

1 UNITED STATES BANKRUPTCY COURT

2 DISTRICT OF DELAWARE

3

4 In re:

Chapter 11

5 PHYSIOTHERAPY HOLDINGS, INC.,

Case No. 13-12965(KG)

6 et al.,

7 Debtors.

(Jointly Administered)

8 PAH LITIGATION TRUST,

9 Plaintiff,

10 v.

Adv. Pro. No. 15-51238

(KG)

11 WATER STREET HEALTHCARE

12 PARTNERS, L.P., et al.,

13 Defendants.

14

15 United States Bankruptcy Court

16 824 North Market Street

17 Wilmington, Delaware 19801

18

19 April 26, 2018

20 2:00 PM

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23 B E F O R E :

24 HON KEVIN GROSS

25 U.S. BANKRUPTCY CHIEF JUDGE



1 HEARING re Motion to Compel Production by the Litigation
2 Trust

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25 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.

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

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

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

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

6 The Court cannot import Delaware privilege law
7 into this case without violating the Thompson rule, which
8 has been binding settled law in the Third Circuit since
9 1982.

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

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

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

22 THE COURT: Yes.

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

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

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

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

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

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

1 That's U.S. vs. Fisher, 500 F.2nd 683, U.S. vs. Ancalini
2 (ph), 271 Fed. Appendix 268, and U.S. vs. Alvarez, 519 F.2d
3 1036.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 THE COURT: All right.

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

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

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

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

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

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

25 THE COURT: Yes.

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

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

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

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

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

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

1 redaction.

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

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

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

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

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

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

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

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

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

25 MR. MORIDANI: Well two responses to that, Your

1 Honor.

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

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

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

1 having looked at certain documents.

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

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

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

8 THE COURT: All right.

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

11 THE COURT: All right.

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

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

25 THE COURT: Well weren't they doing work where

1 Delaware law applied?

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

6 THE COURT: Right.

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

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

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

1 THE COURT: Well because --

2 MR. MORIDANI: Where chaos ensues, --

3 THE COURT: When they did --

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

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

21 THE COURT: Yes.

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

1 the outcome for privilege disputes.

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

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

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

10 THE COURT: All right.

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

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

14 MR. STEARN: Okay. Thank you.

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

20 THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 production of hundreds of documents.

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

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

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

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

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

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

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

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

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

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

10 THE COURT: Let me stop you there --

11 MR. STEARN: Of course --

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

16 MR. STEARN: Well, they argue --

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

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

20 THE COURT: Right.

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

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

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

15 THE COURT: All right.

16 MR. STEARN: So what I was going to say was -- now,
17 of course, what I just read is hardly a throw-away line from
18 the Chancellor, who was not known for ill-considered throw-
19 away lines. And anyone who practices Delaware corporate law
20 has known Jedwab to reflect the Delaware privilege rule in
21 the transactional context for more than 30 years. I
22 certainly remember from when I practiced in Chancery in the
23 90s and I suspect Your Honor remembers it from your
24 practicing days in Chancery as well.

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

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

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

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

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

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

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

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

5 3Com, Your Honor, then drops footnote 18 which we
6 refer to in our brief providing a sample of opinions since
7 Jedwab confirming the Jedwab privilege rule.

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

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

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

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

22 "To the extent that Udata" -- and that was the
23 investment banker.

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

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

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

10 And the Court then cites Jedwab. In fact, each of
11 these three decisions in the footnote -- in footnote 18 in
12 3Com -- cite as the basis for their ruling Chancellor
13 Allen's decision in Jedwab.

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

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

1 communications are privileged. Goldman Sachs'
2 precise role in a specific communication is not
3 critical as long as it involved legal issues
4 regarding the transaction and participation by
5 3Com's attorneys."

6 Now, Your Honor, the litigation trust does not
7 address 3Com in its brief. It must have known we would cite
8 to it because, for example, 3Com was discussed in our March
9 27, 2018 meet and confer letter which Mr. Moridani attached
10 as Exhibit 15 to his declaration. And 3Com doesn't --
11 excuse me -- the litigation trust doesn't cite 3Com in its
12 brief because it really has no answer to 3Com. It can't
13 argue that the Court's privilege discussions in 3Com is
14 dicta because the Court's determination that privileged
15 communications shared with Goldman Sachs remained privileged
16 was the holding of the case.

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

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

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

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

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

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

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

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

1 amended privilege serves an important state policy. Pearson
2 says:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 program.

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

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

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

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

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

1 governed by Delaware law.

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

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

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

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

21 Your Honor, there can be no reasonable dispute that
22 the parties here would have expected Delaware privilege law
23 to apply to their transaction related communications.

