The following constitutes the ruling of the court and has the force and effect therein described.

Signed November 14, 2008 **United States Bankruptcy Judge**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re:	§	
	§	CASE NO. 05-41513-DML-7
FORT WORTH OSTEOPATHIC HOSPITAL	§	
INC. D/B/A FORT WORTH OSTEOPATHIC	§	
MEDICAL CENTER OF TEXAS, AND	§	CASE NO. 05-41503-DML-7
	§	
HEALTH CARE OF TEXAS, INC., D/B/A	§	
OSTEOPATHIC HEALTH SYSTEM OF	§	
TEXAS,	§	
	§	
DEBTORS.	§	
	§	
SHAWN K. BROWN, CHAPTER 7 TRUSTEE,	§	
	§	
PLAINTIFF,	§	ADVERSARY NO. 07-04015-DML
	§	
v.	§	CIVIL ACTION NO. 4:07-CV-206-Y
	§	
ROBERT C. ADAMS, D.O., ET.AL.,	§	
	§	
DEFENDANTS.	§	

REPORT AND RECOMMENDATION

TO HON. TERRY R. MEANS, UNITED STATES DISTRICT JUDGE:

Comes now the undersigned bankruptcy judge and, pursuant to your *Order Adopting Report and Recommendation of Bankruptcy Judge and Denying Motion to Dismiss* (the "Referral Order"), makes this report and recommendation respecting the *Former Directors' Amended Motion to Compel Production of Documents by MBIA and to Overrule its Objections to Movants' Production Requests and Brief in Support* (the "Motion"). [Docket No. 491]. The Motion was filed by the Former Directors[1] seeking to compel production of documents from MBIA Insurance Corporation ("MBIA") under FEDERAL RULE OF CIVIL PROCEDURE 34. In response to the Motion, MBIA filed *MBIA Insurance Corporation's Opposition to the Former Directors' Amended Motion to Compel Production of Documents by MBIA and to Overrule its Objections to the Movants' Production Requests* (the "Response"). [Docket No. 503]. The Former Directors then filed the *Former Directors' Reply in Support of their Amended Motion to Compel Production of the Documents by MBIA and to Overrule its Objection to Movants' Production Requests and Brief in Support Thereof* (together with the Motion and Response, the "Pleadings"). I conducted a hearing on the Pleadings on September 23, 2008 (the "Hearing"). At the Hearing I heard argument from counsel for the Former Directors and counsel for MBIA. As required by your Referral Order, I now make this report and recommendation respecting disposition of the Motions.

II. BACKGROUND

[1] The term "Former Directors" shall mean Jay G. Beckwith, D.O., David M. Beyer, D.O., John Allen Chalk, Esq., Winfred T. Colbert, Esq., Kay Day, Barton E. Head, CPA, Margery Ivory as personal representative of the Estate of David Ivory, William M. Jordan, D.O., Randall L. Kressler, Esq., Gibson D. Lewis, Harris F. "Sam" Pearson, D.O., Irwin Schussler, D.O., Jane E. Schlansker, and William Wallace, D.O.

The Original Complaint in this adversary proceeding was filed on February 9, 2007, and was subsequently amended by the First Amended Complaint[2] (together, the "Complaint"). In the Complaint Shawn K. Brown as the chapter 7 trustee (the "Trustee") in the underlying bankruptcy case asserted various causes of action against approximately 37 defendants, including the Former Directors.

On August 19, 2008, the Former Directors filed a cross-complaint (the "Cross-Complaint") against MBIA asserting a right of contribution.[3] In the context of pursuing their claims of contribution in the Cross-Complaint the Former Directors filed the Motion seeking to compel production of various documents from MBIA.[4]

At the commencement of the Hearing the Former Directors and MBIA announced that through agreement they had narrowed the issues requiring decision by you into two categories. The first category for your determination is a relevance objection to specific requests for production from the Former Directors to MBIA. Those specific requests as stated on the record are nos. 23, 40, 44, 45, 50, 51, 52, 56 (each a "Request" and, collectively, the "Specific Requests"). The second category for your determination is broader and requires determination of the extent to which various privileges protect documents from production.

III. DISCUSSION

I will address the categories in turn, discussing the issue of relevancy with regard to the Specific Requests first, and then addressing the issues involving the privileges asserted by MBIA.

[2] The first Amended Complaint was filed on November 30, 2007, at docket no. 202.

[3] The background relevant to this adversary is more fully described in the Complaint, which fills 151 pages.

[4] The request for production which underlie the Motion were served on MBIA through the *Certain Former Director and Officer Defendants' Request for Production to MBIA Insurance Corporation* (the "Request for Production").

A. Relevancy and the Specific Requests

MBIA opposes production in response to the Specific Requests on the basis that they are not relevant. Resolution of this issue is governed by the FEDERAL RULES OF CIVIL PROCEDURE (the "Rules") as made applicable in this adversary proceeding by the FEDERAL RULES OF BANKRUPTCY PROCEDURE. In determining whether information is relevant a court should liberally construe the Rules governing relevancy to promote disclosure of information that would facilitate a fair ability to analyze the claims asserted in the litigation.

In this case, the Complaint asserts numerous claims by the Trustee against, *inter alia*, the Former Directors. These claims include: Breach of Fiduciary Duty, Waste, Negligence, Gross Negligence, Negligence *Per Se*, Unjust Enrichment, Conspiracy, Trust Fund Liability, and Vicarious Liability among others.

The Former Directors' claim of contribution against MBIA is made in relation to the claims which the Trustee asserts against the Former Directors. In this case, the claims asserted in the Complaint are broad and therefore the universe of relevant information is necessarily large.

i. The Burden of Proof

In this discovery dispute, as in all discovery disputes, the court has considerable discretion in making its determinations. See *Kreger v. General Steel Corp.*, 2008 WL 782767, *2 (E.D. La. 2008) citing *Munoz v. Orr*, 200 F.3d 291, 305 (5th Cir. 2000) ("As an initial matter, courts have considerable discretion in managing discovery.") (internal citation omitted). Courts thus have broad discretion in determining questions of relevancy in the discovery context. See *Export Worldwide, Ltd. v. Knight*, 241 F.R.D. 259, 262-3 (W.D. Tex. 2006). "The definition of relevant information in Rule 26(b)(1) is broad, and relevant information need not be admissible at the trial of [sic] the discovery appears to be reasonably calculated to lead to the discovery of

admissible evidence." *Gauthier v. Union Pacific R. Co*., 2008 WL 2467016, *2 (E.D. Tex. 2008).

When seeking discovery under the Rules "[t]he burden lies with the moving party to show clearly that the information sought is relevant to the case and would lead to admissible evidence." *S.E.C. v. AmeriFirst Funding, Inc.*, 2008 WL 926587, *2 (N.D. Tex. 2008) citing *Export Worldwide, Ltd. v. Knight*, 241 F.R.D. 259, 262-3 (W.D. Tex. 2006); see also *Spiegelberg Mfg., Inc. v. Hancock*, 2007 WL 4258246, *1 (N.D. Tex. 2007) (The party seeking discovery must meet this threshold burden.).[5]

Once a party seeking discovery establishes that its interrogatories and document requests are within the scope of permissible discovery, the burden shifts to the party opposing production to show why discovery should not be permitted. See *Spiegelberg* at *1.

In order for a party seeking production to meet its burden, the party must show that the information requested is relevant within the limits of Rule 26.

ii. Rule 26 and Relevancy

Requests for production, such as the ones which are subject to the Motion are governed by FED. R. CIV. P. 34. In general, Rule 34's scope is limited by Rule 26. In pertinent part, Rule 34 states: "(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):…" *See* FED. R. CIV. P. 34.

Rule 26(b)(1) in turn states:

> **Scope in General**. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged

[5] The *Spiegelberg* case quotes *E.E.O.C. v. Renaissance III Organization,* 2006 WL 832504 at *1 (N.D.Tex. Mar. 30, 2006) to illustrate that "[t]o place the burden of proving that the evidence sought is not reasonably calculated to lead to the discovery of admissible evidence on the opponent of discovery is to ask that party to prove a negative. This is an unfair burden, as it would require a party to refute all possible alternative uses of the evidence, possibly including some never imagined by the proponent."

> matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

FED. R. CIV. P. 26(b)(1).

The plain language of Rule 26 sets forth a two tiered scope for allowable discovery.[6] The first tier is what the parties can seek without court order, i.e. documents relevant to any party's claim or defense. The second tier can be sought after court order, i.e. documents relating to any matter relevant to the subject matter involved in the action.

The underlying purpose of disclosure pursuant to the rules governing discovery is to provide the litigating parties with a fair ability to analyze the claims asserted in the litigation.[7] In furtherance of this goal "[r]elevancy is construed liberally so that the basic issues and facts of the case are disclosed to the fullest extent practical." *Export Worldwide* at 262-3.

iii. Two Tiered Discovery

As noted above, parties may seek non-privileged discovery relevant to the claims or defenses presented in the litigation without court order. Parties may also seek broader discovery relating to the subject matter involved in the action if a court order is sought. See FED. R. CIV.

[6] "Relevant" is not defined in the Federal Rules of Civil Procedure. However, the Federal Rules of Evidence state: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See FED. R. EVID. 401.

[7] The scope of discovery is generally the same when seeking discovery from parties outside of the litigation under the Federal Rules of Civil Procedure. MBIA has pending before your Honor a motion to dismiss the Cross-Complaint; even if that motion is granted, the same recommendations respecting the Motion would be appropriate.

P. 26(b)(1). In order to obtain broader discovery, the party seeking the discovery has the burden to show "good cause".

As a predicate matter the party asserting good cause to broaden the scope of discovery must first show that there is an underlying dispute as to an issue relating to the subject matter of the action. See *AmeriFirst,*at *2.[8] Once the issue is shown to be in dispute the court will then determine "good cause" on a case by case basis.

As noted above, the Parties narrowed the issue before the court with regard to relevance to the Specific Requests. Using the foregoing analysis I now address each of the Specific Requests individually. Each of the following determinations is subject to the discussion following of the privileges asserted by MBIA.

iv. Specific Requests Discussed

Request 23. Request 23 seeks production of "All documents relating to MBIA's cash reserves for losses expected or realized on the Hospital Bonds, including MBIA's cash reserves policies."

In the Request for Production the term "Hospital Bonds" is defined as "…the bonds referred to in the Motion to Compromise and Settle Controversies (the "Settlement Motion") (Docket No. 243)." See Request for Production at p. 3. These bonds allegedly were issued in 1993, 1996, and 1997. I am of the opinion that the requested documents are the type that could lead to the discovery of admissible information and are relevant to the claims asserted in this action. The reserves established by MBIA would be relevant to determining what motivated MBIA's conduct in the period that is the subject of the Complaint. The Former Directors allege

[8] The *AmeriFirst* court stated "Although obtaining the evidence to [address the underlying issue] fits within the broader range of discoverable material, the [party seeking discovery] has failed to demonstrate 'good cause' for this information at this juncture in the case, when the [underlying issue] is not in dispute." See *Id*. at *2 (N.D. Tex. 2008).

in the Cross-Complaint that MBIA's conduct (including acting as *de facto* management) led to the damages sought in the Complaint, information shedding light on MBIA's decision making is clearly relevant. However, the time frame involved is too broad at this time. With regard to this Request, I recommend that MBIA be required to produce responsive documents in the date range of the year 2001 to the present that are in its care, custody or control.

