

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

CROCKETT CAPITAL CORPORATION,
Plaintiff,

v.

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

Civil Action No.: 08-cvs-000691

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR DETERMINATION OF CLAWBACK DISPUTE**

Defendants Inland American Winston Hotels, Inc. and Winn Limited Partnership (collectively, "Inland") submit this opposition to the Motion for Determination of Clawback Dispute filed by Plaintiff Crockett Capital Corporation ("Crockett Capital"). Crockett Capital asserts that, despite Inland's request pursuant to the clawback provision of the Court's Case Management Order that Crockett Capital destroy certain privileged documents that were inadvertently produced during discovery, Crockett Capital should be permitted to use those documents in the course of this litigation. Crockett Capital's request should be denied. The documents that are the subject of this dispute are subject to the attorney-client privilege and/or work product doctrine. (The entries on Inland's privilege log that address the documents at issue here are attached hereto as Exhibit A.) As such, they fall within the purview of the clawback provision.

Crockett Capital first contends that no privilege applies because Inland employee John Brown disclosed the documents to a consultant or to his wife and/or daughter. This argument is

incorrect. As an initial matter, disclosure of an otherwise privileged communication to a third party does not automatically waive the attorney-client privilege. *See, e.g.*, 1 Brandis & Broun on North Carolina Evidence § 129 (6th ed. 1988); *Atwood v. Burlington Indus. Equity, Inc.*, 908 F. Supp. 319, 322 (M.D.N.C. Jan. 11, 2007). As these sources demonstrate, a party does not waive its privilege by disclosing the information to someone with a common interest where there was a reasonable expectation of confidentiality. *See id.* No employment relationship is required if there was a reasonable expectation of confidentiality. *Atwood*, 908 F. Supp. at 322. Plaintiff attempts to distinguish this precedent as applying to in-person meetings as opposed to written communications. The application of those principles to the facts at issue here, however, demonstrates that the documents maintained their privileged character. As the courts have held, “[t]he key question is whether, despite the presence of the third party, the client reasonably understood the conference to be confidential.” *Id.* Crockett Capital does not (and cannot) offer any support for the notion that Mr. Brown did not intend for these documents to be kept confidential.

Crockett Capital next contends that Mr. Brown is part of the “management” of Inland and therefore had the authority to waive the privilege on behalf of the company. Crockett Capital relies principally upon *Jonathan Corp. v. Prime Computer, Inc.*, 114 F.R.D. 693 (E.D. Va. 1987). *Jonathan*, however, presents very different circumstances than those presented here. In *Jonathan*, an employee of the defendant voluntarily provided a copy of a privileged memorandum to the plaintiff. As the court in *Jonathan* stated, “Prime cannot now disclaim the voluntary disclosure of the document to Jonathan by the very individual Prime had designated to deal with Jonathan on the matter” *Id.* at 700. That the document was sent to the plaintiff by the defendant was a central part of the court’s holding. Here, Mr. Brown sent the privileged

information to his family – not an adversary. Unlike the defendant employee in *Jonathan*, Mr. Brown did not have actual or apparent authority from Inland – the holder of the privilege – to disclose that information to his family. Inland never acquiesced in or ratified Mr. Brown’s disclosures. Indeed, as soon as Inland learned of these disclosures, Inland told Mr. Brown that such disclosures were inappropriate and took immediate steps to limit the consequence of such disclosure.

Finally, as to those documents protected from disclosure by the work product doctrine,¹ courts have routinely recognized that this privilege only is waived by disclosure to third parties when the disclosure “substantially increased the opportunities for potential adversaries to obtain the information.” 8 Charles Alan Wright et al., *Federal Practice & Procedure* § 2024 (1994); *In re Copper Market Antitrust Litig.*, 200 F.R.D. 213, 221 n.6 (S.D.N.Y. 2001). The documents at issue here, as Plaintiff concedes, were not disclosed to adversarial parties, but rather to members of Mr. Brown’s family. Because the purpose of the work product doctrine is to protect material from an opposing party in litigation, and not necessarily from the rest of the world generally, the doctrine’s concerns are not implicated by a disclosure – such as the one here – that does not increase the risk of adversarial intrusion into an attorney’s zone of privacy. Even the treatise cited by Plaintiff supports this result. The third parties to whom these disclosures were made have interests aligned with those of Mr. Brown and Inland, and certainly do not have interests aligned with Crockett Capital.

