

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

STATE OF ILLINOIS *ex rel.*
EDELWEISS FUND LLC,

PLAINTIFF,

v.

JPMORGAN CHASE & CO., *et al.*,

DEFENDANTS.

CASE NO. 2017-L-000289

JUDGE DIANE M. SHELLEY

CALENDAR W

**ORDER ON DEFENDANTS' MOTION TO COMPEL PRODUCTION OF RELATOR'S
VRDO ANALYSES**

This matter comes on to be heard on Defendants' Motion to Compel Production of Relator's VRDO Analyses. The motion was fully briefed, and the court heard argument on the record from counsel on April 5, 2021 via Zoom videoconferencing. For the reasons that follow, the motion will be **DENIED**.

BACKGROUND

On April 5, 2018, the plaintiff-relator filed its Amended Complaint alleging that the defendants performed a decade-long fraud upon the State of Illinois in connection with setting and resetting interest rates for municipal bonds called Variable Rate Demand Obligations (VRDOs). The complaint alleged that the Relator (Edelweiss Fund LLC) became "suspicious that defendants and other VRDO remarketing agents" were "systematically resetting the VRDO interest rates on an algorithmic or some other kind of mechanical basis" (Am. Compl. ¶ 8.) It further alleged that the "Relator confirmed its suspicions after performing an extensive forensic analysis of the interest rates and other market data" of Illinois VRDOs for which defendants had served as remarketing agents. (*Id.*)

According to the Relator's principal, Johan Rosenberg, he developed a system of analyzing the VRDO rates, applied for and received a patent for the methodology, and after applying the analysis, became "more certain that [remarketing agents], including Defendants in this action, were engaging in misconduct." (Aff. of Rosenberg ¶¶ 4-5, Feb. 26, 2021, attached as Exhibit 5 to Pl.'s Resp. to Defs.' Mot. to Compel.) The relator states that it retained a company named Pyxis to create software to search and sort VRDO interest rate data, "implementing the methodology described in [Mr. Rosenberg's] patent." (*Id.* ¶ 6.)

In August 2013, Mr. Rosenberg retained the law firm Constantine Cannon LLP as litigation counsel. He states that, at his counsel's recommendation, he "engaged an outside consulting firm to perform additional analyses in preparation of filing a lawsuit." (*Id.* ¶ 10.) It is said that the consulting firm, under the direction of Constantine Cannon LLP, later created "the specific forensic analysis detailed in the complaint Edelweiss filed in this Court on August 28, 2014, and the subsequent complaints in this case." (*Id.* ¶ 11.)

It is said that the consultant "continued to develop the analyses under counsel's direction" and that "th[o]se included VRDO data analyses *not* used in the complaints filed by Edelweiss in this action." (Aff. of Attorney Gordon Schnell of Constantine Cannon LLP, Feb. 25, 2021, attached at Ex. 6 to Pl.'s Resp. to Mot. to Compel) (emphasis added.) Mr. Rosenberg further states that "[n]one of the analyses performed by the consultant under the direction of counsel was intended, used, or performed for any purpose other than in preparation of litigation" and that "[t]hese analyses are not reflected in the complaint in this case." (*Id.* ¶ 13) (emphasis added.)

The plaintiff says that it is withholding its consultants' preliminary work that it says were "neither prepared nor used for Mr. Rosenberg's businesses." Plaintiff further says that those documents were not "referenced or used in the Complaints or part of any of the analyses referenced in the Complaints." (See Court-Ordered Letter to the Court of Attorney Bruce C. Howard, at 3, Sept. 8, 2020.)

On August 19, 2020, the defendants filed the instant motion to compel the following documents or information:

- (1) All documents reflecting or relating to its analyses of VRDOs;
- (2) Documents and Data used in performing those analyses;
- (3) Documents sufficient to reflect how the analyses were performed;
- (4) Documents sufficient to identify the VRDOs or other data inputs included in the analyses;
- (5) Documents sufficient to show the justification for including or excluding specific VRDOs or other data in the analyses;
- (6) Documents sufficient to show any assumptions made in performing the analyses;
- (7) Documents sufficient to show the software used; and
- (8) Documents reflecting the results of the analyses.

That motion to compel the VRDO analyses was fully briefed, and the court heard argument on the record on April 5, 2021. At that hearing, the parties presented their respective positions. The defendant maintained that (1) the privilege log this court required plaintiff to produce was inadequate, and therefore any consultant privilege was not adequately invoked as to the forensic analysis materials; (2) to the extent it was asserted, it has been put “at issue” because of its use in formulating the allegations in the complaint; and (3) even if not at issue, extraordinary circumstances exist that justify requiring production.

ANALYSIS

A. RELEVANCE

Defendants’ state in their motion to compel that because the forensic analysis was mentioned in the complaint, it is relevant to plaintiff’s claim and defendants’ defense as to the False Claims Act, and therefore it must be produced. The plaintiff has maintained that the forensic analysis that gave rise to the relator’s suspicions of defendants’ fraud upon the State of Illinois merely opened the door for its claim under the False Claims Act to establish it was an “original source” under that statutory scheme. It further maintains that because the attorney general has filed an objection under section 4 to dismissal of the cause, it does not matter that the relator is or is not an original source. See 740 ILCS 175/4. Therefore, the basis for establishing it was an original source in the first place—*i.e.*, the forensic analysis—is not relevant to the case. Plaintiff maintains that the forensic analysis is no longer relevant to these proceedings because, as a matter of law, the thing that made relator an original source—the forensic analysis—is, as plaintiff’s counsel put it during oral argument, “no longer part of the case.” (Tr. of Proceedings 24:9-10, Apr. 5, 2021.) Defendants’ counsel did not rebut this assertion at argument on April 5, 2021.