Request 40. Request 40 seeks production of "All documents evidencing reinsurance arrangements relating to actual or expected losses relative to MBIA's insurance of hospital bonds."

For the same reasons as outlined for Specific Request 23, the existence of insurance or reinsurance on the Hospital Bonds is relevant to the claims in this action. MBIA should be required to produce documents in its care, custody or control evidencing the existence of any reinsurance arrangements with regard to the Hospital Bonds. I recommend that MBIA not be required to produce at this time anything beyond the documents which evidence the existence of any reinsurance arrangements respecting the Hospital Bonds (i.e., reinsurance related to the bonds issued for Fort Worth Osteopathic Hospital ("Debtor")).

Request 44. Request 44 seeks production of "All documents relating to two reinsurance agreements entered into with Converium Re (formally Zurich reinsurance) in 1998."

I believe that this request is not facially relevant to the claims present in this case. Further, I do not see that the Former Directors have demonstrated cause adequate to require production of these documents at this time. There is no connection between the claims, defenses or subject matter within this adversary and agreements that are not connected to Debtor's financing that relate to a time years prior to the period covered by the Complaint. I therefore

recommend MBIA not be required to produce in response to Request 44, without prejudice to the Former Directors seeking these documents at a later time.

Request 45. Request 45 seeks production of "All documents relating to an investigation that the audit committee of MBIA Board of Directors conducted in October 2004 into the AHERF reinsurance agreement."

I believe that this request is not facially relevant to the claims present in this case. Further, I do not believe that the Former Directors have demonstrated cause adequate to require production of these documents at this time. The Former Directors have not shown any meaningful connection between the AHERF transaction and MBIA's relations with Debtor. I therefore recommend MBIA not be required to produce in response to Request 45, without prejudice to the Former Directors seeking these documents at a later time.

Request 50. Request 50 seeks production of "All documents evidencing any investigation conducted by any branch of federal, state, or local government related to MBIA's bond insurance business."

For the same reasons discussed in connection with Specific Request 23, this request is facially relevant to the claims in this case to the extent that any investigation involved the Hospital Bonds. This request is otherwise not facially relevant to the claims presented in this case (and is extremely over-broad) and the Former Directors have not demonstrated cause adequate to require production at this time beyond those documents described in the preceding sentence. This should be without prejudice to the Former Directors seeking further production at a later time. I recommend that MBIA be required to produce the documents described in the first sentence of this paragraph that are in its care, custody or control.

Request 51. Request 51 seeks production of "All documents related to the reasons for MBIA's restatement of its audited financial results in March 2005."

This Request is not facially relevant to the claims asserted in this case; however, I am of the opinion that the Former Directors have demonstrated sufficient cause to require production of these documents to the extent they in any way involve or refer directly or generically to Debtor because they are relevant to the subject matter of this case. Changes in MBIA's accounting relating to the Debtor's last months of operations or to MBIA's treatment of its relationship with Debtor would shed light on MBIA's conduct during a relevant time period. I therefore recommend that MBIA be required to produce documents within its care, custody or control which are responsive to this Request to the extent that the documents refer directly or generally to Debtor.

Request 52. Request 52 seeks production of "All documents exchanged by, between, and among MBIA, the Attorney General of the State of New York, and the United States Securities and Exchange Commission from 2001 through 2005."

This Request is facially relevant to the claims in this case to the extent that any documents involve Debtor. This request is otherwise not facially relevant to the claims presented in this case and the Former Directors have not demonstrated cause adequate to require production at this time beyond the scope herein described. I recommend that MBIA be required to produce documents within its care, custody or control which are response to this Request to the extent that the documents directly involve Debtor, without prejudice to the Former Directors seeking further production at a later time.

Request 56. Request 56 seeks production of "All documents relating to the fees received from the Hospital in exchange for insuring the Hospital Bonds, including documents identifying how MBIA accounted for such guaranty fees."

This request is not facially relevant to the claims presented in this case. Moreover, I am of the opinion that the Former Directors have not demonstrated sufficient cause to require production of these documents because they are relevant to the subject matter of the case. The Former Directors have not shown that these documents would address an issue related to the subject matter of this case which is in dispute. I accordingly recommend that MBIA not be required to produce documents in response to Request 56.

B. The Privileges Asserted

In its response to the Request for Production MBIA has asserted that various privileges exist with regard to Specific Requests that would excuse production of certain otherwise responsive documents. The privileges that MBIA asserts are the attorney-client privilege, the work-product privilege, and a joint defense privilege. In support of the asserted privileges, MBIA provided to the Former Directors a privilege log (the "Privilege Log"), a declaration of MBIA's counsel (the "Declaration"), and a "Chart of Individuals", and made representations to the court on the record at the Hearing.

