UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	Chapter 11
PHYSIOTHERAPY HOLDINGS, INC., et al.,	Case No. 13-12965(KG)
Debtors.	(Jointly Administered)
PAH LITIGATION TRUST,	
Plaintiff,	
v.	Adv. Pro. No. 15-51238 (KG)
WATER STREET HEALTHCARE PARTNERS, L.P., et al.,	
Defendants.	

United States Bankruptcy Court
824 North Market Street
Wilmington, Delaware 19801

April 26, 2018
2:00 PM

B E F O R E :
HON KEVIN GROSS
U.S. BANKRUPTCY CHIEF JUDGE

HEARING re Motion to Compel Production by the Litigation Trust

Transcribed by: Dawn South and Sherri L. Breach

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P R O C E E D I N G S

THE COURT: Good afternoon everyone. Judge Gross is on the telephone and we're here of course in the Physiotherapy Holdings matter on a motion to compel production by the litigation trust.

It's been fully briefed, I've read your briefs, and I now give you an opportunity to be heard.

MR. STEARN: Good afternoon, Your Honor. It's Bob Stearn from Richards, Layton & Finger. May it please the Court.

THE COURT: Yes.

MR. STEARN: I think we're at Your Honor's pleasure as to who you'd like to have go first.

THE COURT: Well I think under the circumstances I probably ought to first hear from the litigation trust.

MR. STEARN: Very well, Your Honor.

THE COURT: Yes.

MR. MORIDANI: Good morning, Your Honor. This is Farbod Moridani of Quinn Emanuel on behalf of the Trust. I have with me my colleague, Lee Rosenberg.

Your Honor, since you've read all the briefs I am not going to rehash our arguments, but I do want to address some of the arguments the defendants made in their brief, because to be honest much of it is a distraction in our view.

You know, defendants are asking you to make some history on this motion. The Third Circuit ruled almost 40 years ago that "when there are federal law claims in a case also presenting state law claims the federal rule favoring admissibility rather than any state law privilege is the controlling rule." That's from William T. Thompson vs. General Nutrition Corp., 671 F.2d 100 at 104. That's been the longest jurisdiction for decades, every judge since has respected it, and defendants are asking you to be the first not to.

Thompson involved a case presenting both federal, state, and state claims like ours does. The appellant argued that the court should import into the case state privilege law that conflicted with federal law because state law favored non-disclosure, and the court ruled that because there was existing federal law on the matter, federal law applied and applying substantive federal law required disclosure. So the court -- the Third Circuit specifically rejected application of state privilege law because there was existing applicable federal law on the issue.

Now, if this sounds familiar it should because defendants made the exact argument that Thompson rejected on virtually identical facts. Just like in Thompson this is a federal case involving both federal and state claims. Just like Thompson, defendants are asking the Court to import

state privilege law over federal law. Just like Thompson there's a federal rule favoring disclosure as compared to Delaware law. And as a result, just like Thompson this Court is bound to apply the governing federal rule favoring admissibility over Delaware law. Period, full stop.

The Court cannot import Delaware privilege law into this case without violating the Thompson rule, which has been binding settled law in the Third Circuit since 1982.

Now, defendants know they can't ask a federal judge to disobey binding precedent so what they argue is that the federal law is just too complicated, the Court should adopt Delaware's privilege law rather than "wade into the thicket of inconsistent federal law."

Well first of all you're a federal judge, interpreting federal law is what you do even when it's complicated, and second, it's not even that complicated, which I'll explain in a minute.

But first what I want to address is defendants' argument that the Court should substitute Delaware law for federal law as a matter of comity under Pearson vs. Miller.

THE COURT: Yes.

MR. MORIDANI: Your Honor, Pearson held that federal courts can consult state law in considering whether to recognize a new privilege where there's no existing

applicable federal law. And that's the key distinction here. Courts look to state law all the time when considering whether to recognize a new privilege. But Pearson said nothing about supplanting existing federal law on privilege with state law.

Both Pearson and every single case in defendants' brief relying on it address the creation of new privileges when federal law had said nothing about it. The difference here is that the attorney-client privilege and the rule that disclosing to third parties waives privilege has existed for decades.

So Pearson just has nothing to do with this case at all because we're not talking about recognizing a new privilege in the absence of federal common law on the issue.

So we think it's clear that federal substantive law governs here, and the law in this circuit as to third-party communications is that you can disclose without waiver only if the third party acted as a translator or interpreter for the client.

Now, this isn't something that we've cobbled together to get the most restrictive standard possible, it's actually the standard that the Third Circuit has adopted as recognized by a dozen other cases. Three of them are Third Circuit opinions adopting United States vs. Kovel, which is the Second Circuit opinion announcing the translator test.

That's U.S. vs. Fisher, 500 F.2nd 683, U.S. vs. Ancalini (ph), 271 Fed. Appendix 268, and U.S. vs. Alvarez, 519 F.2d 1036.

On top of that multiple other cases in the Third Circuit have recognized that the court has adopted that as the translator test, for example, one we cited in our brief is In re: GI Holdings, 218 FRD 428 where the court held that the Third Circuit "adheres closely to the translator analogy" noting that "Alvarez and Cavell are nearly identical." And Alvarez being the Third Circuit opinion I just mentioned.

Aside from the ones I just listed off we found seven other cases in the Third Circuit affirmatively adopting the translator analogy, and I'm happy to cite them all off into the record if the Court would like. That would take a while, so I won't unless you ask me to. But the point is that this is about as consistent a line of case law as you can get. Multiple Third Circuit opinions, multiple District Court opinions within the Third Circuit affirmatively adopting the Cavell standard, which provides the translator analogy for third-party communication.

Now, what's interesting to me is the defendants don't even argue that they meet the standard because they really can't. There's no evidence that either Jefferies or EY, who are the two third parties we're talking about here,

ever translated anything for counsel or acted as some kind of go-between between counsel and client.

So what's really left is defendants' argument that the Court should disregard what virtually every other case in the Third Circuit has done and instead apply this functional approach under which communications with a third party remain privileged if the third party is effectively fused with the company's corporate structure. They're still a part of the company that they're effectively an employee.

Now, we don't think that this approach actually applies in light of finding Third Circuit authority adopting Cavell, and defendants' own cases actually note that the Third Circuit has not adopted this approach. For example, the Flonase case only applies to the functional test because the parties stipulated to it in that case.

But even if the Court were to apply functional test it wouldn't help defendants here because neither Jefferies nor EY come close to acting as the functional equivalent of defendants' employees. And if we actually take a look at the cases the defendants cite I think it'll explain why.

So Flonase, for example, that case involved a consultant who played a crucial institutional role of the company. They "assisted in an administrative, managerial, and analytic capacity" and were "intimately involved in the

creation, development, and implementation" of Flonase's business. There's nothing like that here.

Or if you look at the King Drug company case, 2013 Westlaw 4836752, there the consultant was providing "managerial support and strategic advice, was considered part of the company's business team, and had dedicated office space at the company." That's what it takes to be the functional equivalent of an employee, and defendants don't even argue that Jefferies or EY would meet that standard because they can't.

Jefferies was Physiotherapy's client, not Water Street. So Jefferies couldn't be the functional equivalent of Water Street's employee any way, and both Jefferies and EY had an arms length business relationship that both of their engagement letters reflected was on an independent contractor basis.

Jefferies provided typical public-facing business services like identifying potential buyers, establishing a data room, preparing a confidential information memorandum, nothing that effectively fuses it with the company's corporate structure.

And EY's engagement letter even permitted them to represent a potential buyer on the same transaction adverse to Water Street, which is hardly what you would expect of an employee.

So without getting into the weeds too much we think it's clear that federal law applies here, that under federal law third-party communications don't result in a waiver where the third party was acting as a translator or interpreter between client and counsel. We don't believe the functional test applies, but even if it did the outcome would be the same. And, you know, given all of this we think there's really no set of circumstances under which any of these documents that were disclosed to Jefferies or EY could be privileged, and so the Court should order all of them produced without any further review.

Now, unless the Court has any questions on the third-party communication I'd like to address the non-lawyer communications issue.

THE COURT: All right.

MR. MORIDANI: Because it seems to me that defendants' brief is sort of a red herring.

You know, we've challenged defendants' assertion of privilege over communication solely between business people, principals at Water Street and Wind Point, who are discussing the company or the transaction amongst themselves without lawyers.

