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Independent Reviewer

UNITED STATES BANKRUPTCY COURT
 EASTERN DISTRICT OF NEW YORK

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In re:	: Chapter 11
	:
ORION HEALTHCORP, INC.	: Case No. 18-71748 (AST)
CONSTELLATION HEALTHCARE TECHNOLOGIES, INC.	: Case No. 18-71749 (AST)
NEMS ACQUISITION, LLC	: Case No. 18-71750 (AST)
NORTHEAST MEDICAL SOLUTIONS, LLC	: Case No. 18-71751 (AST)
NEMS WEST VIRGINIA, LLC	: Case No. 18-71752 (AST)
PHYSICIANS PRACTICE PLUS, LLC	: Case No. 18-71753 (AST)
PHYSICIANS PRACTICE PLUS HOLDINGS, LLC	: Case No. 18-71754 (AST)
MEDICAL BILLING SERVICES, INC.	: Case No. 18-71755 (AST)
RAND MEDICAL BILLING, INC.	: Case No. 18-71756 (AST)
RMI PHYSICIAN SERVICES CORPORATION	: Case No. 18-71757 (AST)
WESTERN SKIES PRACTICE MANAGEMENT, INC.	: Case No. 18-71758 (AST)
INTEGRATED PHYSICIAN SOLUTIONS, INC.	: Case No. 18-71759 (AST)
NYNM ACQUISITION, LLC	: Case No. 18-71760 (AST)
NORTHSTAR FHA, LLC	: Case No. 18-71761 (AST)
NORTHSTAR FIRST HEALTH, LLC	: Case No. 18-71762 (AST)
VACHETTE BUSINESS SERVICES, LTD.	: Case No. 18-71763 (AST)
MDRX MEDICAL BILLING, LLC	: Case No. 18-71764 (AST)
VEGA MEDICAL PROFESSIONALS, LLC	: Case No. 18-71765 (AST)
ALLEGIANCE CONSULTING ASSOCIATES, LLC	: Case No. 18-71766 (AST)
ALLEGIANCE BILLING & CONSULTING, LLC	: Case No. 18-71767 (AST)
PHOENIX HEALTH, LLC	: Case No. 18-71789 (AST)
	:
Debtors.	: (Jointly Administered)
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**INTERIM REPORT OF INDEPENDENT
 REVIEWER, MELANIE L. CYGANOWSKI**

The undersigned was appointed Independent Reviewer (the “Independent Reviewer”),
 under Federal Rule of Evidence 706, pursuant to the *Order Appointing Independent Reviewer*

dated June 26, 2018 (the “Appointment Order”).¹ ECF No. 335. The purpose of the appointment was to conduct a privilege review of documents in connection with the *Debtors’ Motion for an Order Pursuant to 11 U.S.C. §§ 542(a) and 542(e) Compelling Robinson Brog Leinwand Greene Genovese & Gluck PC to Turn Over and Account for Property of the Estates and Recorded Information*. ECF No. 18. This interim report is meant to detail the Independent Reviewer’s progress to date and establish a procedure for completing the privilege review.

Background

According to the Appointment Order, the Independent Reviewer was to review documents supplied by Robinson Brog “to determine if any such documents are subject to the Fifth Amendment protection or attorney client privilege of the Parmar Parties.” App’t Order ¶ 2, ECF No. 335. To that end, by June 29, 2018, Robinson Brog was to provide to the Independent Reviewer (i) documents related solely to matters in which Robinson Brog represented the Parmar Parties (the “Non-Debtor Only Documents”), and (ii) e-mail exchanges between certain members of the firm, on the one hand, and Paul Parmar, Sotiros (Sam) Zaharis, and Ravi Chivukula, on the other (the “Email ESI”). *Id.* ¶¶ 3–4.

