IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
DIVISION OF PROBATE

ARTHUR P. DUECK, *et al.*	)	CASE NO. 2012 ADV 179424
	)	
Plaintiffs,	)	
	)	JUDGE ANTHONY J. RUSSO
v.	)	
	)	**REPLY IN SUPPORT OF PLAINTIFFS ARTHUR P. DUECK'S, TODD GILMORE'S, NANCY BINDER'S, AND WILLIAM R. KELLER'S, PUTATIVE PLAINTIFFS RHONDA LOJE'S AND JEFFREY MANSELL'S MOTION TO COMPEL**
THE CLIFTON CLUB COMPANY, *et al.*	)	
	)	
Defendants.	)	
	)	
	)	
	)	

INTRODUCTION

The Trustees have wrongly claimed attorney-client privilege over the Improperly Withheld Documents.[1] Under Ohio law, a party claiming attorney-client privilege has the burden to show that the privilege applies to documents withheld in discovery. Instead of coming forward with evidence in their Opposition to Plaintiffs' Motion to Compel, the Trustees base their Opposition on the false premise that because one of the parties' to the communications in the Improperly Withheld Documents is an attorney, it is "reasonable to believe" that those documents are privileged. That is not the standard for showing that the privilege applies. Rather, under Ohio law, the Trustees were required to show that the documents were created in an attorney-client relationship and made for the purposes of rendering legal advice. For Document Nos. 46, 47, 227, 228, 257, 262, and 263, Mr. Rupert and Mr. Cooper, parties to those communications, have submitted unrefuted affidavits showing that those documents were not created in an attorney-client relationship, not intended to be confidential and not made for the purpose of rendering legal advice. For Document No. 117, the Trustees have no evidence beyond guess-work that the document is privileged, while the Plaintiffs presented evidence from

[1] Unless noted otherwise, all capitalized terms have the same meaning as used in the Plaintiffs' Motion to Compel.

the Trustees' own records showing that document was shared with parties who were not trustees. Accordingly, the Improperly Withheld Documents are not privileged and must be produced.

The Trustees also base their opposition to producing their original documents on the false premise that a party must request inspection of the original documents. Ohio Rules of Civil Procedure Rule 34 plainly requires a party to allow inspection of original documents for review and copying. Further, the Trustees' complaints related to burden and expense are unsupported and meritless. Given the Trustees' previous failure to "capture" all responsive documents in their prior production, the Court should compel the Trustees to make their original documents available for inspection and copying.

LAW AND ARGUMENT

I. The Improperly Withheld Documents Are Not Privileged.

The party claiming attorney-client privilege "carries the burden of establishing the existence of that privilege." *Perfection Corp. v. Travelers Cas. & Sur.*, 153 Ohio App. 3d 28, 2003-Ohio-3358, at ¶ 12 (8th Dist.). Where a party fails to present evidence showing that the privilege applies, the court should order the production of improperly withheld documents. *Id.*; *see also Quinton v. MedCentral Health Sys.*, 5th Dist. No. 2006CA0009, 2006-Ohio-4238, ¶ 24 (affirming order compelling production where party "failed to adduce any evidence whatsoever to establish the privilege"); *Nageotte v. Boston Mills Brandywine Ski Resort*, 9th Dist. No. 26563, 2012-Ohio-6102, at ¶ 13 (affirming order compelling production because "trial court was not presented with evidence that the witness statements at issue were confidential.")

Here, the Trustees have failed to come forward with ***any*** evidence showing that the attorney-client privilege applies to the Improperly Withheld Documents.[2] The first set of those

[2] Realizing that their claims of privilege are baseless, the Trustees have removed the privileged designation for two of the Improperly Withheld Documents already: Document Nos. 129 and 141. Copies of those documents are attached hereto as Exhibits 14 and 15. A quick review of those documents shows that the privilege designation was

documents, Document Nos. 46, 47, 227, 228, 257, 262, and 263 (the "Cooper and Rupert Communications"), all include communications that former trustees Rupert's or Cooper's unrefuted affidavits show were not created in the course of an attorney-client relationship or created for the purpose of rendering confidential legal advice. The Trustees have also not provided any evidence showing that the remaining document, Document No. 117 (the "Quintrell Letter"), was created during an attorney-client relationship, and that document appears to have been disclosed to third-parties, meaning any privilege is waived. The Trustees attempt to overcome that overwhelming evidence with speculation and ad hoc conclusions, but supposition is insufficient to show that the attorney-client privilege prevents disclosure of relevant documents. Accordingly, the remaining Improperly Withheld Documents must be disclosed.

