IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re VISIONAMERICA, INC. SECURITIES LITIGATION	)	
This document relates to:	)	CLASS ACTION
ALL ACTIONS	)	No. 02-MC-033 D/V

ORDER DENYING PLAINTIFFS' MOTION TO COMPEL
AND GRANTING BAKER DONELSON'S MOTION TO QUASH

Before the court is a motion filed by the lead plaintiffs in the above-styled class action to compel compliance by Baker Donelson Bearman & Caldwell, P.C. ("Baker Donelson"), a non-party Tennessee law firm, with a subpoena duces tecum. This class action securities litigation was brought in the U.S. District Court for the Middle District of Tennessee against KMPG in its role as independent auditor to VisionAmerica, Inc. The plaintiffs' subpoena seeks documents that Baker Donelson prepared in connection with an internal investigation conducted for VisionAmerica. Baker Donelson resists, asserting the attorney-client privilege, and has moved to quash the subpoena. The motions were referred to the United States Magistrate Judge for a determination.

BACKGROUND

In early 2000, VisionAmerica's board of directors retained Baker Donelson to investigate suspected discrepancies in VisionAmerica's tax payment and check-writing procedures. (Pls.' Mem. of Law in Support of Their Mot. to Compel Baker Donelson Bearman & Caldwell's Resp. to Pls.' Subpoena for Prod. of Documents [hereinafter Pls.' Mem.] at 2, Ex. 3.) Shortly thereafter, VisionAmerica filed for bankruptcy.[1] VisionAmerica had stored certain corporate documents in a Shelby County, Tennessee self-storage unit. As of March 2002, those documents appeared to be abandoned, and the bankruptcy court entered a consent order allowing the plaintiffs and KMPG to access and copy them. In those documents, the plaintiffs discovered several references to the investigation by Baker Donelson. (*Id.* at 5.) The plaintiffs now ask the court to compel Baker Donelson to reveal the results of its investigation and all its associated documents, correspondence, memoranda, et cetera. For the following reasons, the plaintiffs' motion is denied, and Baker Donelson's motion to quash is granted.

ANALYSIS

As an initial note, Baker Donaldson's resistance to disclosure

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[1] VisionAmerica initially sought Chapter 11 bankruptcy protection, which was converted to a Chapter 7 bankruptcy in December 2001. The bankruptcy case was closed on April 5, 2002. (Pls.' Mem. at 3.)

is entirely proper. A Tennessee attorney who breaches his obligation of attorney-client confidentiality is subject to discipline unless he does so pursuant to the order of a tribunal after asserting all meritorious challenges or in other extremely limited circumstances outlined by the disciplinary rules. *See, e.g.,* Tenn. Sup. Ct. R. 8, DR 4-101 (permitting disclosure in obedience to the order of a tribunal); Tenn. Sup. Ct. Formal Ethics Op. 81-F-20 (Sept. 3, 1981) (affirming an attorney's duty to "invoke all available legal remedies against such disclosure").

Both parties correctly recognize that the scope of discovery is quite broad under the federal rules. Information is generally discoverable if it is "relevant to the claim or defense of any party" or if it "appears reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1). *See also Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978); *Lewis v. ACB Bus. Services, Inc.*, 135 F.3d 389, 402 (6th Cir. 1998). However, privileged information is not discoverable. FED. R. CIV. P. 26(b)(1).

Because this case is before the court on federal question jurisdiction pursuant to Rule 10(b)(5) and the Exchange Act, (Pls.' Mem. at Ex. 1), federal common law governs questions of privilege. FED. R. EVID. 501; *General Motors Corp. v. Director of the Nat'l Inst. for Occupational Safety and Health*, 636 F.2d 163, 165 (6th

Cir. 1980). Attorney-client privilege exists

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

United States v. Goldfarb, 328 F.2d 280, 281 (6th Cir. 1964) (quoting 8 WIGMORE, EVIDENCE § 2292 at 554 (McNaughton rev. 1961)). The attorney-client privilege may be asserted on behalf of a corporation, *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1984), but in all cases it must be narrowly construed, *In re Grand Jury Proceedings October 12, 1995*, 78 F.3d 251, 254 (6th Cir. 1996); *United States v. Collis*, 128 F.3d 313, 320 (6th Cir. 1997) (citing *In re Grand Jury Proceedings October 12, 1995,* 78 F.3d 251, 254 (6th Cir. 1996)).