Robinson Brog supplied the above documents and e-mails (together, the “Documents”) in five batches, sent between June 28, 2018 and July 10, 2018. The first two batches were sent by flash drive and internet link, respectively, and contained a combined total of 5.39 GB of Non-Debtor Only Documents. The third batch, also sent by internet link, contained 10.9 GB of both Non-Debtor Only Documents and Email ESI. The final two batches, sent by e-mail and ShareFile, respectively, each contained a single .pdf of Non-Debtor Only Documents. In total, the Documents comprise 240,423 pages.

¹ Capitalized terms used by not defined herein are to be given the meaning ascribed to them in the Appointment Order.

The Appointment Order set an original deadline of August 31, 2018 for the Independent Reviewer to prepare and file a report summarizing the privilege review. However, around this time, I was still working with the parties to obtain information critical to the review, namely a list of relevant parties and entities. Accordingly, I requested, and the Court granted, an extension of the deadline to make a report through and including October 30, 2018. I received a list of relevant names and entities on September 6, 2018. The list included the names of the (i) Debtors; (ii) Non-Debtor Affiliates; (iii) Current and Former Officers and Directors of the Debtors; (iv) Related Individuals; and (v) Entities Through Which Parmar Conducted Business. The list did not include the names of the various professionals other than Robinson Brog that may have been representing the Debtors and/or working with Robinson Brog on specific transactions that were the subject of the e-mails being reviewed.

Review Methodology

Once furnished, the Documents were prepared for review using the e-discovery software program Relativity.² Within the program, the Documents are organized into 71 batches of approximately 500 “documents” each.³ The number of pages in each document varies, and there are 37,754 total documents. The documents are not necessarily in sequential order.

Further, documents are connected by “thread groups.” A “thread group” is composed of related documents and e-mail chains, attachments to those e-mails, and, in some cases, independent pages that either contain only image files from e-mail signature lines or are entirely blank. The production was not “de-duped,” and some groups contain documents in duplicate form. In many cases, these thread groups contain documents that span multiple batches. An

² Counsel for the parties were already using Relativity and consequently, with their consent, we entered into an agreement with Relativity with our review “off-limits” to the other parties.

³ Only two batches did not contain approximately 500 documents. One of these batches contained 2,582 documents, and another contained 57 documents.

example of a thread group is one in which there are common senders although the senders might not be identical for every email in the thread.

Although the Appointment Order only required that I determine whether a privilege applies to any of the reviewed documents, my team and I nonetheless have sought to make an educated determination as to whether a document is Non-Debtor or Debtor/Joint Debtor related. Accordingly, the Documents are being designated as either “Non-Debtor,” “Debtor/Joint,” or “Needs Further Review.” Among these options, my team and I have attempted to categorize each document by reviewing the topics being discussed or referenced in the subject line of the e-mail, and comparing that to the list of matters for which Robinson Brog represented one or more of the Parmar Parties. *See* ECF No. 200. Where this is not possible, my team and I have made an inference based on the individuals included on the e-mails (e.g., if they are an officer or director of one of the Debtors). There were several documents for which we have been unable to discern from the content or context of the e-mail if it pertained to the representation of a Debtor-entity or non-Debtor entity. Those documents were classified as “Needs Further Review,” which can also be classified as “Unknown.”

The next category pertains to whether the subject document is privileged. A document may be classified as one of the following: “Privileged,” “Not Privileged,” or “Redact.” Documents classified under “Redact” contain privileged content that may be protected through redaction, rather than by withholding the document altogether. “Redact” documents will also include notes specifying exactly which part of the document must be redacted.

The third category specifies which type of privilege applies: “ACP” for attorney-client privilege, “WP” for work product, “ACP/WP” for both attorney-client privilege and work product protection, “Common Interest” for the common interest doctrine, and “5th Amendment”

for 5th Amendment privilege.

Finally, based on the above, documents will be classified as: “Produce,” “Produce as Redact,” or “Don’t Produce.” Documents will have a “Produce as Redact” classification when they have also been classified as “Redact.”