A. The Cooper and Rupert Communications Are Not Privileged.

Trustees were required to provide evidence that there was an attorney-client relationship between the parties to the Cooper and Rupert Communications and that those communications were intended to be confidential and made for the purpose of rendering legal advice. *Smith v. Smith*, 1st Dist. No. C-050787, 2006-Ohio-6975, at ¶¶ 7, 10 (finding that the privilege protects "confidential communications made between the client and his attorney in the course of seeking or giving legal advice" and that a "communication that is not intended to be confidential is not privileged."); *State v. Montgomery*, 997 N.E.2d 579, 2013-Ohio-4193, at ¶ 21 (8th Dist.) ("[T]he attorney-client privilege exists only when the communication is for the purpose of requesting or receiving legal advice and is intended to be confidential.") The Trustees offered ***zero*** evidence to refute the affidavits of Mr. Rupert and Mr. Cooper. And those unrefuted affidavits show that the Cooper and Rupert Communications were not intended to be or rendered as confidential legal advice and not made during the course of an attorney-client relationship:

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baseless and that the Trustees stone-walled production of those documents based purely on an attorney being a party to those communications.

- Mr. Rupert was a trustee from 1969-1997, which encompasses the entire timeframe of the Cooper and Rupert Communications. (Ex. 2, Ex. 3 at ¶ 3.)

- His unrefuted affidavit states that neither himself nor any other trustee retained Mr. Cooper as an attorney for the Trust or the trustees. (*Id.* at ¶ 7.)

- Moreover, all of his "communications during [his] tenure . . . regarding Clifton Park Trust matters were as a Trustee" and he "never served in the capacity of Legal Counsel to the Trustees." (*Id.* at ¶¶ 4-5.)

- Finally, his "communications with the Clifton Park Trustees . . . were not intended to be confidential attorney client communications."

- Mr. Cooper was a trustee from 1984-2001.

- Consistent with Mr. Rupert's unrefuted statements, Mr. Cooper's unrefuted affidavit shows that he never served as attorney for or had an attorney-client relationship with the Trust or trustees. (Cooper at ¶¶ 6-7.)

- Further, like Mr. Rupert, all of his "communications during [his] tenure" as trustee "regarding Clifton Park Trust matters were as a volunteer Trustee, not as a practicing lawyer." (*Id.* at ¶ 5.)

Accordingly, the Cooper and Rupert Communications are not privileged.

The Trustees' Opposition is based on the false premise that it is "reasonable to believe" that the "Trustees viewed" the Improperly Withheld Documents as "confidential legal advice provided on behalf of the Trustees." But the Trustees' nebulous claim does not identify any specific prior trustees who would have had the reasonable belief or who retained Mr. Cooper and/or Mr. Rupert. Instead, like Document Nos. 129 and 141, it appears the Trustees have no substantive basis for their privilege claim. Further, although the Trustees do not identify in their Opposition who they claim the attorney for the Cooper and Rupert Communications was, the privilege log identifies Mr. Cooper as "attorney Cooper" for all such communications. (Ex. 2.) Thus, Mr. Rupert's unrefuted affidavit is enough to show that the privilege does not apply as he would be the purported client as a trustee under the Trustees' theory for purposes of all the communications. Finally, it is not reasonable to believe any of the Cooper and Rupert Communications are privileged because, as shown above, it is unrefuted that during the

timeframe of those communications neither Mr. Rupert or Mr. Cooper served as attorney for the then trustees or trust, had an attorney-client relationship with the then trustees or trust, and did not communicate regarding Trust matters with fellow trustees for the purpose of rendering confidential or legal advice.

B. The Quintrell Letter Is Not Privileged.

The Trustees' Opposition regarding the Quintrell Letter is not based on any evidence. Rather, the Trustees base their opposition on the speculative and unsupported premises that (1) Quintrell acted simultaneously as trustee and attorney, (2) Pyke, Sr., a partner at a different law firm, was also counsel for the then trustees, and (3) then trustee Reed did not do what he said, *i.e.* share the contents of the document with a third-party. Again, such guesswork does not satisfy the Trustees' burden to show that the Quintrell Letter is subject to the attorney-client privilege.

