

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

POWER & TELEPHONE SUPPLY)
COMPANY, INC.,)
)
Plaintiff,)
)
vs.) No. 03-2217M1V
)
SUNTRUST BANKS, INC., SUNTRUST)
BANK, SUNTRUST BANK - ATLANTA,)
SUNTRUST BANK - NASHVILLE, N.A.,)
SUNTRUST EQUITABLE SECURITIES)
CORPORATION, and SUNTRUST)
CAPITAL MARKETS, INC.,)
)
Defendants.)

ORDER GRANTING IN PART AND DENYING IN PART
THE PLAINTIFF'S MOTION TO QUASH SUBPOENA SERVED ON DOUG EARTHMAN

Before the court is the December 29, 2003 motion of the plaintiff, Power & Telephone Supply Company, Inc. ("P&T"), pursuant to Federal Rule of Civil Procedure 26(b)(1) & (c) to quash a subpoena duces tecum served on Doug Earthman, an attorney with the law firm of Armstrong Allen, PLLC, and a non-party to this litigation. The subpoena seeks documents related to any of P&T's "potential, proposed or actual financial transaction[s]" and "documents relating to swaps, caps, derivative instruments and financial transactions" for an eight-year period from 1995 to the

present. (Pl.'s Mem. in Supp. of Mot. to Quash at 1.)¹ P&T objects to the subpoena on the grounds that the request is overbroad, that it seeks irrelevant information, and the information sought is protected by the attorney-client privilege set forth in Tennessee Code Annotated § 23-3-105. The motion was referred to the United States Magistrate Judge for determination. For the reasons that follow, the motion is granted in part and denied in part.

As stated in an earlier order, this litigation arises out of several contracts that P&T entered into with Sun Trust Bank or its subsidiary between 1998 and 2000 - namely loan agreements for a \$75 million syndicated line of credit with a variable interest rate and two interest rates "SWAP agreements." In the second amended complaint filed by John Cannon, an attorney with the law firm of Armstrong Allen and counsel of record for P&T in this lawsuit, P&T alleges that one, and possibly both, of the syndicated lines of credit violates the Bank Holding Act by being illegally tied to interest rate derivative actions. (Sec. Am. Compl. at Count VIII.) P&T also alleges that the defendants orally agreed to renegotiate the loan agreement if interest rates fell, (*Id.* at ¶¶44, 45), and that the SWAP agreements were inherently unsuitable for P&T because

¹ The court relies on P&T's description of the subpoena in question. The subpoena in question was not attached to P&T's motion to quash or to the errata to the motion to quash.

its inventory was inflation resistant, (*Id.* at ¶22). The commitment letter provided by SunTrust in connection with the 2000 loan indicated that P&T should enter a hedge agreement with respect to at least 50% of all floating rates. In its second amended complaint, P&T claims this provision violates the Bank Holding Act. (*Id.* at ¶¶ 73, 74.)

In connection with the 1998 Syndicated Line of Credit, Earthman, an attorney associated with Armstrong Allen, represented P&T, and his law firm rendered an opinion that the loan documents "constituted a legal, valid, and binding obligation of [P&T], enforceable against [P&T] in accordance with their respective terms" (Defs' . Brief in Opp. at 2 and Ex. A.) In connection with the later loan agreement in 2000, Armstrong Allen rendered a similar opinion. (Defs' . Brief in Opp. at 3.)

Privilege in federal cases are governed by Rule 501 of the Federal Rules of Evidence which states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience

F.R.E. 501. In federal question cases, questions of privilege are governed by federal common law. *Reed v. Baxter*, 134 F.3d 351, 355

(6th Cir. 1998). Where there are pendent state claims, federal common law still governs all claims of privilege. *Hancock v. Dodson*, 958 F.2d 1367, 1373 (6th Cir. 1992) (finding "in federal question cases where pendent state claims are raised the federal common law of privileges should govern all claims of privilege raised in the litigation"); F.R.E. 501, 1974 Advisory Committee Notes ("the Federal law of privileges should be applied with respect to pendent State law claims when they arise in a Federal question case.") The attorney-client privilege is recognized by federal courts where federal law supplies the rule of decision. *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 450 (6th Cir. 1983).

The defendants argue that P&T's assertion of the attorney-client privilege is misplaced because the subpoena does not seek production of any privileged matter. Rather, according to the defendants, the subpoena merely seeks factual information relating to "(1) drafts of the subject agreements; (2) e-mails and correspondence with individuals other than senior officers at P&T concerning the subject agreements; and (3) notes by Earthman or other attorneys at Armstrong Allen which reflect any analysis of the alleged illegal provisions set forth in the commitment letter, or the so called agreement to 'renegotiate' alleged to be part of the contracts in questions." (Defs.' Brief in Opp. at 5.) The

defendants insist that Earthman and potentially other attorneys at Armstrong Allen are potential fact witnesses with respect to their opinion letters and as to discussions they may have had with persons other than P&T concerning the alleged illegal provisions of the loan agreements and the alleged oral contract to renegotiate the agreements if interest rates fell.

The court agrees with the defendant. The attorney-client privilege is not absolute. *Fausek v. White*, 965 F.2d 126, 129 (6th Cir. 1992). It applies only to confidential communications. *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 451 (6th Cir. 1983).

Here, it appears that Earthman as counsel for P&T and his law firm, Armstrong Allen, were involved in the negotiations surrounding the financial transactions that gave rise to this litigation. As part of their involvement, they may have had discussions and exchanged drafts, letters, and e-mails with the defendants, their employees, and their attorneys. These communications would not be confidential and therefore not protected by the attorney-client privilege.

Accordingly, Suntrust's motion to quash is denied. As before, the subpoena duces tecum is limited to all similar financial transactions, instead of all financial transactions, and the time period is limited to 1998 through 2002. Earthman and Armstrong

Allen are directed to produce the documents requested in the subpoena as modified by this order within eleven (11) days of the date of entry of this order. Privileged attorney-client communications between Armstrong Allen and P&T providing legal advice need not be produced.

IT IS SO ORDERED this 17th day of February, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE