 148 Mich App 649, 657; 385 NW2d 296 (1986).

Analysis

The primary disputed issue in this case is whether an appraiser hired by defendant to evaluate the fair market value of the Project may be used to set the “FMV Option Price” for defendant’s exercise of its purchase option as set forth in the lease. Article 5, Section 5.1(b) of the Lease states that “the option price shall be the fair market value of the Project ... as determined by an independent third (3rd) party appraiser selected by Tenant and at Tenant’s expense.... The choice of appraiser shall be subject to the approval of Landlord, which approval shall not be unreasonably withheld.... Such appraisal shall state in reasonable detail the basis of such fair market value determination.”

² MCR 2.302(B)(3)(a): “Subject to the provisions of subrule (B)(4), a party may obtain discovery of documents and tangible things otherwise discoverable under subrule (B)(1) and prepared in anticipation of litigation or for trial by or for another party or another party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent only on a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is 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.”

Counsel for both parties confirm that there are disputed issues of fact as to whether American Appraisal Associates, Inc., defendant's chosen appraiser, is "an independent third party appraiser," whether plaintiff was given the opportunity to approve said appraiser, and if so, whether plaintiff unreasonably withheld approval. Plaintiff also asserts that defendant hired American Appraisers to conduct a 2012 appraisal of the Project prior to the 2013 appraisal which forms the basis of this litigation, asserts that defendant's attorney reviewed, commented on, and edited drafts of the 2013 appraisal before it was completed and produced, and asserts that defendant's counsel "dictated" that American Appraisal was not to consider plaintiff's leased fee interest in its 2013 appraisal.

Defendant asserts that it has produced most of the documents requested of it in four general categories,³ but has identified 37 documents arguably subject to protection as privileged or as protected work-product, and has submitted them to the court for *in camera* review. The court notes that most of the emails between defendant's counsel, appraiser, and others contain a standard "Confidentiality Note" in the footer of every email. This formulaic approach does not determine whether the communication in question is subject to protection, as the determination here is one of law, not fact. *Reed Dairy, supra*, at 618; *Koster, supra*, p 168.

The court further notes that plaintiff is entitled to "reasonable detail" with respect to "the basis of such fair market value determination," as provided in section 5.1(b) of the Lease. Defendant's counsel and appraiser are the only sources of such information, and the inquiry into the basis of the fair market value determination supporting the alleged Option Price is the issue at the heart of this litigation. Plaintiff has therefore generally shown a substantial need for this information, and has shown that it cannot be obtained elsewhere.

The court reviews the defendant's documents and determines its claims as follows:

<u>Tab</u>	<u>Date</u>	<u>Description</u>	<u>Analysis</u>
1	9/12/13	Email to Attorney from Appraiser	This email to defendant's attorney attached the 2013 draft appraisal, and sought counsel's response. The attorney-client privilege may attach to communications by an attorney's agent. ⁴ This email expressly solicits a response from an attorney and is protected by the attorney-client privilege.
2	9/3/13	Draft 2013 appraisal sent to Attorney	The draft 2013 appraisal serves as the basis for the "fair market value determination" of the option price for the Project. Although it is work-product, prepared in anticipation of litigation, plaintiff has shown a substantial need for it, which it cannot obtain from any other source. It is therefore not subject to protection as work-

³ These categories are listed as: 1) the 2012 Appraisal and 2013 Appraisal, along with the worknotes for such appraisals, 2) administrative and billing files for the two appraisals, 3) communications, and 4) a list of other engagements undertaken by American Appraisals for defendant, defendant's counsel, and a related entity.

⁴ The attorney-client privilege extends to any person who is or may be an agent of either the attorney or the client. *People v. Marcy*, 91 Mich App 399, 406-407; 283 NW2d 754 (1979); *State v Tapia*, 113 N.J.Super. 322; 273 A2d 769 (N.J.Super.A.D., 1971) (investigator); *State v. 62.96247 Acres of Land*, 7 Storey 40, 57 Del. 40, 193 A.2d 799 (1963) (appraiser); see generally *The Attorney-Client Privilege and the Work-Product Doctrine in Michigan* (ICLE, 2003 Ed.).

product. It is subject to the attorney-client privilege, but defendant has contracted to provide “reasonable detail” of the basis for the 2013 appraisal, and assertion of the privilege and refusal to provide the draft appraisal will likely violate that contractual obligation and compel the conclusion that the appraiser is not an “independent third party appraiser.”