First, as a matter of law, there was no attorney-client relationship between then trustee Quintrell and the other then trustees as Mr. Quintrell could not have simultaneously worn both hats by acting as a trustee and an attorney. *See Holik v. Lafferty*, 11th Dist. No. 2005-A-0005, 2006-Ohio-2652, ¶¶ 15-16; *Haller v. Wiles, Doucher, Van Buren, & Boyle Co.*, 10th Dist. No. 99AP-1341, 2000 Ohio App. LEXIS 2416, *4 (June 8, 2000); *Ziegler v. Bove*, 8th Dist. No. 98 CA 65, 1998 Ohio App. LEXIS 6473, at *5 (December 23, 1998). Further, the Trustees' ad hoc argument that the letter is privileged because it appeared on law firm stationery does not satisfy the Trustees' burden. The Trustees' must present more than "an attorney wrote it, thus it is privileged." For the same reason, the Trustees' argument that Pyke, Sr. was an attorney for the then trustees has no basis. Finally, the Trustees' offer no rebuttal beyond speculation to the evidence showing that then trustee Reed said he "will" disclose the ***contents*** of the Quintrell Letter to the third-party Club President Mr. Sessions. Disclosure of the contents of the communication waives the privilege as to the whole document. *Hollingsworth v. Time Warner*

Cable, 157 Ohio App.3d 539, 2004-Ohio-3130, at ¶ 65-66 (1st Dist.) (A client's disclosure of "communications with his or her attorney to a third party" is simply "inconsistent with an assertion of attorney-client privilege." (quotations omitted)). Because Mr. Reed was the purported client and he voluntarily disclosed the contents of the Quintrell Letter, any potential privilege was waived.

II. The Trustees' Meritless Burden and Expense Claims Cannot Prevent the Inspection of the Trustees' Original Documents.

The Trustees' opposition to producing the original documents is based on the incorrect premise that under Civ.R. 34, a party must specifically request inspection of the producing party's original documents. The Trustees have not produced any authority supporting their reading of Civ.R. 34. And contrary to the Trustees' misreading, under Civ.R. 34, the Trustees' were required to produce the original documents for inspection and copying either (1) "as they are kept in the ordinary course of business" or (2) "organized and labeled to correspond with the categories in the request." Civ.R. 34(B). Here, the Trustees did neither, and their description of the Plaintiffs' Motion as a "second-bite of the apple" is false because there was never a "first-bite." Accordingly, the Plaintiffs are entitled to inspect the original documents as they are kept in the ordinary course of business under Civ.R. 34.[3]

The Trustees' unsubstantiated claims of burden and expense also do not justify stone-walling the Plaintiffs' inspection of the Trustees' original documents under Civ.R. 34. First, the Trustees must provide support for such a claim, have not done so, and thus, those claims are meritless. Moreover, to the extent that the documents are stored in an unwieldy and disorganized fashion such that the task of pulling copies of 276 privileged documents from the Trustees' files

[3] The Trustees' also misrepresent the impetus for this Motion. The Trustees voluntarily chose to scan documents, and the accidental omission of 300 documents, most of which proved to be directly relevant to the issues in this case, was not discovered until Plaintiffs' counsel pointed out deficiencies through numerous letters. And the fact that counsel accidentally omitted documents during the scanning process of which there is no record of how the documents were originally scanned warrants compelling inspection of the originals.

is monumental, the Trustees cannot avoid discovery by claiming its organization system makes discovery burdensome. *Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co.*, 94 Ohio Misc. 2d 17, 37 (Ohio C.P. 1996) ("[A] party cannot avoid discovery when its own recordkeeping system makes discovery burdensome. If a party chooses to store information in a manner that tends to conceal rather than reveal, that party bears the burden of putting the information in a format usable by others."); *see also Baxter Travenol Laboratories, Inc. v. Le May*, 93 F.R.D. 379, 383 (S.D. Ohio 1981) (collecting cases) ("an unwieldy record-keeping system, which requires heavy expenditures in money and time to produce relevant records, is simply not an adequate excuse to frustrate discovery."); *Dunn v. Midwestern Indem.*, 88 F.R.D. 191, 198 (S.D. Ohio 1980) (same).

CONCLUSION

Based on the foregoing, the Plaintiffs respectfully request that the Court grant their Motion to Compel.