24 Physiotherapy was a Delaware communication -- excuse me --
25 corporation. Documents relating to the Delaware merger

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

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

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

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

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

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

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

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

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

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

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

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

16 Your Honor, there have been more than 14 million
17 pages of documents produced in this case, including over
18 400,000 pages of documents produced by Jefferies and Ernst &
19 Young. Among defendants' production there are almost 3,500
20 documents reflecting communications with Jefferies and Ernst
21 & Young which were produced without any redaction
22 whatsoever. More than 40 depositions have been taken in
23 this case, including five depositions of Jefferies and Ernst
24 & Young.

25 By the way, the litigation trust also has served

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

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

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

19
20 Additionally, Your Honor, Castellani rejected the
21 argument that the litigation trust makes here that,
22 essentially, there was some compelling need for the
23 documents withheld on grounds of privilege, state law
24 privilege, given the defendant's ample opportunity, or
25 excuse me. In this case -- it was the defendant's

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

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

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

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

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

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

18 On the flip side, Your Honor, actions that for over
19 30 years the Delaware courts have deemed beneficial in the
20 corporate transactional context -- sharing privilege
21 communications with financial professionals -- likely will
22 be curtailed. What attorney would take the risk that a
23 federal court won't respect Delaware's privilege rule in
24 some future federal litigation involving the transaction?

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

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

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

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

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

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

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

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

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

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

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

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

10 THE COURT: All right.

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

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

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

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

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

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

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

1 functional equivalent test and it described the test as
2 follows:

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

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

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

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

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

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

6 But here's what Kovel actually held:

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

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

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

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

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

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

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

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

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

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

21 No interpreter discussion.

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

25 Your Honor, every single Third Circuit opinion the

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

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

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

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

20 (Laughter)

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

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

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

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

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

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

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

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

11 I'm sorry.

12 THE COURT: I didn't say anything.

13 MR. STEARN: I didn't --

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

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

18 THE COURT: That's okay.

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

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

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

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

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

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

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

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

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

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

25 So if the Court is going to reject Delaware's

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

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

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

25 According to the litigation trust claims of

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

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

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

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

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

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

6 THE COURT: Yes.

7 MR. STEARN: -- defendants --

8 (Laughter)

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

10 THE COURT: No.

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

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

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

1 participation facilitates counsel's provision of legal
2 advice.

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

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

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

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

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

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

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

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

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

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

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

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

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

16 THE COURT: Okay.

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

25 And so the Trust filed its motion covering both

1 third party communications and non-lawyer communications.

2 So we think this dispute is ready for a resolution today.

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

11 And I have to say it's telling that Mr. Stearn
12 didn't go into the substance of the Thompson case. As a
13 preliminary matter, and there is nothing in Pearson that
14 says they were overruling Thompson, nor could they, because
15 it's settled law that a subsequent panel of the Court of
16 Appeals cannot overrule a previous opinion unless it's en
17 banc. That's City of Lafayette vs. Louisiana Power and
18 Light Company, 532 F.2d. 431 affirmed by the Supreme Court
19 535 U.S. 389.

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

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

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

16 UPMC vs. TBIV, 2018 Westlaw 1542423 expressly
17 adopts the translator analogy, Western District of
18 Pennsylvania. Louisiana Municipal Police Employees
19 Retirement System vs. Sealed Air, 253 FRD 300 explicitly
20 adopts the translator analogy, District of New Jersey. Same
21 thing in E.I. du Pont de Nemours & Co. v. MacDermid, Inc.,
22 2009 Westlaw 3048421. Same thing in Cellco Partnership
23 versus Certain Underwriters at Lloyd's, 2006 Westlaw
24 1320067. I could go on and on and on and on.

25 There is not one case within the Third Circuit that

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

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

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

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

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

4 So let's take five minutes.

5 MR. STEARN: Thank you, Your Honor.

6 MR. MORIDANI: Thank you, Your Honor.

7 MS. HARDMAN: Thank you, Your Honor.

8 THE COURT: Thank you, all.

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

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

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

25 However, Pearson then went on to state that, and

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

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

12 And the second quote is a quote from the United
13 States versus King, 73 Federal Rules decision page 103 at
14 105, a decision of the Eastern District of New York in 1976.

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

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

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

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

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

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

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

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

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

25 Communications among attorneys, clients and

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

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

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

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

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

3 And that ends my ruling. And anything further?

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

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

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

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

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

24 MR. MORIDANI: Understood. Thanks, Your Honor.

25 THE COURT: All right.

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

4 MR. STEARN: Thank you, Your Honor.

5 MS. HARDMAN: Thank you, Your Honor.

6 THE COURT: All right, all.

7 MR. MORIDANI: Thank you, Your Honor.

8 THE COURT: Good day to you.

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

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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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