

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CIVIL ACTION NO: 08-CVS-000691

CROCKETT CAPITAL CORPORATION,

Plaintiff,

v.

INLAND AMERICAN WINSTON
HOTELS, INC. AND WINN LIMITED
PARTNERSHIP,

Defendants.

**PLAINTIFF’S REPLY SUPPORTING
MOTION FOR DETERMINATION OF
CLAWBACK DISPUTE**

Pursuant to North Carolina Business Court Rule 15.7, Crockett Capital Corporation (“Crockett Capital”) submits this reply to address several arguments newly raised in defendants’ Opposition to Plaintiff’s Motion for Determination of Clawback Dispute.

1. As set out in Crockett Capital’s opening brief, John Brown, an executive of defendant Inland American, disclosed 46 documents to third parties who have no connection to defendants. Notably, defendants do not dispute that the disclosures were intentional. The disclosures waived attorney-client privilege before the documents were produced in this litigation, and the documents are therefore not subject to defendants’ clawback demand. *See Nationwide Mut. Fire Ins. Co. v. Bournal*, 172 N.C. App. 595, 603 (2005) (“Our courts are obligated to strictly construe the attorney-client privilege” because “the attorney-client privilege may result in the exclusion of evidence which is otherwise relevant and material”) (citation and punctuation omitted).

2. Defendants nevertheless argue that Mr. Brown's disclosures did not waive attorney-client privilege, first because he is not part of management and lacked the authority to waive the corporate privilege.

3. After Crockett Capital moved this Court to determine the clawback dispute, a mediation occurred on June 1.¹ Pursuant to North Carolina Business Court Rule 19 and the rules for Mediated Settlement Conferences in Superior Court Actions, each party must be represented by a person with authority to negotiate on behalf of the party to the action. Mediated Settlement Conferences Rule 4. Defendants chose to send two individuals to represent it at this mediation. One was Mr. Brown.

4. Mr. Brown's presence at the mediation is consistent with the evidence of Mr. Brown's management status set out in Crockett Capital's opening brief, including that Mr. Brown and Mr. Thomas McGuinness (who accompanied Mr. Brown to the mediation) were the defendants' representatives at this Court's motion hearing on June 13, 2008 in Mecklenburg County. Defendants' representation through the mediation that Mr. Brown had the authority to negotiate on behalf of defendants, as well as other evidence of his management role, estops them from contending that Mr. Brown lacked authority to waive corporate privilege.

5. In addition, in March 2008, two months after Crockett Capital filed this suit, Inland American sued the principals of Crockett Capital, Mr. Robert Winston and Mr. Kenneth Crockett, in Wake County Superior Court, alleging violation of a non-solicitation agreement. *Inland American Winston Hotels, Inc. v. Kenneth R. Crockett and Robert W. Winston, III*, 08-CV-003995. Mr. Brown has been the sole designated corporate representative of Inland at the depositions of both Mr. Crockett and Mr. Winston in that action.

¹ The mediation resulted in impasse, as described in the letter to this Court from Mr. David Hamilton dated June 17, 2009.

6. Defendants next argue that even if Mr. Brown is part of management, his intentional disclosures did not waive the privilege, so long as he maintained a “reasonable expectation of confidentiality” and shared a “common interest” with the third parties to whom he disclosed so much. They rely principally on *Atwood v. Burlington Industries Equity, Inc.*, 908 F. Supp. 319, 322 (M.D.N.C. 2007). Their argument misinterprets *Atwood*.

7. *Atwood* holds that a communication made to an attorney in the presence of a third party is privileged only if there is both (a) an expectation of confidentiality, *and* (b) the third party is an agent of the client. *Atwood*, 908 F. Supp. at 322. A “common interest” between the client and the third party is not sufficient. The third party must actually be an agent of the client. *See id.* (“[T]he presence of a third party will not vitiate the privilege **if the third party is the client’s agent.**”) (emphasis added).²

8. Defendants have not attempted to argue that Mr. Brown’s wife, daughter, or business associate were agents of defendants for any purpose whatsoever. Accordingly, by its own terms, *Atwood* does not instruct this Court on waiver.

9. Defendants also misconstrue *Jonathan Corp. v. Prime Computer, Inc.*, 114 F.R.D. 693 (E.D. Va. 1987). Defendants claim that Crockett Capital relies on *Jonathan* to establish that Mr. Brown was part of management, and therefore endowed with authority to waive the privilege.

10. To the contrary, *Jonathan*, putting the authority question to one side, teaches that *any* corporate employee may waive the corporation’s privilege by disclosing a privileged document to a third party. If that employee lacked authority to disclose, then the corporation

² The treatise defendants cite is to the same effect. *See* 1 Brandis & Broun on North Carolina Evidence § 129 (6th ed. 2004) (“[T]here is no privilege if [the communication] was made in the presence of one not an agent of client or attorney.”).

may seek damages from the employee for acting ultra vires. But the corporation may not put the privilege genie, once waived, back in the bottle.