Everyone seems to agree that a communication that relays or reflects legal advice by an attorney can be privileged even if it doesn't involve counsel. That's not

particularly controversial. But what defendants haven't done is make the predicate showing that the documents they withheld actually do relay or reflect legal advice. And our brief lays out the standard the courts use to scrutinize assertions of privilege over these kinds of communications, and that is -- and courts require substantial proof that the communications actually reflect or relay legal advice because of the opportunity for abuse on these kind of communications.

Defendants' brief doesn't address this issue. It doesn't address our cases. And it doesn't even argue that the documents the defendants withheld actually relay or reflect legal advice. Instead what they argue is that distributing legal advice within the corporate structure doesn't waive privilege, but that begs the question of whether they were distributing legal advice in the first place.

So we're not talking about waiver here, we're not talking -- we're not saying that defendants waived privilege by forwarding privileged communications to non-lawyers, we're saying the defendants haven't met a showing of privilege to beginning with, and you know, a lot of this is discussion in a vacuum. So I think looking at an example would be helpful here.

THE COURT: Yes.

MR. MORIDANI: Jefferies' log number 21, we attached their log as Exhibit 3. If the Court wants to take a look it's row 21 of the spreadsheet for Jefferies, the Bates number is Jeff_00395429. This is an email from Joe Dejean, a non-lawyer Water Street employee, to Robert Womsley, a non-lawyer Water Street principal.

The log entry says communications reflecting legal advice from Kirkland & Ellis in connection with indebtedness and net working capital relating to the sale of PTA.

So defendants' argument would go, Mr. Dejean was relaying Kirkland's advice to Mr. Womsley who is part of the corporate structure, needs to know that advice, and but there's no waiver, right? But here's what they actually redacted in 27 different iterations of this document.

"Would someone mind doing us a favor tonight and checking to see if any of the buyers have accessed the (indiscernible) report in the data room. If so how many of them have."

There's nothing privileged about this question. So the argument that forwarding legal advice doesn't waive privilege is a total non sequitur because there was no privilege to begin with.

And by the way, the only reason we even know that this language was improperly redacted is that a copy existed in Water Streets' production where they missed the

redaction.

And, Your Honor, we found so many examples of these where defendants have withheld purely business discussions and then withheld them on the basis that they're reflecting or relaying legal advice when no such thing is happening.

And that's precisely why courts like the In re: Behr case and the Adams case requires substantial proof that the documents being withheld actually reflect or relay legal advice, because it's so easy to abuse things like this. And the way they go about that is by asking whether the document at issue reflects its integration into the legal advice communication chain. If it does great, you're reflecting -- relaying legal advice, you can withhold it, but if it doesn't then there's no privilege to justify the withholding in the first place.

So defendants' non-waiver argument is frankly neither here nor there because it doesn't address the challenge that we've made and it's pretty telling the defendants don't even argue that they could satisfy the standard if they were called to do so.

On the other hand we do recognize that at least some of the documents the defendants withheld may be legitimately withheld, so for this category what we're proposing is that the Court rule as to the standard and the

showing the defendants have to make and then allow the Trust to select 15 to 20 documents for in camera review so that the Court can rule with context as to what is and isn't privileged and then require defendants to rereview the rest of their withholdings with the benefit of the Court's guidance and then the parties can submit any discrete disputes about specific documents to the mediator, if necessary.

So I know I've given the Court a lot of information here, I don't want to drone on forever, but I think the bottom line here is we're in federal court, you're a federal judge, we have federal claims governed by federal law. Under federal law third-party communication privilege is waived because defendants have made no showing and haven't even tried to make a showing that counsel was acting as a translator or interpreter.

And then with respect to the non-lawyer communications defendants haven't even tried to make the predicate showing that a privilege existed that was being relayed or reflected in the communications they withheld.

THE COURT: Mr. Moridani, I just have a couple of questions for you, and one is this.

As opposed to my reviewing in camera documents why shouldn't the discovery mediator do so?

MR. MORIDANI: Well two responses to that, Your

Honor.

With respect to the third-party documents I don't think there's any need to review in camera at all, I think the Court can just rule as a matter of law.

As to the non-lawyer communications there's plenty of precedent for judges, some of whom may be the fact finder ultimately reviewing in camera documents, because that's what you do. And in fact Judge Stark himself in the Idenix case reviewed a sample of documents to determine whether or not the substance of those documents are actually privileged or not, then instructed the parties to do effectively what we're asking for here. He instructed the parties to take his rulings as to the sample that was provided and extrapolate from those what the determination should be as to the remainder.

So really we're just asking you to do what other judges in the Third Circuit have done, including Judge Stark, which is just to review a sample, provide us your guidance on what is and isn't privileged under the law, and then defendants can take that guidance and apply it, and then if anything remains on a discrete basis, you know, if we happen to be fighting over dozens or hundreds of documents still then I think it would make sense to bring in the mediator. But I don't think it makes sense to do that before we have your guidance with the benefit of context

having looked at certain documents.

THE COURT: All right. And my -- here's my next question.

The work that Ernst & Young and Jefferies did was in connection with a merger agreement was it not?

MR. MORIDANI: Well it was in connection with a transaction that was contemplated.

THE COURT: All right.

MR. MORIDANI: But at the time they were hired there was no merger agreement.

THE COURT: All right.

MR. MORIDANI: Jefferies' services were for the company, it served as a financial advisor that provided investment banking services and like I said looking for buyers and preparing a data room. But as far as we can tell there is nothing to do with legal advice in any of the work that they did. And in fact Jefferies' managing director testified under oath that Jefferies never assisted counsel in providing legal advice.

So this isn't a document-by-document concern, this is a legal matter. As a legal matter there isn't a shred of evidence that supports the contention that either EY or Jefferies assisted counsel in providing legal advice in any way.

THE COURT: Well weren't they doing work where

Delaware law applied?

MR. MORIDANI: I don't believe so, Your Honor. I mean the work that was done, most of it was done in Pennsylvania. Yes, the merger agreement was governed by Delaware law, but --

THE COURT: Right.

MR. MORIDANI: -- that doesn't provide any basis for overwriting applicable federal law of privilege which governs regardless of what the particular transactions are governed by.

And you know, defendants have made an argument, they've made a policy argument that when there's a transaction that involved a particular, you know, state's law the parties should be able to rely on that law. There is nothing that supports that argument, and in fact it flies in the face of the Thompson case where state law governed the state law claims and the court nevertheless applied federal common law.

And the rule the defendants have proposed, you know, under which Delaware law would apply would create an absolute mess in federal courts. You know, they talk about predictable and of the need for predictability. Well what's more predictable than federal court plus federal claim equals federal law? There's nothing more predictable about that.

THE COURT: Well because --

MR. MORIDANI: Where chaos ensues, --

THE COURT: When they did --

MR. MORIDANI: -- is imagine a case involving multiple transactions or multiple agreements, each of them governed by different states' laws, let's say we're talking about a copyright case involving licensing agreements involving 50 states. Is the court to each time there's a privilege dispute assess which agreement governs which communications sometimes multiple agreements can relate to a communication and then conduct some quasi choice of law analysis to determine which state has the greatest interest whose privilege should apply? It's just utter chaos.

And I think frankly that's the reason why the Thompson court determined that federal law should apply, because in particular as against Delaware law both the Delaware Superior Court and the District of Delaware have recognized that Delaware law and federal law are in fact very different. Federal law applies a much narrower view of privilege than Delaware does.

THE COURT: Yes.

MR. MORIDANI: And that's precisely the reason why federal law should apply, because if you're doing this comparison it's going to be an absolute mess and in a federal case it's federal law that should ultimately provide

the outcome for privilege disputes.

THE COURT: All right. All right, Mr. Moridani, thank you. You'll have an opportunity to respond.

And now I think I'll hear probably from Mr. Stearn.

MR. STEARN: Yes, Your Honor. Once again good afternoon, may it please the Court, Bob Stearn from Richards, Layton & Finger. I'll be speaking on behalf of all defendants today.

THE COURT: All right.

MR. STEARN: Your Honor, I'm on my speakerphone, am I being sufficiently clear and is that acceptable?

THE COURT: Yes, it is, Mr. Stearn, it's fine.

MR. STEARN: Okay. Thank you.

Your Honor, just in terms of division of labor, I'll be addressing legal issues, and to the extent that we need to talk about documents or the parties' discussions about privilege, Ms. Hardman and Mr. Falgowski will handle that.

THE COURT: All right.