¹ Plaintiff identifies a November 27, 2007 document with the Bates label “IAWH 0068523” and states that the document is not subject to the work product doctrine since it was prepared “some months before this litigation began.” It is black letter law, however, and Plaintiff concedes, that the doctrine applies not only to documents created during the litigation, but also to documents created “in anticipation of litigation.” That this document was created prior to the filing of a complaint, therefore, is inconsequential.

For these reasons, Inland respectfully requests that the Court find that the documents at issue contain privileged information and are subject to the clawback provision in the Court's Case Management Order.

Rule 15.8 Certificate

Inland hereby certifies that this brief complies with Business Court Rule 15.8.

Dated: June 18, 2009

Respectfully submitted,

/s/ Scott M. Tyler

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Winn Limited Partnership*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Defendants' Opposition to Plaintiff's 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:

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Dated: June 18, 2009

/s/ Scott M. Tyler
Scott M. Tyler

Exhibit A

Prod Begin	Prod End	Date	From	To	Copied To	Subject	Privilege
IAWH 0068225	IAWH 0068225	4/7/2008	Brown, John	mrsdb7@aol.com; Brown, John		Email chain relaying legal advice concerning Durham Westin	Attorney Client; Work Product
IAWH 0068229	IAWH 0068229	1/15/2008	Brown, John	Tweeten, Rolf	Manno, Jeff	Email chain relaying legal advice concerning RDU Aloft documentation	Attorney Client
IAWH 0068230	IAWH 0068230	1/15/2008	Brown, John	Tweeten, Rolf		Email chain relaying legal advice concerning RDU Aloft documentation	Attorney Client
IAWH 0068231	IAWH 0068231	1/18/2008	Brown, John	Brown, Mia		Email chain seeking and providing legal advice concerning RDU Aloft submission	Attorney Client; Work Product
IAWH 0068233	IAWH 0068233	3/2/2008	Brown, John	Brown, Mia	mrsdb7@aol.com	Email concerning attached draft letter to Crockett Capital Corporation regarding Durham Westin prepared at the request of counsel	Work Product

Exhibit A

Prod Begin	Prod End	Date	From	To	Copied To	Subject	Privilege
IAWH 0068234	IAWH 0068234					Attached draft letter to Crockett Capital Corporation regarding Durham Westin prepared at the request of counsel	Work Product
IAWH 0068235	IAWH 0068235	3/3/2008	Brown, John	Brown, Mia		Email concerning attached draft letter to Crockett Capital Corporation regarding Durham Westin prepared at the request of counsel	Attorney Client; Work Product
IAWH 0068236	IAWH 0068236					Attached draft letter to Crockett Capital Corporation regarding Durham Westin prepared at the request of counsel	Attorney Client; Work Product
IAWH 0068238	IAWH 0068238	3/3/2008	Brown, John	Brown, Mia; mrsdb7@aol.com		Email concerning draft letter to Crockett Capital Corporation regarding Durham Westin prepared at the request of counsel	Work Product
IAWH 0068239	IAWH 0068239	3/4/2008	Brown, John	Brown, Mia		Email chain seeking and providing legal advice concerning draft letter to Crockett Capital Corporation regarding Durham Westin	Attorney Client; Work Product