Respectfully submitted,

Dennis R. Rose (0039416)
Arthur E. Gibbs III (0066819)
Casey J. McElfresh (0088083)
HAHN LOESER & PARKS LLP
200 Public Square, Suite 2800
Cleveland, Ohio 44114
Telephone: (216) 621-0150
Facsimile: (216) 241-2824
E-mail: drrose@hahnlaw.com
aegibbs@hahnlaw.com
cmcelfresh@hahnlaw.com

Ross M. Babbit (0072946)
Ross M. Babbit Co., LPA
Hoyt Block, Suite 200
700 West St. Clair Avenue
Cleveland, Ohio 44113
Telephone: 216-623-6346
Facsimile: 216-274-9683
E-mail: rbabbitt@babbitt-lawfirm.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply in Support of Plaintiffs Arthur P. Dueck's, Todd Gilmore's, Nancy Binder's, and William R. Keller's, Putative Plaintiffs Rhonda Loje's and Jeffrey Mansell's, and Defendant Dennis R. Butler's Joint Motion to Compel* has been served by electronic mail on May 14, 2015 upon the following:

Adam M. Fried, Esq.
afried@reminger.com
David Ross, Esq.
dross@reminger.com
Julian Emerson, Esq.
jemerson@reminger.com
Reminger Co., LPA
101 W. Prospect Avenue, Suite 1400
Cleveland, OH 44115-1093

Attorney for Defendant
The Clifton Club Company

Leo M. Spellacy, Esq.
lspellacy@porterwright.com
Porter Wright Morris & Arthur LLP
925 Euclid Avenue, Suite 1700
Cleveland, OH 44115-1483

Attorney for Interested-Party Defendant
BAI, LLC

Kip Reader, Esq.
kreader@ulmer.com
Mary Forbes Lovett, Esq.
mlovett@ulmer.com
Ulmer & Berne LLP
Skylight Office Tower
1660 W. Second Street, Suite 1100
Cleveland, OH 44113

Attorneys for Defendants
Charles Drumm; John S. Pyke, Jr.; Peter A. Kuhn; Philip W. Hall; and Warren Coleman (Trustees of the Clifton Park Trust)

Walter F. Ehrnfelt, Esq.
walter@healthlaw.com
Thomas M. Ehrnfelt, Esq.
tehrnfelt@healthlaw.com
Waldheger Coyne
Gemini Tower I, Suite 550
1991 Crocker Road
Cleveland, OH 44145

Attorneys for Interested Party-Defendants
Edmond and Mary Blades, Trustees;
Louis and Cynthia Keppler; and Robert Stall

Michael C. Cohan, Esq.
mcohan@cavitch.com
Cavitch, Familo & Durkin Co., LPA
1300 E. Ninth Street, 20th Floor
Cleveland, OH 44114

Attorney for Interested-Party Defendants Sarah Cohan; Leigh E. Fox, Trustee; Joanne H. Calkins, Trustee; Matthew and Susan Beverstock; Jeffrey S. and Stefanie Christian; Janna Dresing; Cynthia Dunn and Dale Cuthbertson; Mark and Nancy S. Graves; Scott and Amy C. Kimes; Andrew Logan; Peter and Linda Joy Nintcheff, Trustees; Ron and Beverly Rudin; Carolyn Seelbach; and Byron T. and Mary Anne Crampton, Trustees

Jack S. Kluznik, Esq.
JKluznik@westonhurd.com
Dana Rose, Esq.
DRose@westonhurd.com
Weston Hurd L.L.P.
1301 East Ninth Street, Suite 1900
Cleveland, OH 44114-1862

Attorney for Interested-Party Defendants Leslie D. Coleman, Trustee; Marcia Hall; Cathryn Kuhn; Edward Hill; Judith A. Pyke; Karen Upton; and Karen Harwood aka Karen Wilson

Gary A. Vick, Jr., Esq.
gavickjr@connickvicklaw.com
Connick & Associates Co., L.P.A.
NorthPoint Tower, Suite 1720
1001 Lakeside Avenue
Cleveland, OH 44114

Attorney for Interested-Party Defendants Charles and Patricia Geiger; Gordon D. and Susan S. Geiger; Christine R. Kraay, Trustee; and 17822 Lake Avenue LLC

F. Thomas Vickers, Esq.
tvickers@vickerslawgroup.com
Vickers Law Group Co., LPA
1119 Bassett Road
Westlake, OH 44145

Attorney for Interested-Party Defendants Joseph and Alicia A. Kerrigan

John F. McCaffrey, Esq.
john.mccaffrey@tuckerellis.com
Tucker Ellis LLP
925 Euclid Avenue, Suite 1150
Cleveland, OH 44115-1414

Attorney for Interested-Party Defendants John F. and Margaret McCaffrey

Kevin M. Spellacy, Esq.
kspell@mghslaw.com
McGinty, Hilow & Spellacy Co., LPA
The Rockefeller Building, Suite 1300
614 West Superior Avenue
Cleveland, OH 44113