MR. STEARN: So, Your Honor, let me start out by giving you a preview of where I'm going. I'm going to start with just a little bit of background. I'm next going to turn to the legal standard governing privileged communications involving financial professionals. As

subparts of that we'll start with first identifying the Delaware rule, we'll then discuss why the Court should adopt the Delaware rule as a matter of federal common law in this case, and in the alternative we'll address what federal rule to apply if the Court rejects the Delaware standard. And then we'll finish up with a discussion of the legal standard applicable to non-attorney privileged communications.

Obviously, Your Honor, the parties disagree on many things, including what happened that led us to today's dispute, and the litigation trust had a lot to say about that in its brief and its declaration.

I could tell you our side of the story, Your Honor, but I can't imagine you want to hear a he said, she said dispute. We're here to discuss legal issues today. So suffice to say we disagree with the litigation trust's characterization of events and believe defendants acted in good faith at all times, and I'll just leave it at that.

So -- but just touching briefly on the background, Your Honor. Both parties withheld as privileged certain communications with their financial advisors. For the defendants as you know this was Jefferies, who had provided financial advice and assistance in connection with the transaction at issue, and Ernst & Young who provided seller support services in connection with that transaction. And although the litigation trust says Jefferies was retained by

Physiotherapy, not defendants, and tries to draw some distinction based on that, frankly, Your Honor, that argument is irrelevant. We refer to it in I think it was footnote 1 of our brief, it's reflected in Section 12L of the merger agreement, which was Exhibit A I think to our April 16th brief. And what's reflected in Section L is two important things.

Number one, it reflects that Kirkland & Ellis, who was counsel to Physiotherapy, was also counsel to Water Street. In other words there was a common legal interest between Physiotherapy and Water Street.

And Section 12L of the merger agreement further provides that after the transaction was consummated, Physiotherapy's privilege resided solely with Water Street. And that type of treatment of a privilege, what happens to the privilege that existed pretransaction after the company is in effect sold, that it's permitted to be retained under Delaware law by the seller. That's expressly permitted under Delaware law as reflected in, for example, the Great Hill Equity decision we cite in footnote 1 of our April 16 brief. So hopefully that puts this what I call Jefferies non-issue to bed.

Now, as Your Honor knows we had a hearing about privilege issues on February 21. After that hearing or during that hearing the Court asked the parties to re-

examine their privilege calls because the Court concluded the parties may have been too cautious. And quoting from page 49 of the transcript Your Honor ruled as follows.

"I think the parties have to confer, have to narrow the issues, have to go to Mr. Price and let him look at documents, and if necessary I'll hear you in court."

The Court also rejected during that hearing the litigation trust's suggestion that you should review a sample of documents. In fact Your Honor expressed reluctance to review privileged documents because you thought it could impact your thinking about the case.

Now, after the February 21 hearing and as a compromise, defendants produced additional documents as did the litigation trust. I think it's fair to say, Your Honor, that the parties were more conservative in making original privilege calls and were less conservative after the February 21 hearing. And in fact the defendants produced more than half of the documents that they had previously withheld.

Thereafter the parties met and conferred but have not presented anything to the discovery mediator because the litigation trust insisted that Your Honor address legal issues first. So here we are.

And to be clear, Your Honor, it's defendants' understanding that the only reason we are here today is for

the Court to decide applicable legal standards. Thereafter the parties ought to reevaluate their positions in light of the Court's rulings, meet and confer, and present any remaining disputes to the discovery mediator.

In fact, Your Honor, the litigation trust's full-blown motion to compel asking the Court to order production of hundreds of documents and to review others in camera came as quite a surprise to us. It was not the basis for the trust's request for this hearing. And our email communications with the Court on that issue are attached to our April 16 brief as Exhibit G.

And in fact, Your Honor, in their April 3rd email requesting this hearing, the trust's counsel said the following. "The parties are at an impasse with respect to the legal standard governing assertions of privilege over communications disclosed to third parties and purely non-lawyer communications." And then skipping ahead they said, "the governing legal standard is thus a gateway issue that the trust believes should be resolved by the Court before the parties present discrete disputes about specific documents to the discovery mediator."

What happened here respectfully, Your Honor, in some other circles is what's known as a bait and switch. You were asked to address legal issues, now you've got a full-blown motion to compel asking the Court to order

production of hundreds of documents.

It was never our understanding that this hearing was going to be a full-blown motion to compel. That's why you don't see us arguing about or defending privilege calls on specific documents, because we never thought that's what this hearing was supposed to be about.

So, Your Honor, with that background let's turn first to a discussion of the legal standard applicable to privileged communications involving financial professionals. And I'll start obviously with Delaware's privilege rule.

Your Honor, the legal -- the litigation trust makes a number of legal arguments in its brief that are just flat out wrong. Here's the first. The litigation trust argues that the Delaware privilege rule is essentially a myth, dicta in an old case. That's on page 10, footnote 4 of their brief.

But, Your Honor, anyone who practices Delaware law knows much better. The privilege rule outlined by Chancellor Allen in Jedwab is a bedrock principle of the Delaware corporate transactional and litigation practice reaffirmed many times since Jedwab.

Let's start with Jedwab itself. Jedwab involved an effort to enjoin a merger between MGM Grand and Bally. Class plaintiffs brought a motion to compel Bally to produce documents withheld as privileged. Bally had withheld drafts

of transaction documents that were shared between counsel for Bally and MGM on the ground of a common interest privilege. Chancellor Allen said privilege comes down to expectations of confidentiality.

So, for example, sharing privileged documents or communications with your professionals such as investment bankers does not blow privilege because there is a legitimate expectation of confidentiality. But sharing privileged documents with the other side in a merger negotiation does not carry with it a legitimate expectation of confidentiality, at least not until you actually have a deal.

And I think it's important to look at what Chancellor Allen actually said because Delaware practitioners have been following this for 30 plus years. What the Chancellor said was, ”whether disclosure of a communication beyond the client and the lawyer destroys the basis for the claim of privilege or not inevitably involves a judgment as to whether in the circumstances the person making the disclosure, in fact, regarded that disclosure as confidential and, if there was an expectation of confidentiality, whether the law will sanction that expectation.

Thus, for example, where a client seeks legal advice as to the proper structuring of a corporate

transaction and it is also prudent to seek professional guidance from an investment banker, it would hardly waive the lawyer/client privilege for a client to disclose such facts at a meeting concerning such transaction and with -- at which both his lawyer and his investment banker were present. Knowledgeable participants in such transactions would themselves regard disclosures at such a meeting as confidential and the law would, in my opinion, tend to validate that judgment."

THE COURT: Let me stop you there --

MR. STEARN: Of course --

THE COURT: Let me stop you there, Mr. Stearn, and ask isn't -- don't -- isn't the litigation trust saying that under those circumstances the privilege would be waived because --

MR. STEARN: Well, they argue --

THE COURT: -- because a non-lawyer was involved?

MR. STEARN: Well, that's their argument is that a different rule applies.

THE COURT: Right.

MR. STEARN: And that's -- that's kind of what the dispute boils down to. But what I wanted to do was establish at the threshold what the Delaware rule is and there's no question about it, and why it plays such an important role in the fabric of Delaware corporate

transactional law. So that's kind of where I'm going. And that it's been relied upon by lawyers practicing Delaware law for more than 30 years.

But I agree with you. They say there's a different rule that applies and if someone like a investment banker comes in, unless they're literally an interpreter there's no privilege. And one of the first things I want to establish is the importance of this privilege rule to Delaware transactional law and then why it is the Court should uphold it under cases like Pearson and others, and then we'll talk about the rule that the litigation trust proposes not really being an established rule in the Third Circuit at all. But that's my -- that's my flight path here, Your Honor, if you will.

THE COURT: All right.

MR. STEARN: So what I was going to say was -- now, of course, what I just read is hardly a throw-away line from the Chancellor, who was not known for ill-considered throw-away lines. And anyone who practices Delaware corporate law has known Jedwab to reflect the Delaware privilege rule in the transactional context for more than 30 years. I certainly remember from when I practiced in Chancery in the 90s and I suspect Your Honor remembers it from your practicing days in Chancery as well.

But, Your Honor, there's additional case law on the

Delaware privilege rule. And the Delaware precedent on this does not stop with Jedwab. For example, there's Vice-Chancellor Noble's 2010 decision in 3Com which reflected the law at the time of the 2011 and 2012 privileged communications at issue here. 3Com involved a dispute relating to a merger agreement governed by Delaware law.

In fact, 3Com is essentially on all fours with us, Your Honor. There was a motion to compel merger related communications shared with 3Com's investment banker, Goldman Sachs. And for reasons we'll talk about momentarily the Court first determined that Delaware law applied to the parties' privilege dispute.

The Court then explained that Delaware's privilege rule in the corporate transactional -- excuse me -- then explained Delaware's corporate privilege rule in the transactional context where a party discloses privileged information to a financial advisor:

"Delaware law sanctions the privilege's application to attorney-client communications including an investment banker especially within the context of a pending transaction."

In other words, precisely where we are today, Your Honor.

The Court then quotes Jedwab which, of course, I won't repeat. And the Court goes on to say:

"Following Jedwab, Delaware courts have applied the attorney-client privilege to protect communications disclosed to the client's financial advisor in the corporate transactional context."

3Com, Your Honor, then drops footnote 18 which we refer to in our brief providing a sample of opinions since Jedwab confirming the Jedwab privilege rule.

For example, 3Com cites Hexion Specialty Chemicals versus Huntsman. Again, this is in footnote 18, and the Court itself drafted the following parenthetical for Hexion:

"Finding that the attorney-client privilege was not destroyed by disclosure of communications between a party's counsel and its investment banker advising on a merger for the purpose of eliciting commentary on strategies to make covenants contained within the merger agreement more favorable to the client."

The 3Com court also cites -- and that was a 2008 opinion.

The 3Com court also cites Cede and Company versus Joule, which I'm sure I'm mispronouncing, a 2005 decision for the following quote:

"To the extent that Updata" -- and that was the investment banker.

"To the extent that Updata's files contain advice given by Joule's counsel to Joule and Updata

became privy to that advice during the course of Updata advising Joule, those portions of documents may be redacted as the attorney-client privilege is not waived by the presence of the investment banker."

And then the court in 3Com also cited the SICPA Holdings decision from 1996 for the following quote: "The defendant agrees that the privilege is neither destroyed nor waived by virtue of the fact that a copy of these documents was provided to SICPA's financial advisors."

And the Court then cites Jedwab. In fact, each of these three decisions in the footnote -- in footnote 18 in 3Com -- cite as the basis for their ruling Chancellor Allen's decision in Jedwab.

Now 3Com itself, Your Honor, denied a motion to compel, rejecting the movant's argument for a narrower privilege analogous to the standard the litigation trust seeks to impose here. And here's what the 3Com court said:

"According to the movement -- the movant" -- I'm sorry -- "if Goldman Sachs received a particular communication for any reason other than to assure that 3Com received informed legal advice, the communication must be disclosed. The case law is clear, however, that insofar as Goldman Sachs was involved in communications between 3Com and its attorneys involving legal matters, those

communications are privileged. Goldman Sachs' precise role in a specific communication is not critical as long as it involved legal issues regarding the transaction and participation by 3Com's attorneys."

Now, Your Honor, the litigation trust does not address 3Com in its brief. It must have known we would cite to it because, for example, 3Com was discussed in our March 27, 2018 meet and confer letter which Mr. Moridani attached as Exhibit 15 to his declaration. And 3Com doesn't -- excuse me -- the litigation trust doesn't cite 3Com in its brief because it really has no answer to 3Com. It can't argue that the Court's privilege discussions in 3Com is dicta because the Court's determination that privileged communications shared with Goldman Sachs remained privileged was the holding of the case.

So, Your Honor, clearly Jedwab and its progeny reflect the privileged rule in Delaware.

So, Your Honor, on the threshold legal issue, what is Delaware's privileged rule in the corporate transactional context, there is no legitimate dispute. The privilege rule articulated by Chancellor Allen more than 30 years ago in Jedwab and recognized in 3Com and an unbroken string of decisions in between is the law of Delaware. And the Delaware rule is that privilege communications disclosed to

financial professionals in the corporate transactional context remain privilege regardless of the financial professional's role in the communication.

So let's move on to the next issue, Your Honor, what law is going to govern.

The parties agree that federal privilege law applies to a dispute in federal court where there is a mixture of federal and state law claims. The question is, given the facts and circumstances of this case, what legal standard should the Court adopt under the federal common law for privileged communications involving financial professionals.

The defendants respectfully submit that under established Third Circuit precedent, federal common law should follow the Delaware privilege rule here. We rely primarily in terms of Third Circuit law on Pearson versus Miller which, of course, came 18 years after the Thompson case that the litigation trust is relying on.

And Pearson tells us several things. First, Your Honor, it says the federal common law of privilege is not static. Courts have the flexibility to develop rules of privilege on a case by case basis. I'm just highlighting some of the things we said in our brief.

Second, Your Honor, federal courts may recognize new privileges or amend existing ones where the new or

amended privilege serves an important state policy. Pearson says:

> "A strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy."

The test essentially compares the importance of the state policy to the federal policy in favor of admissibility.

Now once again it was pretty clear we would be relying on Pearson in our brief, as we discussed the case in our March 27th letter to the litigation trust, Exhibit 15 to Mr. Moridani's declaration.

But the litigation trust's only argument against the application of Pearson in its brief, which it repeated today by its reference to William Thompson versus General Nutrition, is that Pearson supposedly is limited to recognition of new privileges and does not apply where federal law already addresses an issue.

Your Honor, set aside for the moment the fact that Third Circuit law in this area as we'll discuss shortly is inconsistent and unsettled, so it's not clear whether the court would be adopting a new privilege, modifying an existing privilege or something else. The litigation

trust's argument that Pearson is limited to recognition of new privileges is another demonstrably incorrect statement of law, and the Court need go no further than Pearson to see that.

On page 67 of the opinion, Pearson says the following: "The policy decisions of the states bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one."

And the entire quote I just read from Pearson is itself a quote from the Supreme Court's opinion in Jaffee versus Redmond. So even if William Thompson versus General Nutrition said what the litigation trust says, certainly it would have been revised, amended by a subsequent Supreme Court opinion in Jaffee versus Redmond.

Now this quote I just read also appears on page 3 of our April 16 brief.

So, Your Honor, the law is clear that Pearson and Jaffee apply regardless of whether the federal court is considering adopting a new privilege or modifying an existing one. And, Your Honor, the law is equally clear that where there is an important state policy underlying a privilege that outweighs the federal interest in admissibility, the federal court should adopt the state privilege as a matter of federal common law.

And, Your Honor, we've provided the Court with

three examples from within the Third Circuit where the District Courts did just that. One case, KD ex rel. Dieffenbach (ph) versus United States, a case by the Delaware District Court in which the Delaware District Court applied the Pearson test and recognized the Maryland Medical Review Committee privilege under federal common law. And it did so even though the court recognized that the balance of federal authority weighed against recognition due to a strong state policy supporting the privilege.

We cite another opinion from a Pennsylvania District Court, Sheldone (ph) versus Pennsylvania Turnpike Commission. And in that decision the Pennsylvania District Court applied the Pearson test and recognized a state law mediation privilege under federal common law. And among other things, the Pennsylvania District Court relied on and recognized the Supreme Court's Jaffee opinion for the fact that the state's mediation privilege would have little value if participants were aware that the privilege would not be honored in federal court, an observation that is apt here.

And then of course we also cite a decision to round this out by the New Jersey District Court, Castellani versus Atlantic City, decided barely a year ago in March of 2017. And the New Jersey District Court applied the Pearson test and recognized a state law privilege for documents relating to the plaintiff's entry into a pretrial intervention

program.

And among other things, the court rejected the defendant's argument there, that there was "an extremely compelling need for the documents," because the defendant "already had ample opportunity to develop a factual record and depose plaintiff and numerous witnesses."

So what we're asking the Court to do here, Your Honor, apply the Pearson test and recognize the Delaware state law privilege as a matter of federal common law, is neither remarkable nor unusual. It has been done a number of times in this circuit.

So let's move on next, Your Honor, to a discussion of Delaware's interest in the application of its privilege. And in particular, Your Honor, Delaware's interest in vindicating the reasonable expectations of the parties to Delaware transactions that their transaction related communications will remain privileged.

As we discuss in our April 16 brief, Your Honor, Delaware's interest in the privilege in a transactional context is substantial. I won't repeat everything in the brief. Let me just hit the highlights.

As the Court of Chancery explained in 3Com, Delaware has a considerable interest both in defining the scope of and then second vindicating the reasonable expectations of parties that engage in a transaction

governed by Delaware law.