The Former Directors insist MBIA has not made a sufficient evidentiary showing and so MBIA's claims of privilege have been waived. After reviewing the record and the evidence and representations presented by MBIA to support its claims of privilege, I believe that MBIA has generally met its burden to show its right to claim privilege. I believe that even if MBIA has not met its burden, it should be allowed to supplement as necessary the evidence already presented. I deal more specifically with the arguments of the Former Directors below.

i. Federal Law Points to State Law on the Issue of Privilege in this Circumstance[9]

As an initial matter, the claim of attorney client privilege is determined by Texas law. Federal courts are obliged to use state law of privilege when considering state law claims pursuant to FEDERAL RULE OF EVIDECE 501,[10] which reads in relevant part:

> …[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

The proposition that state law will govern with respect to an element of a claim or defense as to which state law supplies the rule of decision as to privilege is recognized in the case law. See, e.g., *In re Avantel, S.A.*, 343 F.3d 311, 318 (5th Cir.2003) (Applying Texas law); *In re Mirant Corp*., 326 B.R. 646, 650 (Bankr. N.D. Tex. 2005) (applying the laws of the state of Georgia); *In re Myers*, 382 B.R. 304, 309-310 (Bankr. S.D. Miss. 2008) (applying Mississippi law). Accordingly Texas law will govern in this situation because the claims and defenses at issue are claims and defenses arising under Texas law. That being the case, I now turn to the relevant Texas law.

ii. State Law Regarding Privilege

[9] I find it troubling that neither party identified the appropriate federal evidentiary rule governing claims of privilege and the considerable codified authority pertinent to the privileges issue. Both the Former Directors and MBIA are represented by very competent and experienced counsel; counsel are certainly familiar with the distaste courts have for arbitrating discovery disputes. Yet, the research of both sides on this issue was so cursory that it was left to the inadequate resources of chambers to identify the controlling law. As this adversary has been plagued by discovery disputes – often disputes apparently joined more for legal posturing than due to a serious question of how the law should be applied – I must one last time caution all parties to this adversary that counsel who use discovery disputes as tactical weapons or force upon the court the need to instruct in the obvious are playing with fire.

[10] While it is true that the Trustee's Complaint asserts an objection to proof of claim (arguably a federal cause), that count is applicable only to Cantey & Hanger, L.L.P. The claims by the Trustee which triggered the Former Directors' claims for contribution against MBIA all are dependent entirely on state law.

In Texas, "[t]he attorney client privilege exists only as it is found in the Texas Rules of Civil Evidence." See *Cigna Corp. v. Spears*, 838 S.W.2d 561, 564 (Tex. App.-San Antonio 1992, orig. proceeding).[11] TEXAS RULE OF EVIDENCE 503 lays out what the privilege entails and who may claim it. Rule 503 states in part: "503(b). Rules of Privilege. (1) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:…" TEX. R. EVID. 503(b)(1).

In conjunction with TEXAS RULE OF EVIDENCE 503, the TEXAS RULES OF CIVIL PROCEDURE provide a procedural mechanism by which a privilege may be properly asserted. TEXAS RULE OF CIVIL PROCEDURE 193.3 provides the procedure to assert attorney client privilege.[12] One court has described the procedure clearly:

> A party resisting discovery bears the burden of proving any applicable privilege. Rule 193.3 prescribes the procedure for asserting a privilege. A party who claims that material or information responsive to written discovery is privileged may withhold the privileged material or information from the response. The party must state in the response or in a separate document that information or material

[11] As of 1998 Texas no longer makes a distinction between rules of civil evidence and rules of criminal evidence.

[12] Tex. R. Civ. P. 193.3 states in part:

> A party may preserve a privilege from written discovery in accordance with this subdivision.
> (a) Withholding Privileged Material or Information. A party who claims that material or information responsive to written discovery is privileged may withhold the privileged material or information from the response. The party must state--in the response (or an amended or supplemental response) or in a separate document--that:
> (1) information or material responsive to the request has been withheld,
> (2) the request to which the information or material relates, and
> (3) the privilege or privileges asserted.
> (b) Description of Withheld Material or Information. After receiving a response indicating that material or information has been withheld from production, the party seeking discovery may serve a written request that the withholding party identify the information and material withheld. Within 15 days of service of that request, the withholding party must serve a response that:
> (1) describes the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege, and
> (2) asserts a specific privilege for each item or group of items withheld….

See Tex. R. Civ. P. 193.3.

> responsive to the request has been withheld, the request to which the information or material relates, and the privileges asserted.

See *In re Seigel*, 198 S.W.3d 21, 28 (Tex. App-El Paso 2006, orig. proceeding) (internal citations omitted).

iii. Burden of Proof

In Texas, "[t]he burden of proof falls on the party asserting the privilege and seeking to limit discovery." *Cigna Corp.* at 564. Although the initial assertion of privilege need only meet the requirements of Rule 193.3, once the privilege is objected to, the party claiming the privilege may be required to make an evidentiary showing of entitlement.

A party seeking to prevent discovery following an objection must meet the requirements of TEX. R. CIV. P. 193.4(a). On its face the rule makes clear that evidence may be presented, but is not always necessary. TEX. R. CIV. P. 193.4(a) states: "[t]he party making the objection or asserting the privilege must present any evidence necessary to support the objection or privilege." See TEX. R. CIV. P. 193.4(a). "As the rule recognizes, evidence may not always be necessary to support a claim of protection from discovery." See *Weisel Enterprises, Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1986). [13] Thus, the evidence required is only that *necessary* to support the privilege; if the privilege is clearly properly claimed, no more need be shown in support of the claim of privilege.