Defendants in their reply say the forensic analysis is needed in order to test relator’s assertions and prepare a defense. However, the analysis performed by *plaintiff’s consultants* has not been put at issue in this case; rather, the analysis by the relator itself has. The plaintiff has maintained that it will produce (at the so-called “custodial phase” of discovery) information related to its own analysis, but not information concerning the consultants’ analysis. Accordingly, because the consultants’ forensic analysis is not at issue, this court should not compel production of documents relating to that analysis.

B. CONSULTANT PRIVILEGE

Nevertheless, to the extent the consultants' forensic analysis is relevant to the claims or defenses at issue, the plaintiff maintains that the consultants' privilege applies and that no exception to the privilege has been shown. Defendant maintains that, at the very least, there are extraordinary circumstances that justify production of the consultants' forensic analysis.

There are two sets of data the parties are working with: the relator's own analysis that it performed, and the consultants' subsequent analyses that informed—but were not made part of—the Amended Complaint. Plaintiff has tendered multiple affidavits by its counsel and the relator's principal (Johan Rosenberg) showing that the work product of the consultants did not make its way into the Amended Complaint.

Generally, if an expert serves as a Rule 201(b)(3) consultant, who will not testify at trial, “[t]he identity, opinions, and work product of a consultant are discoverable *only* upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject matter by other means.” Ill. S. Ct. R. 201(b)(3) (eff. July 1, 2014) (emphasis added).

The court finds that the plaintiff has adequately shown that the consultant's privilege under Rule 201(b)(3) applies, given the affidavits on file and the positions in the parties' briefs. The consultants were retained at the direction and advice of relator's principal's counsel, and their work product informed the relator that its earlier conclusion—based on his earlier analysis—was correct in its view. None of these consultants will testify at trial, and that is enough to invoke the privilege.

However, that does not end the analysis, because there may be “exceptional circumstances” that permit discovery. This is a heavy bar because, as the Supreme Court of Illinois has noted, even the discovery of the specific facts that a party used to inform a consultant's opinions may not be discovered. In *Dameron v. Mercy Hospital & Medical Center*, 2020 IL 125219, ¶ 43, the Court stated that “the [committee] comments reiterate that the rule contemplates protection of not only a consultant's opinions in the first instance but also the facts informing the consultant's opinions, *i.e.*, objective data.” The example contemplated by the rules as to when such objective data would be discoverable—*i.e.*, when an “exceptional circumstance” exists—is “where an item of physical evidence would no longer be available due to destructive

testing and a party could not obtain information about the destroyed item from any other source but the adversary's consultant who performed the destructive testing, exceptional circumstances exist to justify discovery of the information." *Id.*

A showing of exceptional circumstances itself requires exceptional facts, such as that the facts that would be used as a necessary claim or defense in the case are no longer *available* to the moving party. However, the most defendants have raised on this point is that "only Relator and its related entities possesses the materials related to the forensic analysis that Defendants seek." (Defs.' Reply at 7, Mar. 12, 2021.) The alleged exceptional circumstance must be balanced against the relevancy of the material in order for the court to determine whether the facts and circumstances really are "exceptional."

Here, the defendants have not shown that exceptional circumstances exist that would justify compelling plaintiff to produce its consultants' identity, opinions, or work product as to a forensic analysis that plaintiff has shown (by affidavit) did not make its way into the operative complaint. Therefore, the motion to compel production of all documents reflecting or relating to the plaintiffs' consultants' forensic analyses will be denied.

C. PRIVILEGE LOG

Although the court will deny the motion to compel the consultants' material, the defendants have raised several deficiencies in plaintiff's privilege log in its memorandum in support of the motion and its reply. The defendants' reply brief discusses the most-recently produced privilege log, which was produced while the parties were briefing the instant motion to compel.

Defendants contend that the failure to adequately produce a more-fully-developed privilege log bars the consultant's privilege from being invoked. They are correct that claims of privilege in discovery must be expressly made and supported by a description of the nature of the documents and communications, or things not produced or disclosed. Ill. S. Ct. R. 201(n). The log should include the date, type of document, author(s), recipient(s), general subject-matter of the document, and the privilege being claimed with sufficient specificity to inform the other side as to what is being withheld. The defendants are entitled to a proper privilege log.

However, this does not change the court's rulings as to the applicability of the consultants' privilege to any analyses that were performed to inform the

relator, or as to the court's finding that such work was not put at issue by the complaint. At most this deficiency may give rise to a question regarding a specific document.

IT IS HEREBY ORDERED:

- I. The defendants' Motion to Compel Production of Relator's VRDO Analyses is **DENIED**.
- II. The plaintiffs shall submit a privilege log that conforms to the requirements of Illinois Supreme Court Rule 201(n) by **May 17, 2021**.
- III. The **May 7, 2021** status date is **stricken**.
- III. This cause is continued for status on discovery to **May 26, 2021, at 10:30 a.m.** via Zoom videoconferencing (Meeting ID 921 0771 7798, Password 881878.)

ENTER:

Judge Diane M. Shelley

APR 27 2021

Circuit Court – 1925

Judge Diane M. Shelley #1925
April 27, 2021