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| 3 | 9/16/13 | Email to Appraiser from Attorney | This email from defendant’s attorney to the appraiser contains the attorney’s mental impressions and opinions, and is protected by the attorney-client privilege. |
| 4 | 9/17/13 | Email to Appraiser from Attorney | This email from defendant’s attorney to the appraiser confirms the receipt by appraiser of the attorney’s mental impressions and opinions, and is protected by the attorney-client privilege. |
| 5 | 9/18/13 | Email to Appraiser from Attorney | This email from defendant’s attorney requests finalization of the appraisal, and attaches prior correspondence, noted above. It is protected by the attorney-client privilege. |
| 6 | 9/18/13 | Email to Appraiser from Attorney | This email confirms the number of copies and format requested, but attaches prior correspondence as noted above. It is protected by the attorney-client privilege. |
| 7 | 9/17/13 | Email to Attorney from Appraiser | This email to defendant’s attorney from the appraiser confirms revisions following receipt of the attorney’s mental impressions and opinions, and is protected by the attorney-client privilege. |
| 8 | 9/18/13 | Email to Attorney from Appraiser | This email to defendant’s attorney from the appraiser confirms revisions following receipt of the attorney’s mental impressions and opinions, and is protected by the attorney-client privilege. |
| 9 | 9/17/13 | Email to Attorney from Appraiser | This email to defendant’s attorney from the appraiser confirms receipt of the attorney’s mental impressions and opinions, and is protected by the attorney-client privilege. |
| 10 | 9/16/13 | Email between representatives of appraiser | This email between appraiser’s representatives forwards defendant’s attorney’s mental impressions and opinions, and is protected by the attorney-client privilege. |
| 11 | 9/17/13 | Email between representatives of appraiser | This email between appraiser’s representatives confirms the forwarding of defendant’s attorney’s mental impressions and opinions, and is protected by the attorney-client privilege. |
| 12 | 9/26/13 | Email to Appraiser from Attorney | This email to appraiser’s representatives reviews the defendant’s attorney’s mental impressions and opinions, and is protected by the attorney-client privilege. |
| 13 | 9/26/13 | Email to Appraiser from Attorney | This email to appraiser’s representatives follows up the review of defendant’s attorney’s mental impressions and opinions, and is protected by the attorney-client privilege. |
| 14 | 9/26/13 | Email to Attorney from Appraiser | This email to defendant’s counsel from appraiser’s representatives follows up defendant’s attorney’s mental impressions and opinions, and is protected by the attorney-client privilege. |
| 15 | 9/25/13 | Email to Appraiser | This email to appraiser’s representatives reviews the defendant’s |

		from Attorney	attorney's mental impressions and opinions, and is protected by the attorney-client privilege.
16	9/12/13	Draft of Executive summary and Introduction sections of 2013 appraisal	These sections of the draft 2013 appraisal support the basis for the "fair market value determination" of the option price for the Project. Although it is work-product, prepared in anticipation of litigation, plaintiff has shown a substantial need for it, which it cannot obtain from any other source. It is also subject to the attorney-client privilege, but defendant has contracted to provide "reasonable detail" of the basis for the 2013 appraisal, and refusal to provide the draft appraisal will likely violate that contractual obligation and compel the conclusion that the appraiser is not an "independent third party appraiser."
17	9/26/13	Email to Attorney from Appraiser	This email to defendant's counsel from appraiser's representatives follows up defendant's attorney's mental impressions and opinions, and is protected by the attorney-client privilege.
18	9/26/13	Email between representatives of appraiser	This email between appraiser's representatives confirms the forwarding of defendant's attorney's mental impressions and opinions, and is protected by the attorney-client privilege.
19	9/12/13	Draft of Executive Summary and Introduction sections of 2013 appraisal	These sections of the draft 2013 appraisal support the basis for the "fair market value determination" of the option price for the Project. Although it is work-product, prepared in anticipation of litigation, plaintiff has shown a substantial need for it, which it cannot obtain from any other source. It is also subject to the attorney-client privilege, but defendant has contracted to provide "reasonable detail" of the basis for the 2013 appraisal, and refusal to provide the draft appraisal will likely violate that contractual obligation and compel the conclusion that the appraiser is not an "independent third party appraiser."
20	9/26/13	Email between representatives of appraiser	This email between appraiser's representatives confirms the forwarding of defendant's attorney's mental impressions and opinions, and is protected by the attorney-client privilege.
21	1/9/14	Email to Attorney from Appraiser	This email confirms receipt of subpoena for production of documents, and attaches prior emails referenced above containing defendant's attorney's mental impressions and opinions. It is protected by the attorney-client privilege.
22	1/10/14	Email to Appraisers from Attorney	This email from defendant's attorney to appraiser's representative confirms receipt of the above email, and copies litigation counsel, again attaching prior emails referenced above containing defendant's attorney's mental impressions and opinions. It is protected by the attorney-client privilege.
23	9/26/13	Email between representatives of appraiser	This email between appraiser's representatives forwards defendant's attorney's mental impressions and opinions, and is protected by the attorney-client privilege.
24	9/12/13	Draft of Executive Summary and Introduction sections of 2013 appraisal	These sections of the draft 2013 appraisal support the basis for the "fair market value determination" of the option price for the Project. Although it is work-product, prepared in anticipation of litigation, plaintiff has shown a substantial need for it, which it cannot obtain