The party seeking to prevent discovery may provide the court with some evidentiary basis for asserting the privilege, to the extent that evidence exists. The evidentiary burden can be met by "…presenting evidence to the trial court in the form of testimony, affidavits, depositions, interrogatories, et cetera, or by the documents themselves." See *Cigna Corp.*at 564 see also

[13] Accord *In re Union Pac. Res. Co*., 22 S.W.3d 338, 341 (Tex. 1999) ("As [Tex. R. Civ. P. 193.4(a)] recognizes, evidence may not always be necessary to support a claim of protection from discovery."); *In re Memorial Hermann Healthcare System*, 2008 WL 4542720, *6 (Tex. App.-Houston [14 Dist.] 2008).

Weisel at 58 ("Any party who seeks to exclude documents from discovery must specifically plead the particular privilege…applicable to support such claim."). [14] TEXAS RULE OF CIVIL PROCEDURE 193.4(a) expressly states that affidavits may properly be used to support a claim of privilege. That rule states in part:

> 193.4(a) Hearing. Any party may at any reasonable time request a hearing on an objection or claim of privilege asserted under this rule. The party making the objection or asserting the privilege must present any evidence necessary to support the objection or privilege. *The evidence may be testimony presented at the hearing or affidavits served at least seven days before the hearing or at such other reasonable time as the court permits.* If the court determines that an in camera review of some or all of the requested discovery is necessary, that material or information must be segregated and produced to the court in a sealed wrapper within a reasonable time following the hearing.

See TEX. R. CIV. P. 193.4(a) (emphasis added).

In the case at bar, the materials presented by MBIA – the Privilege Log, Chart of Individuals, Declaration, and counsel's representations – are, in my judgment, sufficient under Rule 193.3 to support MBIA's claim of privilege. As discussed below, the claims of privilege are, on their face, clearly consistent with the codified Texas law. Thus, even if the materials and representations offered by MBIA are arguably deficient (as the Former Directors claim) as evidence, I consider them enough to show that MBIA's claims of privilege are valid. Even if MBIA's showing is insufficient, however, case law suggests MBIA should have an opportunity to supplement its offering with additional evidence.[15]

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[14] In this case, the court believes that the representations of counsel and the Privilege Log provide adequate information regarding the withheld documents; such information identifies the information to which the document relates to, and identifies the privilege asserted. See TEX. R. CIV. P. 193.3(a)(1)-(3). Moreover, counsel for MBIA has provided the Declaration as well as making representations on the record. See TEX. R. CIV. P. 193.3(a) and *Cigna Corp.*at 564.

[15] If the initial showing by the party claiming the privilege is inadequate, the party may be allowed to supplement the evidentiary record. See TEX. R. CIV. P. 193.4(a) ("…such other reasonable time as the court permits…") see also *Huie v. DeShazo*, 922 S.W.2d 920, 926 (Tex. 1996).

The Former Directors point to a number of cases they insist demonstrate that a failure to provide sufficient evidence to support a claim of privilege results in a waiver of the privilege. The cases cited by the Former Directors do not, in fact, support their contention. Rather, each of these cases involved a claim of privilege that was not recognized under applicable law, a result sustaining the claim of privilege, or egregious conduct by the party invoking the privilege. [16] The privileges claimed by MBIA are provided for specifically by rule under Texas – applicable – law; no evidence has been provided to me suggesting MBIA has been guilty of egregious conduct.

iv. In Camera Review

Much was made at the Hearing about the entitlement of the party seeking discovery to an *in camera* review. I have reviewed the applicable case law and determined that in some instances an *in camera* review may be appropriate; however, this has not been shown to be such a case. The *Weisel* case is instructive in this regard.

The *Weisel* court stated: "Under the facts of this case, the trial court had no choice but to review the allegedly privileged documents *in camera*, prior to its ruling, because it was asked to make an *in camera* review…" See *Weisel* at 58. When taken in context, however, under the

[16] The *El Paso* case was decided under federal law and dealt with tax evasion and an asserted accountant privilege (there is no accountant privilege under Federal law). See *United States v. El Paso Co.*, 682 F.2d 530, 541 (5th Cir. 1982). The *Modern Woodman* case was also decided under federal law and dealt with communications dealing with the suicide of an insured as being "general conversation" or confidential. *Modern Woodmen of America v. Watkins*, 132 F.2d 352, 354 (5th Cir. 1942). The *I.E. DuPont* case was a state court case which held that the affidavits were sufficient to support the claim of privilege. *In re E.I. DuPont de Nemours and Co*., 136 S.W.3d 218, 223 (Tex. 2004). The *McCaugherty* case was decided under federal law and dealt with a situation in which the party resisting discovery had been given at least two opportunities to present evidence in support of its privilege claim but had provided none. *McCaugherty v. Siffermann*, 132 F.R.D. 234, 244 (N.D.Cal.1990). In the *Upjohn* case, the Supreme Court, interpreting federal law, found that the party resisting discovery should be allowed to preserve the privilege. *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The *Hodges* case was remanded for further proceedings in federal court to determine if the privilege existed. *Hodges, Grant & Kaufmann v. IRS*, 768 F.2d 719 (5th Cir.1985). The same is true of *U.S. v. Chevron Corp*., 1996 WL 264769 (N.D. Cal. 1996).

facts of the *Weisel* case, no support had been provided for the claim of privilege.[17] In an instance in which no support at all is provided in support of a claim of privilege, an *in camera* review may indeed be the only way to determine if the documents are, in fact, privileged.