In this case, the material sought is relevant to the plaintiffs' action: it bears on potential wrongdoing by VisionAmerica's management and KPMG, the independent auditors for VisionAmerica. The parties do not dispute this point. The parties also do not dispute that Baker Donelson's investigative work produced the type of information normally protected by the attorney-client privilege. (Pls.' Mem. at 4-5; Baker Donelson Bearman & Caldwell, P.C.'s Mem. of Law in Supp. of Its Mot. to Deny Pls.' Mot. to Compel Baker Donelson Bearman & Caldwell's and to

Quash Pls.' Subpoena for Prod. of Documents [hereinafter Baker Donelson's Mem.] at 3.) Rather, the plaintiffs claim that VisionAmerica waived the attorney-client privilege when it abandoned the self-storage documents and when its bankruptcy trustee lodged no objection to the March 22, 2002 order that gave the plaintiffs access to the self-storage documents.

"The burden of establishing privilege rests with the person asserting it." *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 450 (6th Cir. 1983). As part of that burden, the proponent of the privilege must show non-waiver. *See Goldfarb*, 328 F.2d at 281.[2] In this case, Baker Donelson avers that all communications related to the VisionAmerica investigation "remain

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[2] The Sixth Circuit has not stated this requirement in so many words, but in *Goldfarb* the Sixth Circuit adopted the Wigmore formulation of privilege. Other circuits using this formulation have consistently held that the party claiming privilege bears the burden of showing non-waiver as an element of that claim. *See, e.g., In re Horowitz*, 482 F.2d 72, 82 (2d Cir. 1973); *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982); *In re Grand Jury Proceedings* [United States v. Knox Jones], 517 F.2d 666, 670 (5th Cir. 1975), *reh'g denied* 521 F.2d 815 (5th Cir. 1975); *Weil v. Investment/Indicators, Research & Mgmt.*, 647 F.2d 519 (9th Cir. 1981); *United States v. Landof*, 591 F.2d 36 (9th Cir. 1978); *United States v. Bump*, 605 F.2d 548, 551 (10th Cir. 1979). The Sixth Circuit has favorably cited these cases. *See, e.g., Grand Jury Investigation No.* 83-2-35, 723 F.2d 447, 450 (6th Cir. 1983) (citing, inter alia, *United States v. Landof*, 591 F.2d 36 (9th Cir. 1978); *Puckett v. Arvin/Calspan Field Services, Inc.*, 1986 U.S. App. LEXIS 19519, *6-*7 (6th Cir. 1986) (unpublished opinion) (citing *Weil v. Investment/Indicators, Research & Mgmt.*, 647 F.2d 519 (9th Cir. 1981)).

in confidence, and the confidence remains inviolate;" that "with the exception of transmission to certain directors of VisionAmerica, the substance of these privileged communications has been communicated to no other person;" and that "[a]ll . . . documents pertaining to the investigation have been continuously maintained at the offices of Baker Donelson." (Baker Donelson's Mem. at Ex. 1, Aff. of Robert Walker, Esq.)

To the contrary, the plaintiffs claim that "[t]he documents discovered [in storage] provided a significant amount of confidential communications regarding the possible fraudulent activities of VisionAmerica management and it auditors, KPMG." (Pls.' Mem. at 5.) Nowhere, however, do the plaintiffs detail the nature of that information, nor do they assert that the self-storage documents divulged facts underlying Baker Donelson's investigation or conclusions that Baker Donelson might have drawn. Moreover, none of the exhibits presented to the court by the plaintiffs would lead the court to such conclusions. The only exhibits the plaintiffs offer -- selected minutes from Board of Directors's meetings and an excerpt of the deposition testimony of Andrew Miller, who served as Chairman of the Board of VisionAmerica -- contain no underlying facts communicated to Baker Donelson, no attorney reasoning, and no attorney conclusions. Instead, the minutes and the deposition excerpt merely reiterate the fact that

a private investigation was conducted by Baker Donelson and that it resulted in the writing of a confidential report to the board. The report itself was not among the documents in the self-storage unit, nor do the documents contain the findings of the investigation.