			from any other source. It is also subject to the attorney-client privilege, but defendant has contracted to provide "reasonable detail" of the basis for the 2013 appraisal, and refusal to provide the draft appraisal will likely violate that contractual obligation and compel the conclusion that the appraiser is not an "independent third party appraiser."
25	9/26/13	Email between representatives of appraiser	This email between appraiser's representatives forwards defendant's attorney's mental impressions and opinions, and is protected by the attorney-client privilege.
26	9/16/13	Email to Appraisers from Attorney	This email to appraiser's representatives states the defendant's attorney's mental impressions and opinions, and is protected by the attorney-client privilege.
27	9/20/13	Email to Attorney from Appraisers	This email responds to defendant's attorney's mental impressions and opinions, and expressly solicits further response from defendant's attorney. It is protected by the attorney-client privilege.
28	9/20/13	Email between representatives of appraiser	This email forwards defendant's attorney's mental impressions and opinions, and solicits further response before reply to defendant's attorney. It is protected by the attorney-client privilege.
29	9/20/13	Email between representatives of appraiser	This email forwards defendant's attorney's mental impressions and opinions, and provides further response for reply to defendant's attorney. It is protected by the attorney-client privilege.
30	9/20/13	Email between representatives of appraiser	This email forwards defendant's attorney's mental impressions and opinions, and provides further response for reply to defendant's attorney. It is protected by the attorney-client privilege.
31	9/20/13	Email between representatives of appraiser	This email forwards defendant's attorney's mental impressions and opinions, and provides further response for reply to defendant's attorney. It is protected by the attorney-client privilege.
32	9/20/13	Email between representatives of appraiser	This email forwards defendant's attorney's mental impressions and opinions, and provides further response for reply to defendant's attorney. It is protected by the attorney-client privilege.
33	9/20/13	Email between representatives of appraiser	This email forwards defendant's attorney's mental impressions and opinions, and provides further response for reply to defendant's attorney. It is protected by the attorney-client privilege.
34	9/20/13	Email between representatives of appraiser	This email forwards defendant's attorney's mental impressions and opinions, and provides further response for reply to defendant's attorney. It is protected by the attorney-client privilege.
35	9/24/13	Email between representatives of appraiser	This email forwards defendant's attorney's mental impressions and opinions, and provides further response for reply to defendant's attorney. It is protected by the attorney-client privilege.
36	9/3/13	Summary Appraisal Report	This draft Summary Appraisal Report supports the basis for the "fair market value determination" of the option price for the Project. Although it is work-product, prepared in anticipation of litigation, plaintiff has shown a substantial need for it, which it cannot obtain from any other source. It is also subject to the attorney-client

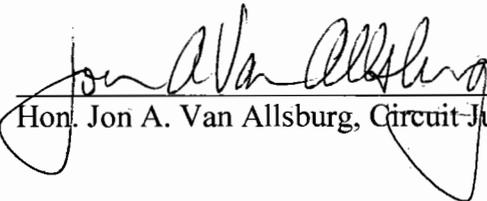
privilege, but defendant has contracted to provide “reasonable detail” of the basis for the 2013 appraisal, and refusal to provide the draft appraisal will likely violate that contractual obligation and compel the conclusion that the appraiser is not an “independent third party appraiser.”

37	9/12/13	Draft of Executive Summary and Introduction sections of 2013 appraisal	<p>These sections of the draft 2013 appraisal support the basis for the “fair market value determination” of the option price for the Project. Although it is work-product, prepared in anticipation of litigation, plaintiff has shown a substantial need for it, which it cannot obtain from any other source. It is also subject to the attorney-client privilege, but defendant has contracted to provide “reasonable detail” of the basis for the 2013 appraisal, and refusal to provide the draft appraisal will likely violate that contractual obligation and compel the conclusion that the appraiser is not an “independent third party appraiser.”</p>
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The court concludes that the defendant is entitled to assert an attorney-client privilege as to the above documents named in its privilege log to the extent of the redactions requested by defendant, and approves the entry of a protective order prohibiting disclosure of the redacted portions of said documents.

IT IS SO ORDERED.

Dated: March 19, 2014


 Hon. Jon A. Van Allsburg, Circuit Judge