The Former Directors cite to *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218 (Tex. 2004) in support of their argument that an *in camera* review is required.[18] In that case, that court held that "[t]he trial court abuses its discretion in refusing to conduct an in camera inspection when such review is critical to the evaluation of a privilege claim." See *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004). In this case, I do not believe that an *in camera* inspection is critical to determining entitlement to the privilege.[19] As discussed above, MBIA has provided sufficient support for its position and thus an *in camera* review is not necessary Only if counsel for MBIA is assumed to have mischaracterized the documents within the Privilege Log would a document-by-document review be called for. I have no evidence before me suggesting counsel has been guilty of such dissemblance.

v. Scope of Attorney-Client Privilege Protection

[17] In addition to this, the dissent at the court of appeals level noted the abuse by the party seeking to prevent discovery. The dissent stated: 'The instant cause reflects a rather protracted history of discovery evasion on the part of [the party seeking to avoid discovery]. The actions of the respondent trial court indicate total disinterest in preserving the integrity of the discovery statutes. The opinion of the majority does no more than thwart an already frustrated effort at achieving some semblance of compliance with discovery as spelled out by a predecessor trial court." See *Weisel* at 52. This was generally referred to by the Texas Supreme Court when it overturned the Appellate Court's affirmation of the trial court. See *Id.* at 57-58. Thus, if *Weisel* has any application to the case at bar, it is in support of giving MBIA maximum opportunity to demonstrate entitlement to the privileges it claims – rather than directing production of any privileged documents because MBIA's showing of entitlement has not, as claimed by the Former Directors, to date been sufficient.

[18] In the Motion, the Former Directors incorrectly cite *DuPont* at 136 S.W.2d 218.

[19] The *DuPont* court noted that the objection to the claim of privilege must be a specific and narrow challenge in order to avoid a situation whereby the court would be required to inspect "untold numbers of documents." See *E.I. DuPont* at 226-7. In this case, even if it were necessary to perform an *in camera* review, I believe that the Motion would have to be narrowed in order to avoid expending untold hours of judicial time to review untold thousands of documents to sort out a discovery dispute more properly resolved between the parties.

As part of the Former Director's Motion, they claim that various documents listed on the Privilege Log (the "A/C Documents")[20] do not facially fall under the protections of the attorney-client privilege because they are not between persons who could claim the privilege. Specifically, the Former Directors claim, *inter alia*, that a corporation cannot claim attorney client privilege as to conversations among various of its employees and as to conversations among that corporation's various attorneys.[21]

Under Texas law, the "lawyer-client privilege" is defined by rule and is quite broad. The applicable rule is TEX. R. EVID. 503 which reads in part:

> 503(b) Rules of Privilege.
> (1) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
> (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
> (B) between the lawyer and the lawyer's representative;
> (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
> (D) between representatives of the client or between the client and a representative of the client; or
> (E) among lawyers and their representatives representing the same client.

See TEX. R. EVID. 503(b).

For the purposes of TEX. R. EVID. 503(b) the term "client" is defined as "a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer." See TEX. R. EVID. 503(a)(1). By

[20] The A/C Documents are the approximately 373 documents identified on pages 11 - 13 of the Motion.

[21] To the extent that the Former Directors contend otherwise, it seems to me counter-intuitive to hold that attorneys for a company whose respective representations are for different matters would not be able to communicate among themselves and retain the privilege.

definition, a corporation can be a client. In turn, the term "representative of the client" is defined as "(i) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client or (ii) any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client." See TEX. R. EVID. 503(a)(2). As noted above, the burden is on the asserting party to show that the privilege exists.

In light of the foregoing discussion, I recommend that the issues raised as to the A/C Documents be disposed of by giving the following instructions to the parties:1) Any claim of attorney-client privilege which purports to protect the notes on, or memorialization of legal issues by an employee of MBIA who is listed on the Chart of Individuals[22] is sustained. 2) Any claim of attorney-client privilege which purports to protect communications between any MBIA employee listed on the Chart of Individuals and any attorney, law firm, financial consulting firm, forensic accounting firm retained by or on behalf of MBIA that is listed on the Chart of Individuals is sustained. 3) Any claim of attorney-client privilege which purports to protect communications between any attorney, law firm, financial consulting firm, forensic accounting firm retained by or on behalf of MBIA that is listed on the Chart of Individuals is sustained. 4) Finally, MBIA has waived the attorney-client privilege in any instance in which MBIA permitted review of the documents listed on the Privilege Log by, or otherwise voluntarily transmitted the same to, any other person.

[22] I do not intend to suggest that by simply including a person or entity on a similar chart, a party may create a right to claim the privilege. Rather, the court finds that the parties so identified therein appear to meet the requirements of TEX. R. EVID. 503(a) after a review of the record. I also recognize that the chart is arguably no substitute for an affidavit by MBIA's CEO or other responsible officer. See *Cigna Corp.* at 566. It may be appropriate that MBIA be required to provide additional support for its contention that every employee on the chart indeed falls within Texas Rules of Evidence 503(a)(2).

With regard to attorney-client privilege, the Former Directors also state that "…many, if not most, of the communications listed on MBIA's privilege log were generated for business purposes or as a result of regulatory requirements, not legal advice." See Motion at ¶ 4.12, p. 17. It is unclear about which of the documents the Former Directors make this assertion. The Former Directors also have not provided any support for this assertion beyond a bare averment. In any case, I am unable to find any reference in the Privilege Log to any documents generated for a regulatory purpose or for any purpose other than in association with legal matters.[23] I recommend that the Motion, to the extent it relies on this argument, be denied.

vi. Scope of Work-Product Privilege in Texas

Like attorney-client privilege, in Texas the work-product privilege is provided for by rule. TEXAS RULE OF CIVIL PROCEDURE 192.5 codifies the work-product privilege[24] in Texas and defines work-product as follows:

> Work product defined. Work product comprises:
> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representative, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

TEX. R. CIV. P. 192.5(a).