An important facet of Delaware transactional law is that privileged communications that include financial professionals remain privileged. It's equally important that parties receive consistent and predictable treatment of their privileged communications under the law, for without predictability and certainty the privilege has little value to those attempting to rely on it.

And Delaware's view, as I just summarized, of the importance of certainty and predictability to parties participating in privileged communications, is echoed in the federal cases cited in our brief such as the Third Circuit's Teleglobe opinion and the Supreme Court's Jaffee opinion.

Teleglobe says, "It is essential that the parties be able to determine in advance with a high degree of certainty whether communications will be protected."

Jaffee, the Supreme Court says, "Any state's promise of confidentiality would have little value if the client were aware that the privilege would not be honored in federal court."

Your Honor, there can be no reasonable dispute that the parties here would have expected Delaware privilege law to apply to their transaction related communications. Physiotherapy was a Delaware communication -- excuse me -- corporation. Documents relating to the Delaware merger

transaction pursuant to which defendants received their payments at issue in this litigation was governed by Delaware law from the outset. Even the initial NDA signed by Court Square in October of 2011 was governed by Delaware law.

And, Your Honor, not only would the defendants and their counsel and their advisors have expected Delaware law to apply, so would the beneficiaries of the litigation trust, Court Square and the noteholders, who knowingly invested in a merger transaction governed by Delaware law.

And, Your Honor, in a sense you've already crossed this bridge when you determined that Delaware rather than Pennsylvania law applied to the litigation trust's state law constructive fraudulent transfer claim. The Court may recall some of the additional factors we talked about at the hearing on the litigation trust's motion to amend. Not only was the merger agreement pursuant to which the transfers at issue here were made governed by Delaware law and provided for a Delaware forum, every single party to the merger agreement, including Court Square, was a Delaware entity.

And the asset that was sold, the value of which is in question here, defendant's stock in a Delaware corporation, as a matter of law under Section 169 of the Delaware General Corporation law had its physical situs here in Delaware.

And the same facts that overwhelmingly supported the application of Delaware law to the litigation trust's state law claim also supports the parties' reasonable expectations that Delaware privilege law would apply.

Conversely, Your Honor, at the time of the transaction at issue there was no material federal interest in the transaction and no expectation that federal privilege law would apply. The federal claim asserted in this litigation did not even exist at the time. The federal fraudulent transfer claim did not come into existence until more than 18 months after the merger transaction closed and the payments were made to the defendants, when Physiotherapy filed for bankruptcy. The federal fraudulent transfer claim asserted by the litigation trust here was not asserted until three and a half years after the transaction closed, which is four years after many of the communications at issue were made.

Your Honor, there really is no legitimate dispute that Delaware has a strong interest in vindicating the reasonable expectations of the parties to this Delaware transaction that their transaction-related communications would remain privileged as expressly provided under Delaware law.

Now, Your Honor, compare Delaware's substantial interest in maintaining the efficacy of its transactional

privilege with the mineral -- excuse me -- minimal federal interest at stake here.

First, Your Honor, there is no substantial federal policy implicated here. This is not a civil rights case or an antitrust case seeking to vindicate a larger societal harm. It's a fraudulent transfer case seeking compensation for a small number of participants in a transaction.

Federal fraudulent transfer law does not reflect some unique federal policy, as the Supreme Court and the Third Circuit have observed. Federal fraudulent transfer law simply reclassified existing state law and both laws should be interpreted consistently.

Second, Your Honor, the litigation trust's ability to prove its case does not hinge on these privileged communications.

Your Honor, there have been more than 14 million pages of documents produced in this case, including over 400,000 pages of documents produced by Jefferies and Ernst & Young. Among defendants' production there are almost 3,500 documents reflecting communications with Jefferies and Ernst & Young which were produced without any redaction whatsoever. More than 40 depositions have been taken in this case, including five depositions of Jefferies and Ernst & Young.

By the way, the litigation trust also has served

four expert reports in support of its case and we haven't even gotten to rebuttal reports yet.

Your Honor, both the Castellani and the Dieffenbach cases, examples of cases I gave relying upon the Pearson test to adopt state privileges, held that where a party already has had a lot of discovery, the federal interest in admissibility of documents being withheld as privileged is minimized. That's, of course, our case here.

Now one of the litigate -- one of the things the litigation trust argued in its brief is that because it deems some of Jefferies and Ernst & Young documents important to the case, all of them must be important. But, of course, that's just speculation, particularly in light of the fact that there's a vast number of productions and a vast number of documents produced by Jefferies, Ernst & Young and the defendants concerning communications with Jefferies and Ernst & Young, the overwhelming majority of which we don't hear about because they're simply innocuous.

Additionally, Your Honor, Castellani rejected the argument that the litigation trust makes here that, essentially, there was some compelling need for the documents withheld on grounds of privilege, state law privilege, given the defendant's ample opportunity, or excuse me. In this case -- it was the defendant's

opportunity in that case. In this case it's the plaintiff's opportunity to develop a factual record. Certainly, the litigation trust has had that opportunity here.

Third, Your Honor, this is not the kind of privileged information that normally would be produced. The litigation trust's argument is not that the substance of the communication was not privileged. That's not the legal argument. That may be the argument that they want to make down the road to the discovery mediator. But the issue today is the legal one. And the legal argument is not that the substance of the communication was not privileged. The argument is based on concepts of waiver, basically, ha-ha, you blew the privilege because you shared privileged information with the financial professional.

And, Your Honor, that's right on page one of the litigation trust's brief where it says, "The disclosure of privileged communications to third parties like Jefferies and Ernst & Young who provide business, not legal advice, waives privilege."

And, Your Honor, that's a particularly weak argument in favor of disclosure here, particularly where at the time the communications at issue were made the parties were relying on a state law privilege which expressly provides that communications shared with financial professionals don't lose their privileged status.

It's also inconsistent with the Supreme Court's ruling in Upjohn because we're only seeking to protect communications. The litigation trust has had ample opportunity to discover facts.

Finally, Your Honor, in terms of the balancing there would be no great victory for federal policy here if Your Honor refuses to recognize Delaware's transactional privilege. There would simply be a crushing defeat for Delaware. Consistent with the Supreme Court's observation in Jaffee, rejecting Delaware's privilege here does not mean that evidence of otherwise privileged communications in Delaware transactions would be available in litigation in the future. It means that parties to such transactions are likely to stop having these types of communications in the future, so purported evidence will cease to exist and no truth seeking function will be served. This is precisely the analysis undertaken in Jaffee by the Supreme Court.

On the flip side, Your Honor, actions that for over 30 years the Delaware courts have deemed beneficial in the corporate transactional context -- sharing privilege communications with financial professionals -- likely will be curtailed. What attorney would take the risk that a federal court won't respect Delaware's privilege rule in some future federal litigation involving the transaction?

And, Your Honor, I'm not one for hyperbole or

speculation, but let's be clear. If this Court does not respect Delaware's transactional privilege here, the Court may well change the way transactional practice is conducted in Delaware. And that's regardless of how many qualifiers or limitations the Court attempts to put on its ruling. Attorneys engaged in Delaware transactions will have to take into account the fact that the privilege that they have come to rely on in Delaware transactions may not be respected by a federal court in possible future litigation arising out of that transaction.

Delaware's transactional privilege, recognized in an unbroken string of cases stretching back for more than 30 years, may become largely a relic of history. And, Your Honor, you don't have to believe me when I say that, but you do have to believe the Supreme Court, which said it best in Jaffee which is quoted on page 6 of our April 16 brief:

"Any state's promise of confidentiality would have little value if the client were aware that the privilege would not be honored in federal court."

And as the Jaffee court went on to say, which is quoted on page 1 of our April 16 brief, "an uncertain privilege is little better than no privilege at all."

So, Your Honor, in summary, the Delaware privilege law is clear. Privileged communications disclosed to financial professionals in the corporate transactional

context remain privileged regardless of the financial professional's role in the communication. Federal law expressly recognizes that state privilege law may be adopted as a matter of federal common law where the state privilege rule reflects an important state policy and there is no substantial harm to a federal interest.

Delaware's transactional privilege in fact reflects an important state policy and there is no countervailing federal interest that outweighs Delaware's policy.

For these reasons, Your Honor, on the facts of this case and for purposes of this case, defendants respectfully request that the Court adopt as a matter of federal common law the Delaware transactional privilege reflected in cases like 3Com and Jedwab. And that's why, for instance, Mr. Moridani's analogies or hypotheticals about cases in which multiple different state's laws might apply is completely irrelevant, because the only question here is where a transaction indisputably is governed by Delaware law and that's the only other law that could be applied.