11. *Jonathan* makes plain that the Court may decide this dispute without inquiring into Mr. Brown's status within Defendants' corporate hierarchy. His disclosure of information relevant to this action to third parties waived the privilege.

12. Defendants also attempt to escape the implication of *Jonathan* by arguing that it applies only where the non-management corporate employee disclosed a document to the company's adversary. That happened to be the case in *Jonathan* itself. But the court did not rely on that fact.

13. The court's reasoning was much broader. It noted that *Upjohn Co. v. United States*, 449 U.S. 383 (1981) strengthened corporate attorney-client privilege by holding that certain communications between corporate counsel and corporate employees may be privileged even when the corporate employee is outside the "control group." *Jonathan* held that if the corporation is reaching for the benefit of the *Upjohn* privilege, the corporation must accept its consequence: corporate employees outside the control group who are protected by the privilege may also waive it by their disclosures to third parties. *Jonathan*, 114 F.R.D. at 698-99.

14. The *Jonathan* court nowhere relied on the identity of the third-party recipient to decide the question of privilege. Rather, *Jonathan* instructs more generally that *any* corporate employee has the power to waive the corporation's privilege. Under *Jonathan*, following *Upjohn*, because Mr. Brown was an employee of defendants, he had the power to waive the privilege. That he did not disclose to defendants' adversary is irrelevant.

15. Finally, defendants return to their attempt to invoke work product protection. Defendants maintain that work product protection may be waived only "by disclosure to third

parties when the disclosure substantially increases the opportunities for potential adversaries to obtain the information.” Defendants argue that because Mr. Brown did not disclose the documents to Crockett Capital directly, the disclosures did not “substantially increase the opportunities” for Crockett Capital to obtain the information.

16. But Mr. Brown’s disclosures *did* substantially increase Crockett Capital’s opportunity to obtain the information. As one illustration of this result, Crockett Capital can subpoena each of these individuals (already, Crockett Capital has subpoenaed Mr. Tweeten’s company) for documents relevant to this litigation. None of the individuals receiving these documents from Mr. Brown would have a valid objection to producing the 46 documents at issue in this motion because the documents are all relevant, the documents are not work product as to those individuals, and the documents are not protected by the attorney-client privilege.

17. In this way, Mr. Brown’s disclosure did open the door for Crockett Capital to obtain the documents, and did “substantially increase” Crockett Capital’s opportunities to obtain them. Even under defendants’ proposed test for work product waiver, defendants have lost any protection that may once have attached to these documents.³

³ In addition, as noted in Crockett Capital’s opening brief, defendants use the wrong test for work product waiver. The test is as follows: “[W]here the third party to whom the disclosure is made is not allied in interest with the disclosing party or does not have litigation objectives in common, the protection of the doctrine will be waived.” *Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113, 115 (S.D.N.Y. 2002). Mr. Brown’s wife, daughter, and business associate are not parties to this litigation and share no litigation objectives with defendants. Mr. Brown waived work product protection when he disclosed the documents to these individuals.

WHEREFORE, Crockett Capital respectfully requests that the Court enter an Order declaring that the 46 documents at issue are not subject to the clawback provision.

This 22d day of June, 2009.

/s/ Richard C. Worf

John R. Wester
N.C. Bar No. 4660
Louis A Bledsoe, III
N.C. Bar No. 12730
Richard C. Worf
N.C. Bar No. 37143

Robinson, Bradshaw & Hinson, P.A.
101 North Tryon Street, Suite 1900
Charlotte, NC 28246
(704) 377-8135
Fax: (704) 373-3939
jwester@rbh.com
lbleadsoe@rbh.com
rworf@rbh.com

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF COMPLIANCE WITH RULE 15.8

The undersigned attorney for Crockett Capital Corporation hereby certifies that this brief complies with the requirements contained in Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

/s/ Richard C. Worf
Richard C. Worf

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFF'S REPLY SUPPORTING MOTION FOR DETERMINATION OF CLAWBACK DISPUTE** has been served upon each of the parties to this action via the Business Court's electronic filing system as follows:

Scott M. Tyler
Moore & Van Allen PLLC
100 N. Tryon Street, Suite 4700
Charlotte, NC 28202-1963
scotttyler@mvalaw.com

Jeffrey D. Herschman
Melissa R. Roth
DLA Piper
6225 Smith Avenue
Baltimore, MD 21209-3600
jeffrey.herschman@dlapiper.com
melissa.roth@dlapipcr.com

and I hereby certify that I have mailed the document by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

Richard T. Boyette
Paul S. Holscher
Cranfill, Sumner & Hartzog, LLP
P.O. Box 27808
Raleigh, NC 27611-7808

This 22d day of June, 2009.

/s/ Richard C. Worf
Richard C. Worf