The plain language of TEX. R. CIV. P. 192.5(a) provides a very broad scope for the work-product privilege. In reading the rule, I conclude that any assertion by the Former Directors that a work-product privilege cannot be asserted solely because the person whose work is involved is not an

[23] TEX. R. EVID. 503 provides for a privilege to apply to documents "making a return or report required by law" in cases in which the authority requiring the return or report so allows. See TEX. R. EVID. 503.

[24] TEXAS RULE OF CIVIL PROCEDURE 192.5(d) states "Privilege. For purposes of these rules, an assertion that material or information is work product is an assertion of privilege." See TEX. R. CIV. P. 192.5(d).

attorney is not supportable. Given the broad standard for determining whether or not documents were created in anticipation of litigation and taking into account the record and evidence presented, I believe that MBIA has met its burden to show that the documents so indicated in the Privilege Log were created in anticipation of litigation.

I further am of the opinion that all individuals listed on the Chart of Individuals fall within those categories of persons described in rule 192.5(a) who are covered by the work-product privilege to the extent they were so identified or referred to on the Privilege Log. In combination with the Chart of Individuals, the Privilege Log, representations, and Declaration are sufficient, I believe, to invoke the protection of rule 192.5.

In considering whether the documents which MBIA seeks to protect based on work-product are covered by the privilege, the court must determine whether or not those documents were prepared in anticipation of litigation. The *Monsanto* case is instructive in this regard. The court there stated:

> Litigation is "anticipated" when two tests are met: (1) whenever the circumstances would indicate to a reasonable person that there is a substantial chance of litigation, and (2) the party now asserting the privilege had a good faith belief that litigation would ensue. A party may reasonably anticipate suit being filed and prepare for the expected litigation before anyone manifests an intent to sue. Actual notice of a potential lawsuit is not required for a party to anticipate litigation. To determine when a party reasonably anticipates or foresees litigation, the trial court must look to the totality of the circumstances and decide whether a reasonable person in the party's position would have anticipated litigation and whether the party actually did anticipate litigation.

See *In re Monsanto Co.*, 998 S.W.2d 917, 923-24 (Tex. App.-Waco 1999, orig. proceeding) (internal citations omitted).

The protections afforded under Texas law for work-product are likewise described in TEXAS RULE OF CIVIL PROCEDURE 192.5. The relevant portion on the rule states:

> Protection of work product.

> (1) Protection of core work product – attorney mental processes. Core work product – the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories – is not discoverable.
> (2) Protection of other work product. Any other work product is discoverable 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 material by other means….

TEX. R. CIV. P. 192.5(b)(1)-(2).

In the Motion the Former Directors, in arguing that MBIA did not anticipate litigation, take a position contrary to that they have adopted by bringing their own Cross-Complaint against MBIA. The facts alleged by the Former Directors, all of which MBIA would have been aware of when the bankruptcy case was commenced for Debtor, surely would create a reasonable concern on the part of MBIA that there was a substantial chance it might be sued.[25] Indeed, when the Trustee settled with MBIA in 2007, the Former Directors, along with other defendants in this adversary, originally argued that the Trustee should sue MBIA rather than settle. Even now, the Former Directors and other defendants insist that the Trustee only avoided suing MBIA because of a potential conflict of interest for his principal counsel in this adversary. Given the positions taken currently and in the past by the Former Directors respecting MBIA's culpability in Debtors demise, the argument that MBIA did not anticipate and should not have anticipated litigation against it in Debtor's bankruptcy case does not even meet a minimal red-face test.

Moreover, I agree with MBIA's contention that bankruptcy itself constitutes "litigation" for purposes of delineating privilege. MBIA has been a major player during Debtor's pre-bankruptcy life and in the chapter 7 case. Formulation of strategies for MBIA in Debtor's bankruptcy – strategies to deal with both MBIA's potential exposure and its rights and claims – would be no more than prudent and, as suggested by the authorities cited by MBIA, certainly

[25] The facts are also sufficient to support a good faith belief that there might be litigation against MBIA.

qualifies as being for or in anticipation of litigation. See *Stanziale v. Career Path Training Corp., (In re Student Fin. Corp.)*, Adv. No. 04-56414, 2006 WL 3484387, at *12 (E.D. Pa. Nov. 29, 2006), *In re Tri-State Outdoor Media Group, Inc.*, 283 B.R. 358, 361 (Bankr.M.D.Ga.2002), *In re Fin. Corp. of Am.*, 119 B.R. 728, 738 (Bankr. C.D. Cal. 1990).

Furthermore, the privilege remains even after the threat of litigation has passed. "The supreme court [of Texas] has already recently held that the privilege is of a continuing duration, and the documents need not have been generated specifically in defense of this [pending] case." See *Cigna Corp.* at 565 citing *Owens-Corning Fiberglas v. Caldwell*, 818 S.W.2d 749, 751-52 (Tex. 1991).

Using the definition of work-product under Texas law and the two types of protected documents, I now turn to the specific objections to MBIA's claim of work-product privilege.