There are not eight transactions with eight different States' laws which is a different case. There is our case on our facts where you have a Delaware law transaction which happened four years before the litigation was commenced -- excuse me. The communications at issue happened as much as four years before the litigation

commenced, three and a half years after the transaction was consummated when parties were relying on Delaware law to make their privilege calls.

Is it appropriate in those circumstances on the facts of this case for the Court to respect the analysis in Pearson and the other Third Circuit District Court cases which have applied state law privilege under the circumstances? The answer, in our view, respectfully is yes.

THE COURT: All right.

MR. STEARN: So, Your Honor, let me move on to the next issue, which is a discussion of federal common law in its current iteration regarding privileged communications involving financial professionals.

To be clear, Your Honor, defendants believe the Court need never get to this analysis because the Court should apply the Delaware privilege rule as a matter of federal common law here. But for purposes of argument let's assume that the Court rejects the application of Delaware's rule.

The first issue the Court needs to confront is a lack of consistency in federal case law. Frankly, Your Honor, notwithstanding the litigation trust's contention that it's all crystal clear and everything lines up, the law is a bit of a mess here. Our research indicates that

federal common law regarding privileged communications with financial professionals has gone down at least two paths and maybe more.

On the one hand, there's the functional equivalent approach, which ultimately focuses on whether communications were kept confidential and made for the purpose of obtaining or providing legal advice. There are narrower and broader applications of the functional equivalent approach reflected in the case law.

Second, Your Honor, there's the Kovel approach advocated by the litigation trust, although we've found that courts relying on Kovel have taken at least two different approaches, only one of which requires that a financial professional effectively serve as a translator for the attorney.

Let me just start by briefly summarizing the functional equivalent approach. Your Honor, that approach traces its origins to the Supreme Court's opinion in Upjohn versus United States, again, we've cited that in our brief, which held that privileged communications -- privilege applies to communications involving a corporation's lower level employees. Courts have extended that rule to apply to non-employees. An example from this Circuit is the Eastern District of Pennsylvania's decision in Flonase. The Court applied what it called a broad practical approach to the

functional equivalent test and it described the test as follows:

"The broad approach to determining whether an independent consultant is the functional equivalent of an employee reflects the privilege analysis in Upjohn by focusing its inquiry on whether the communications at issue were kept confidential and made for the purpose of obtaining or providing legal advice."

In our April 16th brief we've cited additional decisions from within this circuit following the Flonase approach.

Then, Your Honor, there's Kovel which was a Second Circuit decision from 1961, actually the year before I was born, and it's helpful to examine what actually happened in Kovel. Kovel was an accountant who worked for a law firm. A grand jury was investigating alleged federal income tax violations by a client of the firm. Kovel himself was subpoenaed to appear before the grand jury and asserted the attorney-client privilege in response to certain questions. The court below held Kovel in contempt and sentenced him to a year in jail. Not surprisingly, Mr. Kovel appealed.

Judge Friendly (ph) posed the question at issue as "under what circumstances, if any, the attorney client privilege may include a communication to a non-lawyer by the

lawyer's client." That's at 296 F.2d. 920.

Judge Friendly gave a non-exclusive example where an accountant helped to interpret a complicated tax matter so that the lawyer may give better legal advice. That would fall within the privilege.

But here's what Kovel actually held:

"What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting service or if the advice sought is the accountant's rather than the lawyer's, then no privilege exists."

That's at 291 F.2d. at 922.

The court then reversed the conviction and remanded for further proceedings.

And, Your Honor, courts following Kovel have taken two approaches. Some cases, including the non-circuit -- excuse me -- the non-circuit cases relied upon by the litigation trust, have taken the most restrictive view of Kovel possible and concluded that the interpreter/translator example the court provided in Kovel is the only circumstance in which the privilege is maintained where a financial professional is involved.

Other cases, Your Honor, have focused more on Kovel's actual holding, that the privilege is maintained

where a communication is made in confidence for the purpose of obtaining legal advice. An example of that is the Southern District of New York's Byrnes case which we cited in footnote 11 of our April 16 brief. And after citing Kovel and its progeny the Southern District of New York held on page 2 of the opinion that privileged communications involving a consultant remain privileged if the consultant's participation "was designed to assist the attorney to perform her counseling function." No obligation of interpreter or go between or things like that.

Now, Your Honor, the litigation trust contends that the Third Circuit Court of Appeals has adopted Kovel, including the requirement that the financial professional act as an interpreter or translator. But, Your Honor, a simple review of Third Circuit decisions shows that not to be true. In fact, Your Honor, our research has been unable to locate a single decision of the Third Circuit Court of Appeals that adopts the interpreter or translator requirement.

Now we discussed two such cases in footnote 14 of our April 16th brief. One was United States versus Alvarez and the quote from that case is simply that "Kovel holds that communications to an accountant in confidence for the purpose of obtaining legal advice from the lawyer are protected by the attorney-client privilege." That's it.

United States versus Antolini (ph), the Third Circuit's discussion of Kovel actually was dicta because the court held that the attorney-client privilege didn't protect letters which the defendant's attorney sent to the defendant's accountant, because the court determined that the defendant was trying to effect a partial waiver disclosing only information it deemed helpful while withholding information that might be harmful, which not surprisingly giving a partial waiver the Court said was unfair, and it also concluded that the evidence that had been admitted by the court below was duplicative and accordingly harmless error anyway.

The court then dropped footnote 1 of its opinion and said, "We question whether the attorney-client privilege existed here in the first instance," and the Third Circuit then cited Kovel and other cases for the following proposition: "Where a client or the client's attorney retains an accountant for the purposes of obtaining or providing legal advice, the attorney-client privilege may attach."

No interpreter discussion.

In United States versus Fischer, which our friends from the litigation trust mentioned during this call, no adoption of the interpreter requirement.

Your Honor, every single Third Circuit opinion the

parties have cited refers to the ultimate holding of Kovel rather than its interpreter example. Your Honor won't find the words interpreter or translator anywhere in Antolini or Alvarez or Fischer.

Nonetheless, Your Honor, on page 7 of its brief the litigation trust includes the following parenthetical after its citation to Alvarez. "To avoid waiver a third party must act as an intermediary between client and attorney." Your Honor, again, let me be clear. You will not find those words or words like them in Alvarez or any other decision of the Third Circuit Court of Appeals.

What the litigation trust has found is some New Jersey cases, in particular the GI Holdings case and a handful of cases that follow GI Holdings, which infer that the Third Circuit effectively adopted a "go between" requirement in Alvarez.

Your Honor, I have nothing but respect for New Jersey. I was born there. I grew up there. I even like Jersey tomatoes --

(Laughter)

MR. STEARN: -- but there is no support whatsoever in Alvarez for the gloss that GI Holdings puts on the case. Alvarez involved a medical expert retained to assist in the preparation of a criminal trial defense. The government subpoenaed the expert. The defense moved to quash. The

lower court denied the motion and the expert testified at trial. The Third Circuit concluded that the admission of the medical expert's testimony at trial was error and required a new trial. That's at 519 F.2d. 1047. And in so ruling here's what the Third Circuit said:

> "We see no distinction between the need of defense counsel for expert assistance in accounting matters and the same need in matters of psychiatry. The effective assistance of counsel with respect to the preparation of an insanity defense demands recognition that a defendant be as free to communicate with a psychiatric expert as with the attorney he is insisting -- he is assisting."

Nothing in Alvarez about a go between or an interpreter or a translator or an intermediary. If anything, Your Honor, Alvarez is closer to the cases we cite about the importance of a client's ability to consult with financial professionals in complex, modern day transactions.

So to wrap up on this point, Your Honor, there is no Third Circuit decision which adopts the requirement for which some courts and the litigation trust have cited Kovel, not one.

I'll also note that the litigation trust in its brief did not cite any Delaware decision expressly adopting the interpreter requirement over some other analysis either.

So the question is, Your Honor, in light of this inconsistent and somewhat confusing federal law where there is no single federal standard and no clear guidance from the Third Circuit, what is the Court to do? Well, to be blunt, the best answer is don't go there at all. The Delaware privilege rule for communications with financial professionals is straight forward, easy to apply, and fulfils the expectations of the parties.

But assuming the Court doesn't adopt the Delaware rule here it should not adopt the litigation --

I'm sorry.

THE COURT: I didn't say anything.

MR. STEARN: I didn't --

THE COURT: I'm sorry. No, Mr. Stearn. I didn't say anything.