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Prod Begin	Prod End	Date	From	To	Copied To	Subject	Privilege
IAWH 0068242	IAWH 0068242	3/4/2008	Brown, John	Brown, Mia		Email chain seeking and providing legal advice concerning draft letter to Crockett Capital Corporation regarding Durham Westin	Attorney Client; Work Product
IAWH 0068243	IAWH 0068243	3/4/2008	Brown, John	Brown, Mia		Email chain seeking and providing legal advice concerning draft letter to Crockett Capital Corporation regarding Durham Westin	Attorney Client; Work Product
IAWH 0068245	IAWH 0068245	3/5/2008	Brown, John	Brown, Mia		Email chain seeking and providing legal advice concerning draft complaint	Attorney Client; Work Product
IAWH 0068250	IAWH 0068250	5/15/2008	Brown, John	mrsdb7@aol.com		Email chain seeking and providing legal advice concerning amendment to Chapel Hill Aloft sales contract	Attorney Client
IAWH 0068251	IAWH 0068251	5/15/2008	Brown, John	Lithgow, Tom; Filippelli, Scott		Email chain seeking and providing legal advice concerning amendment to Chapel Hill Aloft sales contract	Attorney Client

Exhibit A

Prod Begin	Prod End	Date	From	To	Copied To	Subject	Privilege
IAWH 0068252	IAWH 0068252	5/15/2008	Brown, John	mrsdb7@aol.com		Email chain seeking and providing legal advice concerning amendment to Chapel Hill Aloft sales contract	Attorney Client
IAWH 0068253	IAWH 0068253	5/15/2008	Brown, John	mrsdb7@aol.com		Email chain seeking and providing legal advice concerning amendment to Chapel Hill Aloft sales contract	Attorney Client
IAWH 0068254	IAWH 0068254	5/15/2008	Brown, John	'mrsdb7@aol.com'		Email chain seeking and providing legal advice concerning amendment to Chapel Hill Aloft sales contract	Attorney Client
IAWH 0068255	IAWH 0068255	5/15/2008		'mrsdb7@aol.com'		Email chain seeking and providing legal advice concerning amendment to Chapel Hill Aloft sales contract	Attorney Client
IAWH 0068281	IAWH 0068281	5/3/2008	Brown, John	mrsdb7@aol.com		Email chain relaying legal advice concerning opposition to motion to dismiss	Attorney Client; Work Product

Exhibit A

Prod Begin	Prod End	Date	From	To	Copied To	Subject	Privilege
IAWH 0068282	IAWH 0068282	4/7/2008	Brown, John	mrsdb7@aol.com; Brown, John		Email chain relaying legal advice concerning Durham Westin	Attorney Client; Work Product
IAWH 0068289	IAWH 0068289	5/15/2008	mrsdb7@aol.com	Brown, John		Email chain seeking and providing legal advice concerning amendment to Chapel Hill Aloft sales contract	Attorney Client
IAWH 0068290	IAWH 0068290	5/15/2008	mrsdb7@aol.com	Brown, John		Email chain seeking and providing legal advice concerning amendment to Chapel Hill Aloft sales contract	Attorney Client
IAWH 0068291	IAWH 0068291	5/15/2008	mrsdb7@aol.com	Brown, John		Email chain seeking and providing legal advice concerning amendment to Chapel Hill Aloft sales contract	Attorney Client
IAWH 0068292	IAWH 0068292	5/15/2008	mrsdb7@aol.com	Brown, John		Email chain seeking and providing legal advice concerning amendment to Chapel Hill Aloft sales contract	Attorney Client

Exhibit A

Prod Begin	Prod End	Date	From	To	Copied To	Subject	Privilege
IAWH 0068496	IAWH 0068496	5/15/2008	Brown, John	'mrsdb7@aol.com'		Email chain seeking and providing legal advice concerning amendment to Chapel Hill Aloft sales contract	Attorney Client
IAWH 0068497	IAWH 0068497	5/15/2008	Brown, John	'mrsdb7@aol.com'		Email chain seeking and providing legal advice concerning amendment to Chapel Hill Aloft sales contract	Attorney Client
IAWH 0068498	IAWH 0068498	5/15/2008	Brown, John	'mrsdb7@aol.com'		Email chain seeking and providing legal advice concerning amendment to Chapel Hill Aloft sales contract	Attorney Client
IAWH 0068499	IAWH 0068499	5/15/2008	Brown, John	mrsdb7@aol.com		Email chain seeking and providing legal advice concerning amendment to Chapel Hill Aloft sales contract	Attorney Client
IAWH 0068500	IAWH 0068500	5/15/2008	Brown, John	mrsdb7@aol.com		Email chain seeking and providing legal advice concerning amendment to Chapel Hill Aloft sales contract	Attorney Client