In connection with the very broad scope afforded by the Texas work-product privilege, the TEXAS RULES OF CIVIL PROCEDURE provide the two types of discovery discussed above.[26] Having reviewed the record before me I do not believe that the Former Directors have shown "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 material by other means". See TEX. R. CIV. P. 192.5(b)(2). For this reason, I recommend that the Former Directors' Motion be denied to the extent it seeks production of documents which are asserted to be protected by work-product privilege on the Privilege Log.

viii. Scope of Privilege Under a Joint Defense Agreement

[26] It does not appear that the Motion seeks to compel production of any of work product created by any attorney representing MBIA; however, to the extent that the Motion does, such production is clearly not discoverable under TEX. R. CIV. P. 192.5(b)(1) and should not be compelled.

Under Texas law, the joint-defense privilege is very broad and is commonly referred to as the common interest or community interest rule. See *In re Seigel*, 198 S.W.3d 21, 27 (Tex. App.-El Paso 2006, orig. proceeding). This rule protects documents and information in the same way that attorney-client privilege protects, but, in addition, it acts as an exception as to whom the information may be shared with while still retaining the privilege. "It is not an independent privilege, but an exception to the general rule that no attorney-client privilege attaches to communications that are made in the presence of or disclosed to a third party." *Id.* at 27. This rule is codified in rule 503 of the TEXAS RULES OF EVIDENCE, as stated above.[27]

MBIA claims a joint defense privilege with J.P. Morgan Trust Company, N.A., as Master Trustee and Bond Trustee (the "Bond Trustee") under their *Joint Privilege and Confidentiality Agreement* (the "Joint Privilege Agreement").[28] The Former Directors object to MBIA's claim of joint defense privilege on the basis that the Bond Trustee and MBIA were never co-defendants and that allowing in this case a joint defense privilege would be too broad an exception to the attorney-client privilege. See Motion at ¶¶ 4.18 – 4.19, p. 19 - 20. As the case law and the rules make clear, the Former Directors' argument is incorrect.

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[27] Rule 503 states in part: "(1) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:…(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein…" TEX. R. EVID. 503(b)(1)(C).

[28] The Joint Privilege Agreement was filed on this court's docket at no. 504. The Joint Privilege Agreement states, in part: "The Parties to this Joint Agreement desire to share information in confidence for their common purpose and benefit to facilitate representation of their clients who are creditors of the Hospital, given the potential for litigation in the case recognized by the Parties at this time." Joint Privilege Agreement at p. 1.

MBIA, as insurer of the bonds for the holders of which the Bond Trustee acted, had a common interest with the Bond Trustee. In essence, the debt owed to the Bond Trustee was the basis of a claim in which both MBIA and the Bond Trustee would clearly have a common interest. The two parties shared the benefit of collateral granted by Debtor, and MBIA's obligation would be affected by recoveries by the Bond Trustee. The two parties, recognizing their common interest, even entered into the Joint Defense Agreement evidencing that interest and their intent to maintain the privilege as to exchanges between them.

In Texas, the joint-defense privilege "…creates a privilege for a client to prevent disclosure of confidential communications made for the purpose of facilitating the rendering of professional legal services, when such communications are made by the client's lawyer to a lawyer representing another party in a pending action and concerning a matter of common interest." *Seigel* at 27. In fact, the persons sharing information under this privilege need not be co-defendants in an action. See *Id*.

In Texas, "...the elements necessary to invoke the joint defense privilege are: 1) a common legal interest between all persons with whom the communication is shared; and 2) a communication exchanged among those persons in confidence, not ... for the purpose of allowing unlimited publication and use, but rather, ... for the limited purpose of assisting in their common cause." *In re Lexington Ins. Co.,* 2004 WL 210576 at *2 fn2 (Tex.App.-Houston [14th Dist.] February 2, 2004, orig. proceeding) (internal citations omitted). [29]

The common interest rule must therefore be viewed first through the prism of attorney-client privilege (discussed above) and then in the context of whether that communication concerned a matter of common interest as between the persons asserting the privilege.

I believe that MBIA has provided sufficient support for the position that MBIA and the Bond Trustee fall within the very broad category of being involved in a matter of common interest and that the communications shown on the Privilege Log were exchanged in confidence. The facts of this case, as discussed above, support the contention that the Bond Trustee and MBIA were involved in a matter of common interest and it was agreed between them that their exchanges were to be kept in confidence. As discussed above, it is clear that MBIA (and the Bond Trustee) would reasonably have anticipated disputes arising concerning their prepetition

[29] However, there is no privilege as between two jointly represented parties who assert claims against one another. See TEX. R. EVID. 503(d)(5) accord *In re Valero Energy Corp*., 973 S.W.2d 453, 458 (Tex.App.-Houston [14th Dist.] 1998, orig. proceeding); *In re Mirant Corp*., 389 B.R. 481, 490 (Bankr. N.D. Tex. 2008).

activities. As discussed above and by MBIA, the filing of Debtor's chapter 7 itself is enough to trigger a joint interest in a litigation context.

Therefore, I believe that the same scope of attorney-client privilege should be used when determining whether the joint defense privilege is applicable. Stated differently, I recommend that if a document listed on the Privilege Log would be protected by attorney-client privilege were it not shared, then it should be deemed protected to the same extent under the joint defense agreement privilege under Texas law if it had been shared with the Bond Trustee.

IV. CONCLUSION

After the review of the record I recommend the Motion should be granted in part and denied in part in accordance with the foregoing. To the extent that production is required, I recommend that such production be provided to the Former Directors within 20 days of entry of the Court's final order on the Motion.

Parties may file objections to this Report and Recommendation with the District Court at any time until ten (10) days after the Report and Recommendation's entry.

Respectfully Submitted,

D. Michael Lynn
United States Bankruptcy Judge