MR. STEARN: I apologize, Your Honor. I thought I heard something and I didn't want to talk over the Court.

THE COURT: That's okay.

MR. STEARN: But, Your Honor, assuming the Court doesn't adopt the Delaware rule here, it should not adopt the litigation trust's proposed requirement that financial professionals act as interpreters. That requirement is traceable to an almost 60 year old criminal case which didn't consider the importance of financial professionals in modern day complex corporate transactions. The interpreter

role is not even required in many cases that cite Kovel, which cases focus on Kovel's actual holding of whether communications with an accountant were made for purposes of obtaining legal advice from a lawyer.

The better rule under federal common law is that attorney-client communications involving financial professionals remain privileged where the client was retained by the professional -- excuse me -- where the client retained the professional to assist with the transaction and the financial professional's participation facilitated the lawyer's provision of legal advice.

That is consistent, Your Honor, with the Flonase broad practical approach to the functional equivalent test pursuant to which the Court should "focus its inquiry on whether the communications at issue were kept confidential and made for the purpose of obtaining or providing legal advice." That's from pages 459 to 60 of Flonase.

It's consistent with Kovel's actual holding which is "what is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from a lawyer." And it's consistent with cases like Stafford Trading cited in our brief which recognized that financial advisors play an important role in modern day complex corporate transactions.

In fact, Your Honor, it's helpful to focus on the

analysis that was engaged in by the Stafford court. The Stafford court rejected expressly both the financial professional as interpreter requirement and the narrower reading of the functional equivalent approach. It then uttered the quote that you see in our brief:

> "Many courts have recognized that in today's marketplace attorneys need to be able to have confidential communications with investment bankers to render adequate legal advice."

The Stafford court then adopted what it called the "balanced approach" and concluded that the privilege applied where "Goldman Sachs confidentially communicated with Kirkland or Stafford's in-house counsel for the purpose of providing" -- or excuse me -- "obtaining or providing legal advice." That's at page 7 of the opinion. And the Court then applied this test and held that documents that were shared with Goldman Sachs, such as draft transaction agreements and documents summarizing transaction agreements and issues, remain privileged.

And here's a quote from page 10 of the Stafford opinion: "Including Goldman Sachs in the communications does not destroy the attorney-client privilege because Goldman Sachs' knowledge of the transaction is relevant to the inquiry."

So if the Court is going to reject Delaware's

privilege rule and attempt to articulate a federal standard, that standard should be that the attorney-client communications -- excuse me -- that attorney-client communications involving a financial professional remain privileged where the client retained the professional to assist with the transaction and the financial professional's participation facilitated the lawyer's provision of legal advice. But as we say, we don't think Your Honor ever needs to get there because where we should end up is with the Delaware privilege rule.

Your Honor, let me just spend a very brief period of time on the legal standard applicable to non-attorney privileged communications. Your Honor, that this issue even came up was something of a surprise to us. We thought the parties had actually reached agreement as to the standard at a meet and confer, and we were waiting for the litigation trust to identify the items on our privilege log for which it sought additional information.

But the litigation trust obviously takes a different view and we are where we are, so let's talk about the standard. Your Honor, the litigation trust looks to cases decided around the country, picks and chooses language it likes from a small handful of opinions, and cobbles together the most difficult standard it can create.

According to the litigation trust claims of

privilege for communications among non-attorneys are inherently suspect, are subject to a high level of scrutiny and require substantial proof that the communication is privileged.

Your Honor, the litigation trust does not cite a single decision of any court within the Third Circuit, not the Third Circuit Court of Appeals, not any District Court in this circuit, not any Bankruptcy Court in this circuit, not even any magistrate or special master opinion in this circuit that actually says this, that actually talks about these types of communications being inherently suspect and subject to a high level of scrutiny and requiring substantial proof.

At least in this circuit, Your Honor, there is no privilege law equivalent to enhanced scrutiny or the entire fairness test that must be satisfied here. In contrast, Your Honor, to the litigation trust's non-circuit approach, we have cited a small avalanche of cases reflecting the standard applicable in this circuit in general and in Delaware in particular.

And the test is clear and simple and does not require an enhanced level of scrutiny. Attorney client privilege protects privileged communications shared with or by non-attorney corporate employees or representatives who have responsibility relating to the subject matter of the

communication. It's really that simple, Your Honor. And that's the test we asked the Court to recognize for non-attorney privileged communications.

Your Honor, let me say some words that I suspect you'll be glad to hear from me. In conclusion --

THE COURT: Yes.

MR. STEARN: -- defendants --

(Laughter)

MR. STEARN: I didn't want you to agree with me.

THE COURT: No.

MR. STEARN: In conclusion, defendants respectfully request that the Court adopt the following test for privileged communications.

First, for privileged communications involving financial professionals, the Court should adopt the Delaware rule that communications involving financial professionals are privileged if the communications involve legal matters and the parties legitimately expected the communications to be treated as confidential.

Alternatively, if the Court rejects the Delaware rule, then for privileged communications involving profession -- financial professionals the Court should adopt the federal common law standard that communications involving financial professionals are privileged if there is an expectation of confidentiality and the professionals'

participation facilitates counsel's provision of legal advice.

Finally, Your Honor, for non-attorney privileged communications, the Court should recognize the standard that privileged communications shared among corporate employees and representatives who have responsibility for the underlying subject matter remain privileged.

Further, the Court should order the parties to meet and confer regarding application of the applicable standards to any remaining privilege assertions and thereafter to present any remaining disputes to the discovery mediator.

Your Honor, I think I have both exhausted myself and spoken my piece. Does the Court have any questions of me?

THE COURT: I don't. I don't, Mr. Stearn. I followed your arguments. And certainly -- they were in your briefs and I certainly understand them full well.

MR. STEARN: Your Honor, before I turn the podium -- thank you -- turn the virtual podium back over to my -- or to the litigation trust I would ask if my colleagues have anything to add?

MS. HARDMAN: This is Carrie Hardman on behalf of the Water Street defendants. We don't.

THE COURT: All right. Thank you. I think Mr. Stearn covered it all.

MR. STEARN: I didn't leave anything in the locker room, Your Honor.

THE COURT: No. No. That's for sure.

Well, Mr. Moridani, do you have any very brief comments in response?

MR. MORIDANI: Yes, please, Your Honor. If you don't mind and I'll try to be as quick as I can.

THE COURT: I can only give you five minutes and here's why. I want to take a brief adjournment after this with all of you on the phone unfortunately and go back and sort of finalize a ruling and come out and rule orally, and then I have a 3:30 call that I moved from 3:00. So we are a little bit under the gun.

MR. MORIDANI: Understood. I'll take no more than five minutes, I promise.

THE COURT: Okay.

MR. MORIDANI: First -- the first issue is, Your Honor, we are not here solely to discuss academic legal matters. The Trust's motion to compel has been on calendar since February. When we had the February hearing the Court said, I'm going to set an argument date on the potential motion for April the 5th. That may be a motion on everything. It may be a motion just on the third party communications, whatever it is, it will be.

And so the Trust filed its motion covering both

third party communications and non-lawyer communications. So we think this dispute is ready for a resolution today.

The second issue is I think it's pretty telling that Mr. Stearn spent about ten minutes discussing Jedwab and 3Com which are state law cases applying state law and are thus completely irrelevant. They don't apply to federal law nor do they even consider the question of supplanting federal law with state law nor could they because they're just not federal cases. Federal court, federal judge, federal claim, federal law. That's it.

And I have to say it's telling that Mr. Stearn didn't go into the substance of the Thompson case. As a preliminary matter, and there is nothing in Pearson that says they were overruling Thompson, nor could they, because it's settled law that a subsequent panel of the Court of Appeals cannot overrule a previous opinion unless it's en banc. That's City of Lafayette vs. Louisiana Power and Light Company, 532 F.2d. 431 affirmed by the Supreme Court 535 U.S. 389.

Defendants do not cite one case, not one case where any federal court has supplanted existing federal law in favor of state law. Pearson considered a new fifth federal privilege over mental health health records. Jaffee considered a new federal privilege over second -- for psychotherapist and patient relationships. Dieffenbach

considered a new federal medical peer review privilege. Sheldone considered a new federal mediation privilege. Castellani considered a new federal drug treatment privilege. In all of these cases there was no existing federal law. Your Honor, the only way you can import state law here is if you discard existing federal law which Thompson clearly prohibits.