Exhibit A

Prod Begin	Prod End	Date	From	To	Copied To	Subject	Privilege
IAWH 0068501	IAWH 0068501	5/15/2008	Brown, John	Lithgow, Tom; Filippelli, Scott		Email chain seeking and providing legal advice concerning amendment to Chapel Hill Aloft sales contract	Attorney Client
IAWH 0068502	IAWH 0068502	5/15/2008	Brown, John	mrsdb7@aol.com		Email chain seeking and providing legal advice concerning amendment to Chapel Hill Aloft sales contract	Attorney Client
IAWH 0068506	IAWH 0068506	3/4/2008	Brown, John	Brown, Mia		Email chain relaying legal advice concerning draft letter to Crockett Capital Corporation regarding Durham Westin	Attorney Client; Work Product
IAWH 0068507	IAWH 0068507	3/4/2008	Brown, John	Brown, Mia		Email chain relaying legal advice concerning draft letter to Crockett Capital Corporation regarding Durham Westin	Attorney Client; Work Product
IAWH 0068510	IAWH 0068510	3/3/2008	Brown, John	Brown, Mia		Email chain providing and relaying legal advice concerning draft letter to Crockett Capital Corporation regarding Durham Westin	Attorney Client; Work Product

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Prod Begin	Prod End	Date	From	To	Copied To	Subject	Privilege
IAWH 0068511	IAWH 0068511	3/3/2008	Brown, John	Brown, Mia; mrsdb7@aol.com		Email concerning draft letter to Crockett Capital Corporation regarding Durham Westin prepared at the request of counsel	Work Product
IAWH 0068513	IAWH 0068513	3/3/2008	Brown, John	Brown, Mia		Email concerning attached draft letter to Crockett Capital Corporation regarding Durham Westin prepared at the request of counsel	Work Product
IAWH 0068514	IAWH 0068514					Attached draft letter to Crockett Capital Corporation regarding Durham Westin prepared at the request of counsel	Work Product
IAWH 0068515	IAWH 0068515	3/1/2008	Brown, John	Brown, Mia	mrsdb7@aol.com	Email concerning attached draft letter to Crockett Capital Corporation regarding Durham Westin prepared at the request of counsel	Work Product
IAWH 0068516	IAWH 0068516					Attached draft letter to Crockett Capital Corporation regarding Durham Westin prepared at the request of counsel	Work Product

Exhibit A

Prod Begin	Prod End	Date	From	To	Copied To	Subject	Privilege
IAWH 0068518	IAWH 0068518	2/22/2008	Brown, John	'dbrown@ais-ins.com'		Email chain providing legal advice concerning attached draft complaint	Attorney Client; Work Product
IAWH 0068519	IAWH 0068519					Attached draft complaint	Attorney Client; Work Product
IAWH 0068520	IAWH 0068520	1/17/2008	Brown, John	Brown, Mia		Email chain seeking and providing legal advice concerning RDU Aloft submission	Attorney Client; Work Product
IAWH 0068521	IAWH 0068521	1/14/2008	Brown, John	Tweeten, Rolf		Email chain relaying legal advice concerning RDU Aloft easement	Attorney Client; Work Product
IAWH 0068522	IAWH 0068522	1/14/2008	Brown, John	Tweeten, Rolf		Email chain relaying legal advice concerning RDU Aloft documentation	Attorney Client

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Prod Begin	Prod End	Date	From	To	Copied To	Subject	Privilege
IAWH 0068523	IAWH 0068523	1/14/2008	Brown, John	Tweeten, Rolf	Manno, Jeff	Email chain relaying legal advice concerning RDU Aloft easement	Attorney Client; Work Product