Protocols Implemented

The following protocols were implemented in connection with the review of the Documents:

1. As it is often difficult to determine whether a document was provided as a Non-Debtor Only Document or as Email ESI, all documents are being reviewed for purposes of attorney-client privilege (including work product and common interest) and 5th Amendment privilege, irrespective of whether it was determined that the document may be a Debtor or Joint Debtor related document. As such, even if a document is labeled as “Don’t Produce,” that designation is based solely on the determination of whether the document was privileged and does not take into account whether the document should otherwise be produced because it is a Debtor or Joint Debtor document.

2. Generally, the starting point for all attorney-client privilege determinations is the standard set forth in *United States v. Mejia*, 655 F.3d 126 (2d Cir. 2011) (stating that the privilege applies to “communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice”). For work product, my analysis begins with Federal Rule of Civil Procedure 26(b)(3) and the standard set out in *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180 (2d Cir. 2007).

3. Where more nuanced determinations are required, my team and I have relied on the relevant standards used within this Circuit and, where applicable, State. *See, e.g., United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (waiver); *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 2016 N.Y. Slip Op. 04439 (June 9, 2016) (common interest).

4. We have similarly relied on applicable precedent with respect to all determinations under the 5th Amendment. *See, e.g., Fisher v. United States*, 425 U.S. 391 (1976); *In re Grand Jury Subpoena Dated Feb. 2, 2012*, 741 F.3d 339 (2d Cir. 2013).

5. In considering whether an e-mail chain of communications between client and attorney was privileged, my team and I have tried to consider context. Therefore, communications that merely focused on logistics (*e.g.*, dates, time, place of calls between attorney and client, and the transmittal of documents without comment or legal analysis), were generally deemed not privileged.

6. However, each e-mail message in such a chain is being reviewed as a “separate, unique document.” *See Rhoads Indus., Inc. v. Building Materials Corp. of Am.*, 254 F.R.D. 238, 240 (E.D. Pa. 2008). Accordingly, any one e-mail message may be deemed privileged only if it independently meets the requirements for attorney-client privilege. Depending on the circumstances, this may result in either (i) the redaction of individual messages within a larger chain, or (ii) entire chains being deemed privileged even if certain messages within that chain are not themselves privileged.

7. Attachments are being treated similarly, in that they are also being deemed privileged only if they are independently entitled to such protection.

Progress to Date

My most recent count reflects that my team and I have reviewed 8,223 documents. Many documents are comprised of multiple pages, meaning that the number of pages reviewed is considerably higher.⁴

I contemplated producing a preliminary log with this Interim Report, but two factors counseled against doing so. First, because certain thread groups span multiple batches, it is possible that documents as yet un-reviewed may alter the context of already-reviewed e-mail chains. This requires that my team and I maintain the ability to amend the classifications of earlier documents, and not be bound by earlier determinations based on incomplete information.

Second, we would benefit from, and will request from the parties, an additional list of relevant parties detailing the law firms involved in certain Debtor and non-Debtor transactions, and whom those firms represented. The Debtors and/or Parmar Parties appear to have been represented by law firms other than, or in addition to, Robinson Brog in a number of transactions. As that information is often impossible to discern from context alone the identity of a lawyer's client, a list detailing the various attorney-client relationships is necessary. Such a list will not only improve accuracy, but also efficiency.

Proposed Procedure

In light of the above, I propose the following procedure subject to the Court's approval. In two weeks from the date of this Interim Report (November 13, 2018), I will prepare and provide to the parties an interim privilege log. I will then provide additional interim privilege logs every two weeks thereafter, concluding once all documents have been reviewed and logged. To facilitate the review, I request that the parties supply me, as soon as practicable, with the list

⁴ However, I have been unable to determine precisely how many pages have been reviewed to date. As later batches appear to be comprised of shorter documents, it may be assumed that the number of pages reviewed is greater than the number of reviewed documents might reflect.

of attorney-client relationships described above.

A final report will be prepared and filed at that time and I will also provide the Court with a “final” privilege log.

Dated: October 30, 2018
New York, New York

Melanie L. Cyganowski
Melanie L. Cyganowski
Independent Reviewer