Now it's -- the one last thing I'll say, Your Honor, is on the issue of Kovel, case after case after case not just within the District of New Jersey, but also the Western District of Pennsylvania and the Eastern District of Pennsylvania has ruled that the translator analogy applies and I didn't want to read it into the record before, but unfortunately now I have to because Mr. Stearn has said these cases don't exist. They do.

UPMC vs. TBIV, 2018 Westlaw 1542423 expressly adopts the translator analogy, Western District of Pennsylvania. Louisiana Municipal Police Employees Retirement System vs. Sealed Air, 253 FRD 300 explicitly adopts the translator analogy, District of New Jersey. Same thing in E.I. du Pont de Nemours & Co. v. MacDermid, Inc., 2009 Westlaw 3048421. Same thing in Cellco Partnership versus Certain Underwriters at Lloyd's, 2006 Westlaw 1320067. I could go on and on and on and on.

There is not one case within the Third Circuit that

has considered Kovel and rejected the translator analogy. It doesn't exist and that's why defendants haven't cited it.

Now the very, very last thing is on these non-lawyer communications, Your Honor, in all of the cases the defendants have cited, the predicate showing of legal advice has been shown already. The Court was considering whether there was privilege in the first place. Everyone agreed there was privilege. The question was, does forwarding privilege communications to non-lawyers in the corporate structure waive privilege and the obvious answer to that in all of those cases is no.

What hasn't happened here in this case is the predicate showing the privilege exists, and I think it's pretty telling that Ms. Hardman didn't address the example I raised which shows the -- of the issue perfectly. The issue isn't that forwarding legal advice waives it. We're not making that argument. We're making the argument that defendants have not shown these documents are privileged in the first place. So the act of forwarding something that isn't privileged, there's nothing to waive at all.

THE COURT: All right. All right. Well, here's what I would like to do, and I'm going to cut it back to five minutes because I have a 3:30 call and I'm sure that my ruling will take at least five minutes to read or ten minutes. But let's take a five minute recess, all, and you

can take a rest break and I'll be back out here and I will rule at that point. I think I can do it based upon my review of the briefs and your arguments today.

So let's take five minutes.

MR. STEARN: Thank you, Your Honor.

MR. MORIDANI: Thank you, Your Honor.

MS. HARDMAN: Thank you, Your Honor.

THE COURT: Thank you, all.

(Recess taken at 3:16 p.m.; reconvened at 3:21 p.m.)

THE COURT: Counsel, it's Judge Gross. I'm back on the telephone and I greatly appreciate the arguments. I thought they were excellent. And I just have to make basically a call on what I think the law is. You know, I've been reading most -- nearly all of the cases that the parties have cited in their submissions, and I've selected just a very few of them which I believe are instructive and which I will apply to my ruling.

And I start with Pearson versus Miller, 211 F.3d. page 57, a Third Circuit decision in 2000. There the Third Circuit Court of Appeals stated and held that discovery disputes in federal courts are governed by federal law. And the Pearson court then discussed several principles and one is that privileges are disfavored because they impede access to probative evidence.

However, Pearson then went on to state that, and

I'll quote here from the decision: "The case for recognizing a particular federal privilege is stronger, however, where the information sought is protected by a state privilege." And that's a quote from Pearson. And the Pearson court also discussed federal and state comity which, and here's another quote, "impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy."

And both of those quotes are found on page 67 of the Pearson decision.

And the second quote is a quote from the United States versus King, 73 Federal Rules decision page 103 at 105, a decision of the Eastern District of New York in 1976.

Well, here there is no strong federal policy at stake. We're not dealing with civil rights or the like. And furthermore the communications at issue involving Jeffrey's and Ernst & Young were in the context of Delaware law being applied to their work on the merger.

The influence of Delaware rather than federal law on application of the attorney-client privilege is frankly overwhelming and the defendants' expectation that Delaware law would apply was entirely reasonable.

The Court is also guided by the ruling of the United States Supreme Court in Jaffee versus Redmond, 518

U.S. 1, a 1996 decision where the Supreme Court looked to state law to find a privilege in patient psychotherapist communications, finding that Federal Rule of Evidence 501 authorizes federal courts to define new privileges by interpreting the common law in the light of reason and experience. And it is reason and experience that compels the court to apply Delaware law to the discovery issue before me.

The Court is also persuaded by the decision in In re: Flonase Antitrust litigation, 879 F. Supp 2d. page 454, a decision of the Eastern District of Pennsylvania in 2012. Mr. Moridani is correct that there it was by stipulation, but the Court does have a footnote in the opinion citing the law in numerous circuits.

And in Flonase the issue was whether the attorney-client privilege attached to communications between a corporation and its independent consultant. And the Court discussed specifically the United States Supreme Court's decision in Upjohn Company versus United States, 449 U.S. page 383, a 1981 decision. And the Supreme Court in Upjohn discussed the purpose of the attorney-client privilege as being "to encourage full and frank communications between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice." And that's at page 389 of the Upjohn decision.

The Supreme Court went on to hold that the attorney-client privilege could extend to communications involving lower level employees which was to be determined on a case by case basis. The Flonase court held that an independent consultant was the equivalent of an employee and the remaining question was whether "the communications at issue were kept confidential and made for the purpose of obtaining or providing legal advice." And that's found at pages 459 to 460 of Flonase.

And that is the situation before the Court. Communications were kept confidential and related to legal advice. The Court agrees with the defendants' argument that where a financial professional such as Jeffrey's and Ernst & Young is retained for purposes of a transaction and assisted the lawyers with the transaction, communications with the financial professional and communications that financial professional has relating to the transaction are protected by privilege.

And for this ruling the Court cites with approval the Jedwab decision and that is of course found at 1986 Westlaw 3426, a decision of the Delaware Court of Chancery in 1986, and also 3Com Corp. versus Diamond II Holdings, Inc., 2010 Westlaw 2280734, a decision of Delaware Chancery -- the Delaware Court of Chancery in 2010.

Communications among attorneys, clients and

financial professionals involving legal matters surrounded by the expectation of confidentiality are privileged. That is what those cases stand for. Without this protection, clients would not be able to function in the business world because advice would not be protected.

And the parties are also respectfully directed to the opinion in Moffatt versus Wazana Brothers International (ph), 2014 Westlaw 5410201, a decision of the Eastern District of Pennsylvania in 2014 which holds that the attorney-client privilege protects communications of non-attorneys who have responsibility for the transaction at issue. And numerous Delaware cases are in accord with Moffatt.

So for these reasons the Court holds that the so-called federal attorney-client privilege as defined in this matter; that is, this adversary proceeding, by modifying its applicability through application of the plentiful law of Delaware. The financial professionals are protected by the attorney-client privilege from producing or having defendants produce documents that they produced or received in providing assistance to their clients or their clients' attorneys.

Accordingly, the Court directs the parties to meet and confer, and documents which remain in dispute are in the first instance to be produced to the discovery mediator for

his review on the terms of the privilege contained in this ruling.

And that ends my ruling. And anything further?

MR. STEARN: Your Honor, Bob Stearn. Thank you for ruling so promptly. I apologize I went so long.

THE COURT: That's quite all right, Mr. Stearn. I enjoyed your argument. I enjoyed Mr. Moridani's argument. It was an interesting matter to resolve and I appreciate counsel's hard work.

MR. MORIDANI: Your Honor, this is Farbod Moridani for the Trust. Is the Court going to issue a ruling as to non-lawyer communications as well?

THE COURT: Well, I'm sorry, Mr. Moridani. I thought that I had. Perhaps not, but I -- I am ruling that the non-attorney communications are, in fact, covered by the privilege, and I'm just looking through my notes, because there was an expectation of confidentiality and because presumably those communications were in connection with legal advice.

And I think that upon reviewing the documents that were produced to him, the discovery mediator will be able to determine whether, in fact, that is the case with those documents.

MR. MORIDANI: Understood. Thanks, Your Honor.

THE COURT: All right.

All right, everyone. I thank you very much. And it was an interesting, a very interesting call. And with that we'll stand in recess.

MR. STEARN: Thank you, Your Honor.

MS. HARDMAN: Thank you, Your Honor.

THE COURT: All right, all.

MR. MORIDANI: Thank you, Your Honor.

THE COURT: Good day to you.

(Whereupon, these proceedings concluded at 3:31 p.m.)

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I N D E X

RULINGS

C E R T I F I C A T I O N

We, Dawn South and Sherri L. Breach, certify that the foregoing transcript is a true and accurate record of the proceedings.

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