Attorney for Interested-Party Defendants Thomas and Kelly O'Malley; Michael and Patricia Smith; and Kevin and Molly M. Spellacy

Aaron H. Bulloff, Esq.
abulloff@khwlaw.com
Kadish, Hinkel & Weibel
1360 E. Ninth Street, Suite 400
Cleveland, OH 44114

Attorney for Fiduciary Matthew F. Kadish, Esq. for Interested-Party Defendant Estate of Ewa Pezacka

Gregory D. Seeley, Esq.
GDSeeley@sseg-law.com
Seeley, Savidge, Ebert & Gourash Co., L.P.A.
26600 Detroit Road
Cleveland, OH 44145-2397

Attorney for Interested-Party Defendant Melissa K. Meany

Brian J. Darling, Esq.
BDarling@DarlingDuffy.com
John Duffy & Associates
Brendan Place
23823 Lorain Road, Suite 270
North Olmsted, OH 44070

Attorney for Interested-Party Defendant Harold W. Goforth

Ross M. Babbitt, Esq.
rbabbitt@babbitt-lawfirm.com
Ross M. Babbitt Co., LPA
Hoyt Block, Suite 200
700 West St. Clair Avenue
Cleveland, OH 44113

Co-Counsel for Plaintiffs and
Attorney for Interested-Party Defendants
Rhonda Loje and Jeffrey Mansell

Michael J. Connick, Esq.
mconnick@connickvicklaw.com
Connick & Associates Co., L.P.A.
NorthPoint Tower, Suite 1720
1001 Lakeside Avenue
Cleveland, OH 44114

Attorney for Interested-Party Defendants
James and Nancy S. Seibert

Michael E. Smith, Esq.
msmith@frantzward.com
Frantz Ward LLP
2500 Key Center
127 Public Square
Cleveland, OH 44114-1230

Attorney for Interested-Party Defendants
Michael Smith and Michelle Myers

James D. Romer, Esq.
jromer@pprblaw.com
Polito, Paulozzi, Rodstrom & Burke
21300 Lorain Road
Fairview Park, OH 44126

Attorney for Interested-Party Defendants
James and Katherine Romer

Christian M. Bates, Esq.
cbates@corsarolaw.com
Corsaro & Associates Co., LPA
28039 Clemens Road
Westlake, OH 44145

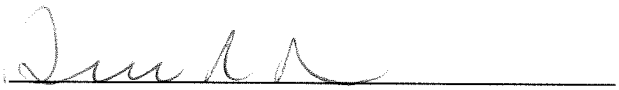
Attorney for Interested-Party Defendant
Saji T. Daniel, Trustee

Solvita McMillan, Esq.
17904 Lake Road
Lakewood, OH 44107

Attorney for Interested-Party Defendants
John G. and Solvita A. McMillan

James P. Oliver, Esq.
james.oliver@squirepb.com
Squire Patton Boggs LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114

Attorney for Interested-Party Defendants
James and Mary Patricia Oliver



One of the Attorneys for Plaintiffs

May 27, 1994

To: Doug Cooper
From: Jack Rupert
Subject: Enclosed memos

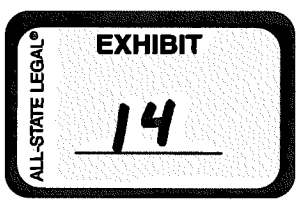
As a last effort before departing for the great Northeast---no not Hanover!!---I have attempted to redraft your redraft of my original draft, and enclose the two memos for your final use.

I ask and urge that the BECDIR memo be put in final form, that you find Angelo and deliver it to him, and that you check back with him within a day or two after delivery. The more time that passes, the weaker our negotiating position.

Since we trustees will be meeting the evening of June 16, you may want to defer sending the Lagoon memo until after that time. My only concern with the delay is that it weakens our approach and may raise questions about our sincerity and the depth of our concern. I'll be happy to discuss our strategy by phone.

Thanks for looking after this matter.

Feel free to ask Mary Anne to help in any way she can. If there are any questions please call me in Maine at (207) 832-7828.



Thompson, Hine and Flory
1100 National City Bank Building
629 Euclid Avenue
Cleveland, Ohio 44114
(216) 566-5500

Jack i 12/20/94

I thought you would be interested in the attached.

I haven't read this thoroughly. perhaps you would present a brief at our next CPT gathering.

Douglas O. Cooper
Direct Dial
566-5641

EXHIBIT
15