In the Sixth Circuit, "the scope of the waiver turns on the scope of the client's disclosure, and the inquiry is whether the client's disclosure involves the same 'subject matter'" as the information sought. *Collis*, 128 F.3d at 320 (citing *In re Grand Jury Proceedings October 12, 1995,* 78 F.3d 251, 255-56 (6th Cir. 1996)). The plaintiffs insist that VisionAmerica's abandonment of the self-storage documents waived the attorney-client privilege as to the subject matter of Baker Donelson's investigation. The controlling definition of "subject matter" rests in *In re Grand Jury Proceedings October 12, 1995,* 78 F.3d 251 (6th Cir. 1996).

In *Grand Jury Proceedings October 12, 1995*, the government was investigating whether a private medical laboratory improperly induced nursing homes to give it business for which it sought Medicare reimbursement. The medical laboratory had prepared a twenty-four-point marketing plan with the advice of an attorney who specialized in Medicare law. Laboratory representatives revealed to government investigators certain details about two points of that marketing plan. Based on this disclosure, the government argued that the laboratory had waived the attorney-client privilege

for its entire marketing plan. The court held that the laboratory had waived its attorney-client privilege only to the extent that it had divulged to government investigators the "substance of the attorney's advice." *Grand Jury Proceedings October 12, 1995,* 78 F.3d at 254. The court concluded that the laboratory had revealed the "subject matter" of an otherwise privileged communication when it revealed to the investigator the facts upon which its attorney based her conclusion; the attorney's reasoning behind her conclusion; and the attorney's legal conclusions. *Id.* The court ultimately determined that the laboratory had partially waived its privilege to the two marketing plan points for which the substance of the attorney's advice, i.e. the "subject matter," had been divulged. The other twenty-two marketing points, about which the laboratory had not divulged the attorney's advice, remained privileged. *Id.* at 255.

The Sixth Circuit applied this same definition and test in *United States v. Collis*, decided one year later. In *Collis,* the court held that full disclosure of "subject matter" occurred when a client divulged underlying facts, to-wit, that his attorney had told him to procure a letter from his employer, that he drafted the letter himself (a forgery), that he gave the letter to his attorney, and that the attorney read the letter and suggested changes. *Collis*, 128 F.3d at 320. *See also United States v.*

Skeddle, 989 F. Supp. 905 (N.D. Ohio 1997) (applying the Sixth Circuit's narrow view of "same subject matter").

The Sixth Circuit also made clear in *Grand Jury Proceedings October 12, 1995* that the acknowledgment that an attorney has examined a matter or a release of the findings of a special report does not result in waiver of the privilege. For example, a mere acknowledgment that an attorney has looked into a particular question which does not divulge the subject matter of the attorney's whole line of inquiry does not waive attorney-client privilege. *See Grand Jury Proceedings October 12, 1995,* 78 F.3d at 254 (citing and distinguishing *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989)). Likewise, a release of a report's findings, without revealing the facts that led to the findings does, not divulge the subject matter of that report and does not waive attorney-client privilege. *See id.* (citing and distinguishing *In re Dayco Corp. Derivative Securities Litigation*, 99 F.R.D. 616 (S.D. Ohio 1983)).

Under the standards set forth in *Grand Jury Proceedings October 12, 1995*, the documents obtained by the plaintiffs from the self-storage unit and offered to the court in support of the plaintiffs' motion to compel do not operate to waive VisionAmerica's attorney-client privilege. At best, the documents are a mere acknowledgment that an attorney-client privileged

investigation was performed and that a report was made. Having found that the disclosed self-storage documents do not, as a matter of law, waive VisionAmerica's attorney-client privilege, this court does not reach the issue of whether VisionAmerica's disclosure was deliberate or inadvertent, nor the issue of whether the bankruptcy trustee had the power to waive privilege on VisionAmerica's behalf.

CONCLUSION

The plaintiffs' motion is denied, and the motion of Baker Donelson to quash the subpoena is granted.

IT IS SO ORDERED this 18th day of December, 2002.

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DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE