AMERICAN BANKRUPTCY INSTITUTE

International Caribbean Insolvency Symposium

Attorney/Client Privilege: Ethics Has No Borders

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ABI Caribbean Insolvency Program

ATTORNEY-CLIENT PRIVILEGE:
CHOICE OF LAW IN INTERNATIONAL
CASES AND THE CRIME-FRAUD EXCEPTION

Introduction

- Panelists
  - Hon. Robert A. Mark, Moderator (S.D. Bankruptcy Court (Miami, FL))
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  - Paul Kennedy (Campbells, Grand Cayman, Cayman Islands)
  - Megan Murray (Underwood Murray P.A., Tampa, FL)

- This panel will discuss idiosyncrasies and potential ethical traps of the attorney/client privilege laws in the Caymans and the U.S., and when those laws apply, even in recognition and other cross-border matters.

Types of Privilege

- Cayman Islands:
  - Follows English Common law as a British Overseas Territory
- United States:
  - Comprised of federal common law and state-law doctrines
  - Must demonstrate:
    - 1) the document constituted a communication between client and counsel, which
    - (2) was intended to be and was in fact kept confidential, and
    - (3) was made for the purpose of obtaining or providing legal advice). Exceptions apply, such as whether "there is substantial reason to believe that a party engaged in or attempted to commit a fraud and used communications with an attorney to do so.

Types of Privilege

- Cayman Islands:
  - Legal Advice Privilege
  - Litigation Privilege
  - Common Interest Privilege
- United States:
  - Attorney/Client Privilege
  - Work Product Doctrine
  - Joint Defense

In-House Counsel

- Cayman Islands:
  - Extends to lawyers or qualified in house counsel acting in a legal capacity
  - Strict Scrutiny applied (business advice excluded)
- United States:
  - Primary Purpose test, broader
  - Only for legal, not business, purposes.

Waiver of Privilege

- Cayman Islands:
  - Explicit or Implicit waiver considered
  - Third Party disclosures …consider specific, limited purpose
- United States:
  - Look to Federal Rule of Evidence 502
  - Was communications in furtherance of a crime?
  - Consider actions in reliance on counsel
  - “At Issue” doctrine - a privilege cannot be used as a shield and a sword
  - Selective waiver discouraged unless confidentiality agreements exist
  - Fiduciary perspective (life in a fishbowl, reliance on fiduciary counsel)

Privilege in the Corporate Context

- Cayman Islands:
  - Privilege belongs to the company as the client, not individual directors or shareholders.
  - Directors may access documents
  - Privilege shifts to insolvency practitioner after administration
  - Consider conflicts of interest between company and director communications
- United States:
  - Privilege belongs to the corporation, not individual employees, officers, or directors.
  - Upjohn Test: communications made for legal advise by those in the scope of their duties
  - Balance shareholders' need for information against the corporation's interest in maintaining privilege.
  - Fiduciary perspective

Crime-Fraud Exception

- Cayman Islands:
  - No privilege if communication part of a plan to conceal or commit a crime
  - Party alleging crime bears prima facie burden
  - High Bar
- United States:
  - No privilege if 1) communication made in furtherance of a fraud, or 2) client knew or indented the communication to assist with illegal conduct (even if recipient didn't know)
  - Only Client's intent is relevant
  - Fiduciary perspective – making criminal referrals

Without Prejudice Communications/Settlement Discussions

- Cayman Islands:
  - Broader, encourages open negotiations
- United States:
  - Narrower
  - Relies on Federal Rule of Evidence 408
  - Does not protect privilege, only limits admissibility
  - Fiduciary perspective

Cross Border Issues/Choice of Law

- Cayman Islands:
  - Follows English principles
  - Parties must disclose sensitive information unless there is a "real risk of prosecution"
- United States:
  - Broad US discovery rules may override foreign privilege rules
  - Must consider which jurisdiction the communication "touches" the most

Insolvency Issues/Disclosure to the Court/Who Controls the Privilege

- Cayman Islands:
  - Liquidators seek Grand Court review and involve liquidation committee in privileged communications of an insolvent company
  - Communications between liquidator and a court are not privileged
  - Liquidators owe a fiduciary duty
  - Liquidation files are not open to public inspection
- United States:
  - Upon bankruptcy filing, privilege belongs to the Debtor (individual or corporate)
  - Power shifts to fiduciary upon appointment
  - Difference of opinions on whether a fiduciary can waive the privilege of an individual debtor.

Insolvency Issues/Disclosure to the Court/Who Controls the Privilege

- Fiduciary's perspective
  - More on privilege
  - Duration considerations
  - When fiduciaries need separate counsel
  - Memorializing decision making (or not)
  - Cross Border Considerations
  - Chapter 7 and 11 responsibilities under 11 U.S.C. 704 and 1106 (statutory obligations)

Shareholder Privilege in Solvent Liquidations

- Cayman Islands:
  - Company prohibited from claiming privilege against its own shareholders
    - Exception: documents crafted for purpose of litigation between company and shareholder
  - Modern courts have challenged this rule
  - Aabar Holdings SARL v Glencore PLC [2024] EWHC 3046 (Comm)
- United States:
  - Shareholder entitled to corporate documents.
  - In litigation between a corporation and its shareholders, shareholders access to information otherwise protected under attorney-client privilege may be limited.
  - Where a fiduciary duty is owed to the shareholder or member, shareholder must show **good cause** why attorney-client privilege should not protect those communications

QUESTIONS?

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Attorney-Client Privilege Issues from a Fiduciary's Perspective

By James S. Feltman
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(1)Who holds/controls the privilege?

Are there differences between a Member, a Corporate Officer, a Director, a CRO, Chapter 11 and Chapter 7 trustee relative to attorney-client privilege ("ACP") issues?

When is there a clear change in control event?

In capacities other than Chapter 7, attorneys represent the entity/estate, not the fiduciary.

(2) What are duration considerations?

Fiduciaries holding the ACP have transitory roles except for the Chapter 7 trustee.

ACP information and decision making related thereto, pass in the chain of control to a successor.

(3) Fiduciaries-when might you need your own counsel vs. the entity's counsel?

When do issues create potential conflicts between a fiduciary's decision-making process and that of the entity?

Examples could include internal investigations, D&O claims, and professional malpractice claims.

What legal advice should a fiduciary want to control independent of the entity?

(4) Memorializing critical decision-making activities or investigative results

Confirm your counsel knows how the rules apply in your jurisdiction.

Creating an ACP communication that can be shielded from third parties until you no longer control the ACP.

Understanding when to use oral vs written legal advice (a cautionary note since discovery may include all forms of communication) and the difference between AC communications and

ACP vs. work product privilege; discovery rules in non-US jurisdictions.

(5) Understanding and managing ACP issues in cross border matters

Differences between client/ACP and client/ACP/Expert communications

Understanding rules in non-US jurisdictions regarding claw back of inadvertent disclosures

Seeking advice about how ACP differs in cross border matters.

Whose rules govern and in what ways?

How does one manage ACP issues arising in multiple jurisdictions simultaneously?

(6) Waving privilege and Common Defense Agreements (life in the fishbowl)

Understanding when use of a common Legal Interest Agreement is or isn't a waiver.

Relying on advice of counsel in decision making re: ACP successor fiduciary issues

(7) Fiduciary's Statutory Responsibilities

Can a Chapter 11 and Chapter 7 trustee's responsibilities under 704(a) and 1106(a) be impacted by ACP issues?

(8) Making Criminal Referrals (Chapter 11 and chapter 7 trustees)

Is the work product and ACP communication protected?

Drawing conclusions or making final judgements pre-discovery.

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CARIBBEAN INTERNATIONAL INSOLVENCY SYMPOSIUM

PRIVILEGE IN CAYMAN AND U.S. INSOLVENCIES

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Cayman v US Privilege

In The Canterville Ghost (1887), Oscar Wilde wrote: "*We have really everything in common with America nowadays except, of course, language*." When it comes to legal principles such as privilege, it could be said that the Cayman Islands and the US share more in common than what divides them. If an alien were to land and for some reason decide to make a comparative study of legal systems the respective Cayman and US dots on his graph would not be too far apart. However, for lawyers the devil is always in the detail and assumptions can be traps for the unwary. So when it comes to privilege the careful insolvency lawyer will always need to pack not just his or her sun lotion but a note of caution when they venture forth into cross-border territory.

1. Legal System and General Framework

The Cayman Islands follows English common law principles as a British Overseas Territory.

Legal privilege is rooted in the principles developed in English common law, including legal advice privilege and litigation privilege.

In the United States, privilege is comprised of federal common law, as well as state-law doctrines serving as a guide. Ultimately, courts consider the pertinent animating principles that govern the scope and rationale for the federal common law of privilege. *See, e.g., Fitzpatrick v. Am. Int'l Grp.,*

Inc., 272 F.R.D. 100, 105–06 (S.D.N.Y. 2010); *Swidler & Berlin,* 524 U.S. 399 at 403, 118 S.Ct. 2081; *Montgomery,* 548 F.Supp.2d 1175 at 1179.

When a complaint in an adversary proceeding alleges claims for relief under both state and federal law, the applicability of the privilege must be decided based on the application of federal common law. *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 319 F.R.D. 100, 104 (S.D.N.Y. 2017) (Under the federal common law, to prevail on their claim of attorney-client privilege with respect to a particular document, defendants had to show that: (1) the document constituted a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice). Exceptions apply, such as whether "there is substantial reason to believe that a party engaged in or attempted to commit a fraud and used communications with an attorney to do so." *Id.* at 107.

Privilege doctrines often stem from constitutional rights, such as the Fifth Amendment (self - incrimination) and the broader adversarial system.

2. Types of Privilege

Cayman Islands:

- Legal Advice Privilege:
  - Protects confidential communications between a lawyer and their client made for the purpose of seeking or giving legal advice.
  - Applies only to qualified lawyers admitted to practice in the Cayman Islands or in jurisdictions where the role of the lawyer is functionally the same or similar to that of a Cayman lawyer (whether in private practice or in-house). There is no list of approved overseas jurisdictions, but the Cayman court will apply a "functional test" to determine whether or not privilege should apply.
- Litigation Privilege:
  - Protects communications with third parties or documents created for the dominant purpose of actual or anticipated litigation.
  - Requires that litigation be "reasonably in contemplation" and focuses on dominant purpose, a strict test.
- Common Interest Privilege:
  - Arises where multiple parties share a common legal interest in the subject matter.
  - Derived from English law, and narrowly interpreted.

United States:

- Attorney-Client Privilege:
  - Protects communications between attorney and client made for the purpose of obtaining legal advice. It is broader in scope compared to the Cayman Islands.
  - Includes in-house counsel if their role involves primarily providing legal advice.

- Work-Product Doctrine:
    - A broader counterpart to litigation privilege. Protects documents and tangible things prepared in anticipation of litigation or for trial.
    - It applies not just to lawyers but also to other representatives (e.g., paralegals and consultants) involved in litigation preparation.
    - Two-tier protection:
        - "Ordinary" work product: can be discoverable if a substantial need is demonstrated.
        - "Opinion" work product receives near-absolute protection.
- Joint Defense or Common Interest Doctrine:
    - Broader application than in the Cayman Islands; protects shared communications or documents among parties with a common legal interest even if litigation has not commenced.
    - The privilege can be broken if the parties become adversaries or have conflicts with respect to the privileged information.
    - Common applications include corporate transactions where two parties are looking to acquire a company, co-defendants in litigation, insurer and insured defending against claims.

In the US, attorney-client privilege can cover communications with third parties (I.e. expert witness) if the purpose of those communications is to assist or enable the attorney to provide legal advice to the client. In Cayman legal advice privilege would not cover such communications. However, litigation privilege goes further under Cayman law and protects communications with third parties for the dominant purpose of litigation.

The US concepts of ordinary work product and opinion work product do not exist in England however there are close parallels with litigation privilege.

3. Scope of Privilege for In-House Counsel

Cayman Islands:

- Legal privilege extends to external lawyers or qualified in-house counsel acting in a legal capacity.
- However, where in-house counsel's role includes non-legal advice (e.g., business decisions), privilege may not attach.
- Courts strictly scrutinize the capacity in which in-house counsel acted.

United States:

- Privilege applies to communications with in-house counsel, even if they are employees of the corporation.
- However, courts apply a "primary purpose" test:

  - If the communication serves both legal and business purposes, privilege applies only if the primary purpose is legal advice.
- *See L.D. v. United Behav. Health*, 2022 WL 3139520, at *12 (N.D. Cal. Aug. 5, 2022) (where a communication has a dual purpose, for example to give or receive both legal advice and business advice, the communication is protected by attorney-client privilege only where the "primary purpose" of the communication is "to give or receive legal advice, as opposed to business ... advice." In re Grand Jury, 23 F.4th 1088, 1091 (9th Cir. 2021)).
  - The court explained that a dual-purpose communication can only have a single "primary" purpose and thus, the primary purpose test is narrower than the "because of" test that some courts have used, which asks only if there is a causal connection. *Id.* The court reasoned that "[a]pplying a broader 'because of' test to attorney-client privilege might harm our adversarial system if parties try to withhold key documents as privileged by claiming that they were created 'because of' litigation concerns[,]" finding that this approach "would create perverse incentives for companies to add layers of lawyers to every business decision in hopes of insulating themselves from scrutiny in any future litigation." *Id.* at 1093-1094.

4. Waiver of Privilege

Cayman Islands:

- Privilege can be waived explicitly or implicitly by the client.
- Inadvertent waiver: Cayman courts follow the English principle that inadvertent disclosure does not automatically constitute waiver; the court considers fairness.
- Third-Party Disclosure: Sharing privileged documents with a third party without proper legal protections risks waiver however it may be possible to share a copy of a legally privileged document with a third party and maintain that document's privileged status, provided that the disclosure was made for a specific and limited purpose. In one of the leading cases privileged information was disclosed to a legal regulator on a voluntary basis as part of an investigation. The Privy Council (Supreme Court equivalent) ruled that the documents had been produced to the regulator for a limited purpose and did not lose their privileged status nor had the law firm waived the same.

United States:

- Waiver rules are more developed and codified under Federal Rule of Evidence 502:
  - Intentional waiver applies to the disclosed communication and potentially related communications if fairness requires.
  - Fairness type of waivers include where the communications were made to third parties, or even attorneys, in furtherance of a crime (the crime fraud exception), or

where a party puts their reliance on counsel at issue. Communications with counsel can then be disclosed.

- Fairness considerations include the "at issue" doctrine which stems from the premise that the attorney-client privilege cannot be used as both a sword and a shield; waiver of the privilege can occur when a party seeks to use the privilege to prejudice the opposing party's case and in fairness requires an examination of otherwise protected communications. *In re Mongelluzzi,* 568 B.R. 702 (Bankr. M.D. Fla. 2017) (Bank waived attorney-client and work-product privileges as to certain documents by asserting good faith defense to fraudulent transfer claims, as good faith defense put bank's knowledge and intent at issue and those documents were most likely the most probative, if not the only, evidence of bank's state of mind).
- Inadvertent waiver: Courts analyze whether the disclosure was accidental, promptly rectified, and the degree of prejudice.
- Selective Waiver: U.S. courts reject selective disclosure of privileged material to third parties unless done under confidentiality agreements.

5. Privilege in the Corporate Context

Cayman Islands:

- Privilege belongs to the company as the client, not individual directors or shareholders.
- Shareholders may access privileged material unless they are in dispute with the company – although that is now in doubt following *Aabar =* see below.
- Once a company enters administration, liquidation, or another insolvency process, the appointed "insolvency practitioner" (which, in Cayman parlance refers to a qualified accountant who acts as a liquidator, receiver, administrator etc.) takes control of the company's legal privileges.
- If directors face allegations of wrongdoing (e.g., fraudulent trading), they may attempt to assert personal LPP over communications with their lawyers.
- However, if the communications were made in their capacity as company officers (rather than as individuals), the privilege is likely to belong to the company, now controlled by the insolvency practitioner.
- Pre-insolvency advice: Communications between the company and lawyers before insolvency may be scrutinized. If these relate to actions intended to defraud creditors, the "fraud exception" to privilege might apply.
- Confidentiality of creditor communications: Privilege does not usually extend to communications between creditors and insolvency practitioners unless there is legal advice involved.
- Conflict of interest: If a lawyer advised both the company and its directors, privilege claims may become complex, particularly if the company is insolvent and the insolvency practitioner takes control of privilege.

United States:

- Privilege belongs to the corporation, not individual employees, officers, or directors.
- U.S. courts apply the "Upjohn test" (from *Upjohn Co. v. United States*, 1981) to determine whether privilege attaches to communications with employees:
    - Communications must be made for legal advice.
    - Employees must provide information within the scope of their duties.
    - Corporate officers or the board of directors generally control the privilege and may waive it on behalf of the corporation.
    - Shareholders suing on behalf of the corporation (e.g., in a derivative lawsuit) may seek access to privileged communications because they are acting in the corporation's interest.
    - Courts balance the shareholders' need for information against the corporation's interest in maintaining privilege. *Garner v. Wolfinbarger* (5th Cir. 1970) allows shareholders to access privileged corporate communications if they can demonstrate "good cause."
        - Good cause factors may include: the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.
    - The court can freely use in camera inspection or oral examination and freely avail itself of protective orders, a familiar device to preserve confidentiality in trade secret and other cases where the impact of revelation may be as great as in revealing a communication with counsel.

The US definition of the “client” is broader than in England. In *Three Rivers No 5*[1]the English Court of Appeal decided that only a limited class of employees with express or implicit authority to seek and receive legal advice on behalf of a company qualified as the client for the purpose of legal advice privilege. That meant communications with employees outside of that class did not attract privilege. This is a much narrower approach than that of the US Supreme Court in *Upjohn Co v United States.*

In the *RBS Rights Issue Litigation*, the UK High Court held that notes of interviews conducted by RBS and its lawyers with employees and ex-employees as part of an internal investigation were not covered by legal advice privilege. The basis for the decision was that the interviewees were not within the definition of "client". Those interviews took place in the US, and, in the US, notes of the interviews would likely have been treated as "attorneys' working papers" and therefore privileged. However, the Court applied the law of England, as the forum for the dispute. There is a long line of authorities going back to the mid-19th century to the effect that the lex fori (law of the forum) should be applied to questions of privilege as between parties and their foreign lawyers. The Court in RBS grappled with the rationale for this rule and while it struggled to identify a principled reason for the longstanding approach it dismissed the other available approaches on practical grounds:

> "*The practical difficulties of applying some other law than the lex fori are fairly obvious: it was recognised in Re Duncan that any solution but the application of the lex fori requires determination of the application and content of foreign law, and even the identification of the relevant foreign law may be difficult according to the stage and context in which the issue arises. Those difficulties are compounded where, in multi-jurisdictional cases involving several parties, there is the potential for a variety of different putatively applicable laws, and the prospect of having to determine them at an interlocutory stage, with cross-examination of experts if there is a disagreement. In short, a convention may often be a reflection of both pragmatism and overall policy. In my assessment, it may well be that application of the lex fori, with a discretionary override, is the least objectionable course."*[1]

6. Crime-Fraud Exception

Cayman Islands:

- Derived from English law; privilege cannot be claimed if a communication or document is part of a plan to commit or conceal a crime or fraud.
- The standard of proof is high; the party alleging crime or fraud must show prima facie evidence.

United States:

- The crime-fraud exception is well-established and applies more broadly.
- The party invoking the exception must provide a prima facie showing that:
    1. The communication was made in furtherance of a crime or fraud.
    2. The client knew or intended the communication to assist with illegal conduct.
- Because the attorney-client privilege benefits the client, it is the client's intent to further a crime or fraud that must be shown to avoid the privilege; both the attorney's intent, and the attorney's knowledge or ignorance of the client's intent, are irrelevant. *In re*

[1] [2016] EWHC 3161 (Ch) at ¶

BankAmerica Corp. Sec. Litig., 270 F.3d 639 (8th Cir. 2001) (Requiring a threshold showing of facts supporting the crime-fraud exception to the attorney-client privilege followed by in camera review of the privileged materials helps ensure that legitimate communications by corporations seeking legal advice as to their disclosure obligations under the federal securities laws are not deterred by the risk of compelled disclosure under the crime-fraud exception).

- Courts are reluctant to order disclosure without conducting an in-camera review of allegedly privileged materials.
- Several circuits have adopted somewhat different standards regarding the quantum of proof required to satisfy the crime-fraud exception. *See In re Sealed Case,* 107 F.3d 46, 50 (D.C. Cir. 1997) (evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent fraud); *In re Grand Jury Proceedings,* 87 F.3d 377, 381 (9th Cir. 1996) (reasonable cause); *In re Richard Roe, Inc.,* 68 F.3d 38, 40 (2d Cir. 1995) (probable cause); *In re Int'l Sys. & Controls Corp.,* 693 F.2d 1235, 1242 (5th Cir.1982) (evidence that will suffice until contradicted and overcome by other evidence).

7. Without Prejudice Communications

Cayman Islands:

- The without prejudice rule, rooted in English law, protects communications made during genuine settlement discussions because parties are more likely to engage in open negotiations without fear that their statements will be used against them in court.
- This rule applies even if litigation has not yet begun.

United States:

- The concept is narrower; Federal Rule of Evidence 408 protects settlement discussions, but:
  - The rule does not grant privilege to communications; it only restricts admissibility as evidence.
  - Settlement discussions may be discoverable in some instances (i.e., to prove bias or prejudice (showing a witness is testifying in favor of a party due to a prior settlement), or to rebut a claim of delay (i.e., the parties were discussing settlement).

8. Cross-Border Issues

Cayman Islands:

- Privilege in cross-border disputes follows English principles.

- Parties may be forced to give discovery of confidential non-privileged information unless doing so would bring about a "real risk of prosecution" in the foreign jurisdiction – see *Bank Mellat*.

United States:

- U.S. courts may not recognize privilege claims from foreign jurisdictions if they conflict with U.S. rules of privilege (e.g., under the "choice of law" doctrine).
- U.S. discovery rules, particularly in civil proceedings, are far-reaching, potentially overriding foreign privilege claims. *See General, Hyundai Motor Company et al. v. Hyundai Technology Group, Inc. et al. ,* No. SA CV 23-01709 (C.D. Cal. Sept. 10, 2024) (discussing the 'touch base' framework and noting the privilege law of a country that has the strongest interest applies). If a document 'touches' the U.S. the most, another country's privilege laws may not defeat the requirement in the US to produce.
- If a communication with a foreign patent agent involves a foreign patent application, then as a matter of comity, the law of that foreign country is considered regarding whether that law provides a privilege comparable to the attorney/client privilege. Even if a comparable privilege is provided, recognition of such a privilege by the foreign government is not controlling but is subject to any overriding U.S. policy considerations. *See Stryker Corp. v. Intermedics Orthopedics, Inc.,* 145 F.R.D. 298, 306 (E.D.N.Y.1992); *Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc.,* No. 95 CIV. 8833 (RPP), 1998 WL 158958, at *1 (S.D.N.Y. Apr. 2, 1998).
- If the communication does not "touch base" with the United States, a court will look to the law of the foreign jurisdiction to determine whether a privilege would protect that communication in the foreign country. On the other hand, if the communication "touches base" with the United States, United States law will apply. *Stryker Corp. v. Intermedics Orthopedics, Inc.*, 145 F.R.D. 298, 305 (E.D.N.Y. 1992).

9. Insolvency

Cayman Islands:

- Cayman liquidators are required to seek the sanction of the Grand Court in relation to the commencement or settlement of litigation or other proceedings commenced by them. This usually involves the disclosure to the Court and at least liquidation committee members of confidential and privileged information.
- However, Communications between a liquidator and a court in Cayman are generally not protected by legal professional privilege and can, in principle, be disclosed to creditors, unless there is a specific reason to protect the confidentiality of those communications.
- Liquidators have a duty to act in the best interests of creditors and are expected to operate transparently. Creditors are entitled to request information about the liquidation process

under certain circumstances. However, there are exceptions to this general principle of transparency.

- Order 24, r.6(1) of the Cayman Companies Winding Up Rules provides:

> *"(1) The Court may direct that the whole or part of any report, order, affidavit or other document, except the petition, winding up order or supervision order, which has been filed or is required to be filed pursuant to these Rules, shall be sealed and kept confidential for a specific period or until the happening of a specified event, on the grounds that –*
>
> *(a) the information in question is of a confidential nature and will not come into the public domain unless and until the document containing such information is filed in Court; and*
>
> *(b) the publication or immediate publication of the information contained in the document will harm the economic interests of the creditors or contributories of the company."*

- Court files relating to liquidation proceedings are not open to public inspection. Right of access to the Court file is governed by CWR Order 26, rule 4(1) which provides that certain persons (including any creditor or contributory of the Company, and former directors of the company which, shall have the right to inspect the Court file in respect of a liquidation proceeding and take copies of filed documents.
- The right to inspect and copy the contents of a Court file under CWR O.26, r.4(1) is not absolute. It is exercised by submitting a written request to the Registrar of the Financial Services Division who must satisfy herself about the "propriety" of the application which means that the Registrar must be satisfied that the applicant is a person falling within one or more of the categories contained in CWR O.26, r.4(1) and that the application is made for a proper purpose.
- Questions of open justice within the context of sealing applications were considered in *Re Silicon Valley Bank (Cayman Islands Branch)* FSD No. 163 of 2023 (DDJ). In that case, the Honourable Mr Justice Doyle held, at paragraph 23, that "*the Winding Up Rules must be read subject to the Constitution, primary legislation and fundamental principles of the common law*". The learned Judge further stated, at paragraph 26, that:

> *"The courts have an inherent jurisdiction to determine how the principle [of open justice] should be applied and there are exceptions to the principle. For example, in litigation concerning a secret process "where the effect of publicity would be to destroy the subject matter". There needs however to be a compelling justification for any departure from the principle of open justice. It must be shown as a matter of strict necessity rather than convenience."*

United States:

In the US, privilege belongs to the Debtor, whether an individual or a corporation. But the power of the privilege shifts when a trustee (Chapter 11, chapter 7) is appointed to control a bankruptcy case. *In re Bazemore*, 216 B.R. 1020 (Bankr. S.D. Ga. 1998). Trustee of corporate Chapter 7 debtor has power to waive attorney-client privilege for debtor-company, because trustee's role includes fiduciary and management duties toward company.

The inquiry requires balancing the interests of a full and frank discussion in the attorney-client relationship and the harm to the debtor upon a disclosure with the trustee's duty to maximize the value of the debtor's estate and represent the interests of the estate. *See Commodity Futures Trading Comm'n v. Weintraub,* 471, U.S. 343, 471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985).

Courts have reached opposite conclusions on whether a trustee may waive the privilege of an individual debtor, and focus on the lack of an adverse effect on the debtor based on the facts of the case. *See In re Williams,* 152 B.R. 123 (Bankr.N.D.Tex.1992) (trustee holds waiver over Chapter 11 debtors of liquidating trusts to avoid fraudulent conveyances because the debtors waived their privileges regarding avoidance as fiduciaries of the trusts, and the debtors would not be harmed by the waiver); *In re Fairbanks,* 135 B.R. 717 (Bankr.D.N.H.1991) (trustee held waiver privilege of individual in Chapter 7 when the debtor disappeared, the trustee was the financial "alter ego" of the debtor, and administration of the estate was required).

But see *In re Hunt,* 153 B.R. 445 (Bankr.N.D.Tex.1992) (in the context of a liquidating trust of Chapter 11 individual debtors' estates, an independent trustee's attempt to avoid fraudulent transfers and pre-petition preferences of the individual debtors, by examining the debtors' attorneys, would chill a full and frank attorney-client communication if sensitive information might be revealed during bankruptcy).

Summary Table

Aspect	Cayman Islands	United States
Legal Framework	English common law	Federal and state-based rules
Types of Privilege	Legal advice, litigation, common interest	Attorney-client, work product, joint defense
In-House Counsel	Strict, business advice excluded	"Primary purpose" test allows broader scope
Waiver	Inadvertent waiver considered carefully	Federal Rule 502 codifies waiver rules
Corporate Privilege	Directors may access documents	"Upjohn test" applies

Aspect	Cayman Islands	United States
Crime-Fraud Exception	High standard for prima facie proof	Broader interpretation, lower threshold
Without Prejudice	Comprehensive protection for negotiations	Limited to admissibility under Rule 408
Cross-Border Issues	Favors confidentiality	U.S. courts may override foreign privileges

Shareholder Privilege in Solvent Liquidations

It is a longstanding rule of English and Cayman law that a company is prohibited from claiming privilege against its own shareholder(s), unless the otherwise privileged documents were created for the purposes of litigation between the company and that shareholder. That rule has been accepted numerous times by the Cayman courts and in recent years it has been held that where a liquidator of a solvent company is standing in the shoes of the board the rule applies such that the liquidator cannot claim privilege as against the company's shareholders.

The principle has existed for over 135 years, having been established in the 19th century decision of *Gouraud v Edison Gower Bell Telephone Co of Europe Ltd* (1888) 57 LJ Ch 498 .However it had come in for much academic criticism given that the understanding during the Victorian period was that shareholders held a proprietary interest in all of the company's assets, including advice which had been paid for by company funds. *Gouraud* obviously pre-dated the landmark decision in *Salomon v A Salomon & Co Ltd* [1897] AC 22*,* which established that a company is a separate legal entity, distinct from its shareholders.

- The Shareholder Rule historically emerged as an analogy to trust law, where trustees owe fiduciary duties to beneficiaries, and privileged documents obtained using the trust's funds must be disclosed to beneficiaries.
- This principle was extended to company law, where directors were seen as fiduciaries acting on behalf of shareholders.
- The rule was developed in decisions like *Gouraud v Edison Gower Bell Telephone Co.* (1888), when companies were still akin to partnerships, and their assets were held in trust for investors.
- This historical foundation relied on a now-outdated view that shareholders had a proprietary interest in the company's assets.
- The principle of separate corporate personality established in *Salomon v Salomon* undermined the earlier analogy between shareholders and beneficiaries under a trust.
- Shareholders no longer have a proprietary interest in company assets, leading to critiques of the Shareholder Rule's foundation.

20th-Century Developments:

- The rule persisted despite *Salomon* through decisions like *Re Hydrosan Ltd* (1991) and *CAS (Nominees) Ltd v Nottingham Forest plc* (2001), which upheld the Shareholder Rule as applicable to companies of all sizes.
- The reasoning often relied on directors' fiduciary duties rather than a robust legal basis.
- Modern courts have increasingly challenges the rule's validity. Decisions like *Sharp v Blank* and *G4S* have questioned its rationale, highlighting that companies and shareholders do not share a common proprietary interest.
- Canadian and Australian courts have outright rejected the rule as inconsistent with the principles of corporate personality established in *Salomon*.
- Some courts have justified the Shareholder Rule on the basis of joint interest privilege, where shareholders and companies are deemed to share a mutual legal interest in privileged communications.
- However, this justification remains controversial and lacks universal acceptance, as courts struggle to define its precise scope and limits.

Aabar Holdings SARL v Glencore PLC [2024] EWHC 3046 (Comm)

This decision of Picken J in the English High Court handed down on 27 November 2024 appears to upend 135 years of jurisprudence. The judgment carefully picks apart the various rationales which have been offered in support of the Shareholder Rule. In particular, Justice Picken found that the modern day justification for the Shareholder Rule, joint interest privilege, does not in fact provide a legitimate basis for the rule and that joint interest privilege itself is not a standalone form or privilege:

> *""Shareholders in companies with a dispersed share-ownership do not, usually, possess a sufficient unity of interest to legitimate a claim to common interest privilege, and so … should not be able to inspect privileged corporate documentation on that basis". I agree also that the suggestion that the Shareholder Rule can be justified as a species of joint interest privilege "is conceptually indefensible, and cannot provide a legitimate justification for the harm and disruption which might be caused by the exercise of the right in large companies" and that legal professional privilege is "too significant to be discarded because of misconceptions about the role of shareholders in the company".*
>
> *116. Lastly, to extend joint interest privilege (assuming that it exists as a freestanding concept at all) to the company/shareholder relationship risks undermining the public policy rationale for legal professional privilege. This is because it would potentially discourage directors from seeking legal advice when to do so would be consistent with the duties owed by them to their company, because of concerns on their part that any advice obtained might be seen by a large number of third parties and, indeed, third parties whose identities may not even be known at any given point in view of the ever-changing make-up of the shareholder community. As Kiu puts it at §105: "… the company-shareholder joint interest privilege cannot be justified as a matter of principle or policy. From the perspective of*

> *principle, once the separate legal personality of a company is accepted, none of the justifications make sense. With respect to policy, allowing disclosure of privileged materials would deter frank discussion between directors and the company's solicitors." As a result, he concludes: "The policy underlying legal advice privilege would be undermined".*
>
> *117. For all these various reasons, my conclusion is that the Shareholder Rule is unjustifiable and should no longer be applied. Its original rationale no longer applies, as Mr Thanki accepted; and the suggested joint interest privilege rationale is neither supported, at least in the shareholder/company context, by authority nor warranted as a matter of principle. It follows that the answer to Issue 1 is 'no'.*
>
> *118. Alternatively, if the Shareholder Rule does exist, I am clear that it only does so in the manner described by Sir Christopher Clarke P and Kawaley JA in Jardine, namely as Kawaley JA put it at [184] on the basis that the question of whether a joint interest existed as between company and shareholder "depends on the circumstances of each individual case" and that "the joint interest principle does not extend to give the shareholder an absolute right to access any company legal advice whatever …". That, as he himself noted in Jardine, is how Sir Christopher Clarke P previously put it in Wong where he noted at [139]-[141] that, although there were "a number of cases in which a right to obtain access has been held to exist by reason of the nature of the existing relationship between A and B", even in those cases "the question whether joint privilege may in fact be asserted will depend on the circumstances".*

It remains to be seen how the ripple effects of this decision will flow out through the common law world. The decision is at first instance and the Shareholder Rule has been approved by the UK Supreme Court. It therefore seems very likely that the issue will come back before the higher courts very soon – perhaps in an appeal by *Aabar* or perhaps in another case.

The Cayman ruling applying the Shareholder Rule to liquidators of solvent companies was also at first instance. The Cayman Islands has a very active shareholder disputes bar where the parameters of the Shareholder Rule are often tested and it seems most likely that it will be in that context that Aabar will first be considered by the Cayman courts.

US Shareholders are also entitled to corporate documents in the US, and corporations cannot protect them under an attorney/client privilege. However, in litigation between a corporation and its shareholders, shareholders access to information otherwise protected under attorney-client privilege may be limited. Where a fiduciary duty is owed to the shareholder or member, that shareholder or member must show good cause why the attorney-client privilege should not protect those communications from disclosure. Courts consider several factors in determining whether the shareholder or member has shown good cause, typically conducting a document-by-document analysis. *See Ward v. Succession of Freeman,* 854 F.2d 780 (5th Cir. 1988) (corporate defendants did not automatically waive attorney-client privilege by attempting to

use privileged communications to demonstrate good-faith reliance on counsel's advice concerning tender offer, where the district court had compelled disclosure of privileged communications, and shareholders at trial used disclosed communications at trial to prove scienter needed for fraud. However, question presented of whether prima facie evidence was presented to meet the crime-fraud exception).

Closely related is the shareholder-fiduciary exception to the attorney-client privilege. *Glidden Co. v. Jandernoa,* 173 F.R.D. 459, 473 (W.D. Mich. 1997). This exception was most extensively formulated by the Fifth Circuit in *Garner v. Wolfinbarger,* 430 F.2d 1093, 1101 (5th Cir.1970). The exception is most often invoked by minority shareholders seeking access to corporate attorney-client communications in a suit seeking vindication of shareholder interests. *Fausek,* 965 F.2d 130 (6th Cir. 1992). The doctrine is founded on a recognition that there is often a mutuality of interest between a corporation's management and the shareholders (who are the beneficiaries of their efforts) in legal advice rendered to the corporation.

The ownership interest of shareholders in a corporation may preclude assertion of the attorney-client privilege against them with regard to the affairs of a corporation which they own. *Garner,* 430 F.2d at 1101. The courts have prescribed a series of factors, by which the existence of good cause for defeat of the privilege should be judged, including percentage of stock held by the inquiring shareholder; the bona fides of the shareholder; the nature and merit of the claim; the need for production of the information; and other relevant inquiries. *Fausek,* 965 F.2d at 130. In *Fausek,* the Sixth Circuit determined that a corporation could not assert attorney-client privilege against a former forty percent shareholder alleging fraud and breach of trust by an officer and director. 965 F.2d at 133.

Conclusion

The Cayman Islands law of privilege is closely aligned with English common law principles and is not expressed separately in statute or in any written code. Generally speaking, it has stricter application then the US rules and the Cayman Islands has strong confidentiality protections. In contrast, U.S. privilege law provides more detailed express protections, especially through the work-product doctrine and rules for in-house counsel, but it also has more structured rules on waiver and exceptions. These differences become particularly relevant in cross-border litigation and insolvency where U.S. discovery rules can pose challenges to Cayman privilege claims.

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ATTORNEY-CLIENT PRIVILEGE: CHOICE OF LAW IN INTERNATIONAL CASES AND THE CRIME-FRAUD EXCEPTION

By Hon. Robert A. Mark
U.S. Bankruptcy Court
Southern District of Florida

In 2023, I issued an opinion finding that the crime-fraud exception to the attorney-client privilege applied to certain communications between the former principal of a foreign debtor and his counsel. *In re Sam Industrias, S.A.*, 653 B.R. 196 (Bankr. S.D. Fla. 2023) ("*SAM*"). A copy of the opinion is in our materials. This article will briefly discuss both the choice of law issues that arose in the case and my analysis in determining that the crime-fraud exception to the attorney-client privilege applied to certain otherwise privileged documents.

I. The SAM Chapter 15 Case and Discovery Dispute

The chapter 15 case was filed by the foreign representative in the Brazilian bankruptcy case (the "Brazilian Case") of three debtors (the "Debtors") – two corporate entities, Sam Industrias S.A. and its parent company, and the principal of those business entities, Daniel Birmann ("Birmann"). The Brazilian Case was extended to include Birmann upon the presentation of evidence that he abused his majority interest in the parent company to loot SAM Industrias, S.A. Under Brazilian law, Birmann is a debtor and,

therefore, he is subject to discovery as a debtor in the chapter 15 case filed in the Southern District of Florida.

In the chapter 15 case, the foreign representative in the Brazilian Case (the "FR") sought to compel the production of documents from an American lawyer, Bruce Hood, Esq. ("Hood") and from two American law firms at which Hood worked. Hood provided legal services to Birmann personally and to certain entities that Birmann controlled. Hood also served as an officer or managing partner of several entities that Birmann controlled. The FR filed a motion to compel against Hood and the law firms to produce documents, including documents and communications relating to a trust (the "Trust") that Birmann created, allegedly to shield his assts from the creditors in the Brazilian Case.

I considered two issues: First, were the subject communications attorney-client privileged or were they non-privileged communications rendered as business advice when Hood was acting in his capacity as an officer or managing member of the Birmann-related entities? Second, if the communications were privileged, did the crime-fraud exception apply to compel disclosure? On the first question, I ruled for Hood and found the communications privileged. On the second question, however, I found the crime-fraud exception applied to certain communications because the communications furthered Birmann's attempts to fraudulently transfer and conceal assets by conveying them to the Trust.

II. The Court's Analysis

A. Choice of Law

I first had to determine whether to apply U.S. or Brazilian privilege law. As discussed in the opinion, the scope of discovery undertaken by a chapter 15 foreign representative is generally governed by Federal Rule of Bankruptcy Procedure 2004. However, as noted in the opinion, foreign law may govern under what is generally referred to as the "touch base" test. Although not discussed in depth in *SAM*, under that test, the court considering a privilege claim should apply "the law of the country that has the predominant or the most direct and compelling interest in whether the communications should remain confidential, unless that foreign law is contrary to the public policy of this forum." *Wultz v. Bank of China Ltd.*, 979 F.Supp 2d. 479, 486 (S.D.N.Y. 2013) (internal quotations and citation omitted). The *Wultz* Court described the country with the predominant interest as "either the place where the allegedly privileged relationship was entered into or the place in which that relationship was centered at the time the communication was sent. *Id.* (internal quotations and citation omitted).

In *SAM*, the choice of law analysis was brief because the parties' pleadings assumed that U.S. privilege law applied. I also found that U.S. law should apply because the communications were with Hood, an American lawyer, and related to both foreign and domestic entities controlled by the client, Birmann.

Choice of law issues are discussed in the separate article written for this panel by Paul Kennedy and Megan Murray. In particular, the article describes the United Kingdom High Court opinion in the *RBS Rights Issue Litigation*. In that case, the court applied English law to resolve privilege issues even though the communications at issue were notes of interviews that RBS and its lawyers conducted of employees in the United States. The decision relied on a line of authority holding that the *lex fori* (law of the forum) should be applied to questions of privilege between parties and their foreign lawyers.

Although choice of law was not disputed in *SAM*, it is an issue that can be critical to the outcome of privilege disputes in international cases.

B. The Crime-Fraud Exception

The crime-fraud exception, if it applies, extinguishes both the attorney-client privilege and a claim of protection under the work product doctrine. The exception "applies when (1) a client consults an attorney for advice that will help them in the commission of a fraud or crime, and (2) the communications are sufficiently related to and were made in furtherance of the crime." *Eastern v. Thompson*, 636 F.Supp. 3d 1078, 1089 (C.D. Cal. 2022) (internal quotations omitted). The exception "applies only to documents that were themselves in furtherance of illegal or fraudulent conduct." *Id.* (internal quotations omitted).

To justify disclosure under the exception, the moving party must make a *prima facie* case that the otherwise privileged communications were for an unlawful purpose or that they demonstrate a future unlawful activity. *SAM*, 653 B.R. at 211. It is not necessary to "conclusively prove the elements of the purported crime or fraud." *Id.* (citing *In re Andrews*, 186 B.R. 219, 222 (Bankr. E.D. Va. 1995)). Importantly, the party seeking disclosure "does not have to prove that the attorney had knowledge of the crime for the exception to apply; the exception relies on a showing of the client's intent, not the attorney's intent." *Id.* (emphasis added).

Although I applied U.S. privilege law in *SAM*, I had to derive findings from the Brazilian Case establishing a *prima facie* case of crime or fraud under Brazilian law. I found that the record in the Brazilian Case established a *prima facie* case that Birmann (the client) consulted with Hood (the attorney) for legal advice that assisted Birmann in committing a fraud or crime. Relying on the Bankruptcy Decree and a judgment entered in an adversary proceeding in the Brazilian Case, and based upon the timing and scope of the Trust transactions, I found that the record in the Brazilian Case established a *prima facie* case that Birmann created the Trust as part of a fraudulent, if not criminal, scheme to place his assets beyond the reach of the creditors in the Brazilian Case. *SAM*, 653 B.R. at 206-07, 216.

Having determined that the record established a *prima facie* case of fraud involving the Trust, I undertook an *in camera* review of the disputed communications and found that certain emails were "sufficiently related to" and "in furtherance" of the crime or fraud to apply the crime-fraud exception.

As I noted at the end of the opinion, I was not finding Birmann guilty of violating Brazilian criminal statutes nor was I adjudicating any civil remedies that the FR was pursuing or may pursue against Birmann or others in the Brazilian Case. I was simply acting as a chapter 15 court providing ancillary relief involving a limited discovery dispute. Still, the decision and analysis in *SAM* may provide some guidance for courts considering the crime-fraud exception in discovery disputes, particularly disputes arising in chapter 15 cases.

hereby **Granted**, and Plaintiffs' Complaint against MCLP Asset Company, Inc. is **Dismissed**.

The following is ORDERED July 12, 2023.

IN RE: SAM INDUSTRIAS S.A., Boulder Participacoes, Ltda, and Daniel Benasayag Birmann, Debtors.

Case No. 18-23941-BKC-RAM

United States Bankruptcy Court,
S.D. Florida,
Miami Division.

Signed July 26, 2023

Background: In Chapter 15 case that was ancillary to foreign main proceeding, foreign representatives of debtors' involuntary bankruptcy estates sought to compel production of documents from American lawyer and from two American law firms at which lawyer had worked.

Holdings: The Bankruptcy Court, Robert A. Mark, J., held that:

(1) domestic privilege law applied to motion to compel production of withheld documents from American lawyer who had been providing services that related to both foreign and domestic debtor entities that principal controlled;

(2) findings that Court had to derive from Brazilian case had to be findings establishing prima facie case of crime or fraud under Brazilian law, although Court had to apply United States law in analyzing whether crime-fraud exception applied;

(3) determining whether crime-fraud exception applied to withheld documents that contained legal advice, and were protected by attorney-client privilege unless crime-fraud exception applied, would not infringe on Brazilian court's jurisdiction;

(4) foreign representatives of debtors' involuntary bankruptcy estates simply had to make prima facie showing that debtors' principal was engaged in, or planned to engage in, criminal or fraudulent behavior when he sent or received e-mails with counsel that comprised most of withheld documents, for crime-fraud exception to apply to attorney-client privilege;

(5) crime-fraud exception to attorney-client privilege applied to e-mail from principal and addressed to attorney with his paralegal in copy describing changes that principal would like to make to trust;

(6) crime-fraud exception to attorney-client privilege applied to e-mail between attorney and his paralegal; and

(7) crime-fraud exception to attorney-client privilege applied to e-mail that was dated well after Brazilian court extended Brazilian bankruptcy case to principal and that was sufficiently related to trust and in furtherance of principal's likely criminal or fraudulent effort to use trust to wrongfully and intentionally conceal and protect his assets.

Motion granted in part and denied in part.

1. Bankruptcy ⚿3047(2)

Filing sur-reply to motion to compel production of withheld documents and e-mailing copy of withheld documents to bankruptcy court that required in camera review was appropriate procedure where parties contested applicability of attorney-client privilege to particular documents in Chapter 15 case that was ancillary to foreign main proceeding. Fed. R. Bankr. P. 2004.

2. Bankruptcy ⚿3047(1)

Federal Rule of Bankruptcy Procedure governing examination generally governs the appropriate scope of discovery requests propounded under that rule, even when such requests are propounded in a Chapter 15 case that is ancillary to a foreign main proceeding. Fed. R. Bankr. P. 2004.

3. Bankruptcy ⚿3047(2)

Claims of privilege may be governed by foreign law even if asserted in the context of a discovery request propounded under Federal Rule of Bankruptcy Procedure governing examinations. Fed. R. Bankr. P. 2004.

4. Bankruptcy ⚿3047(2)

Domestic privilege law applied in Chapter 15 case that was ancillary to foreign main proceeding to motion by foreign representatives of debtors' involuntary bankruptcy estates to compel production of withheld documents from American lawyer who had been providing services that related to both foreign and domestic debtor entities that were controlled by principal who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court; although foreign legal proceedings and creation of foreign trusts and holding structures were discussed, American counsel was retained for purposes of overseeing global asset management strategy involving trust, trust assets included shares in domestic corporations, parties' pleadings assumed that domestic privilege law applied, and bankruptcy court could not find otherwise when there was no other country that had more compelling interest in communications at issue. Fed. R. Bankr. P. 2004.

5. Privileged Communications and Confidentiality ⚿102

Under United States law, attorney-client privilege protects all confidential communications that occur between attorneys and their clients regarding legal advice.

6. Privileged Communications and Confidentiality ⚿102

The following are the essential elements of attorney-client privilege: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

7. Bankruptcy ⚿3047(2)

Privileged Communications and Confidentiality ⚿154

Crime-fraud exception extinguishes both attorney-client privilege and work product doctrine, and applies when client consults attorney for advice that will help them in commission of fraud or crime, and communications are sufficiently related to and were made in furtherance of crime, regardless of whether scheme was even successful.

8. Privileged Communications and Confidentiality ⚿154

Crime-fraud exception to the attorney-client privilege applies only to documents and communications that were themselves in furtherance of illegal or fraudulent conduct.

9. Privileged Communications and Confidentiality ⚿154

Crime-fraud exception to attorney-client privilege can apply to communications between attorney and another attorney representing same client regarding client's legal matters depending on its relation to potential fraud or crime.

10. Privileged Communications and Confidentiality ⚿154

Party seeking disclosure of communications under the crime-fraud exception to the attorney-client privilege must make prima facie case that communications between attorney and client, or between attorneys, were for unlawful purpose or that they demonstrate future unlawful activity, without having to conclusively prove elements of purported crime or fraud.

11. Privileged Communications and Confidentiality ⚿154

Party seeking disclosure of communications under crime-fraud exception to attorney-client privilege must show that client had intent of committing fraud or crime.

12. Privileged Communications and Confidentiality ⚿154

Party seeking disclosure of communications under crime-fraud exception to attorney-client privilege does not have to prove that attorney had knowledge of crime for exception to apply; exception relies on showing of client's intent, not attorney's intent.

13. Privileged Communications and Confidentiality ⚿154

Documents otherwise protected under attorney-client privilege must be produced if communications were in furtherance of crime or fraud that was likely committed by client.

14. Bankruptcy ⚿3047(2)

Findings that bankruptcy court had to derive from Brazilian case had to be findings establishing prima facie case of crime or fraud under Brazilian law, in Chapter 15 case that was ancillary to foreign main proceeding to motion by foreign representatives of debtors' involuntary bankruptcy estates to compel production of withheld documents from American lawyer who had been providing services that related to both foreign and domestic debtor entities that were controlled by principal who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court, although court had to apply United States law in analyzing whether crime-fraud exception applied.

15. Bankruptcy ⚿3047(2)

Party seeking to invoke crime-fraud exception to attorney-client privilege has burden to establish that attorney sought legal advice for purposes of committing bankruptcy crimes or fraud.

16. Privileged Communications and Confidentiality ⚿154

Party seeking to invoke crime-fraud exception to attorney-client privilege must make a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, was planning such conduct when he sought the advice of counsel, or committed a crime or fraud subsequent to receiving the benefit of counsel's advice, then there must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it; if the moving party carries his burden, the crime-fraud exception applies, and the communications at issue are not protected from disclosure by attorney-client privilege.

17. Bankruptcy ⚿3047(2)

Privileged Communications and Confidentiality ⚿154

Crime-fraud exception extinguishes both attorney-client privilege and work product doctrine.

18. Bankruptcy ⚿3047(2)

Determining whether crime-fraud exception applied to withheld documents that contained legal advice, and were protected by attorney-client privilege unless crime-fraud exception applied, would not infringe on Brazilian court's jurisdiction, in Chapter 15 case that was ancillary to foreign main proceeding on motion to compel production of withheld documents from American lawyer who had been providing services that related to both foreign and domestic debtor entities that were controlled by principal who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court, since bankruptcy court did not need to make finding on merits of crime or fraud to apply crime-fraud exception to attorney-client privilege. Fed. R. Bankr. P. 2004.

19. Bankruptcy ⚿3047(2)

Foreign representatives of debtors' involuntary bankruptcy estates simply had to make prima facie showing that debtors' principal was engaged in, or planned to engage in, criminal or fraudulent behavior when he sent or received e-mails with counsel that comprised most of withheld documents, for crime-fraud exception to apply to attorney-client privilege in Chapter 15 case that was ancillary to foreign main proceeding on motion to compel production of withheld documents from American lawyer who had been providing services that related to both foreign and domestic debtor entities that were controlled by principal who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court.

20. Privileged Communications and Confidentiality ⚿154

Communications between attorneys representing same client or between attorney and paralegal representing same client are subject to scrutiny under crime-fraud exception to attorney-client privilege.

21. Privileged Communications and Confidentiality ⚿154

The client's intentions and knowledge matter when considering whether to apply the crime-fraud exception to the attorney-client privilege.

22. Privileged Communications and Confidentiality ⚿154

Party seeking discovery under crime-fraud exception to attorney-client privilege does not need to show that attorney or other agent was aware of client's illegal or fraudulent intent.

23. Bankruptcy ⚿3047(2)

Attorneys and law firm did not satisfy their burden of establishing that work-product doctrine barred production of any withheld documents, in Chapter 15 case that was ancillary to foreign main proceeding on motion by foreign representatives of debtors' involuntary bankruptcy estates to compel production of withheld documents from American lawyer who had been providing services that related to both foreign and domestic debtor entities that were controlled by principal who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court, since issue was raised for first time in only one section of sur-reply by attorney and lawyers and it included only brief argument that one of withheld documents constituted work product.

24. Bankruptcy ⚿3047(2)

Work product protection applies only to documents prepared in anticipation of litigation or for trial.

25. Bankruptcy ⚿3047(2)

Crime-fraud exception to attorney-client privilege for communications between attorney and principal of foreign and domestic debtor entities who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court applied in Chapter 15 case to all communications relating to creation, management, use, and dissolution of trust to extent those communications were made in furtherance of crime or fraud; hiding assets from reach of creditors was fraudulent and likely criminal under Brazilian law, principal more likely than not knew that insolvency decree likely would be entered against him when he sought attorney's legal advice and business assistance in creation of trust and in moving assets into trust, advice attorney provided in later years relating to removal of principal as beneficiary of trust, additional asset transfers into trust, and eventual termination of trust more likely than not assisted principal in continuation of his fraudulent scheme to place his assets beyond reach of his creditors after commencement of Brazilian involuntary liquidation.

26. Bankruptcy ⚿3047(2)

Crime-fraud exception to attorney-client privilege applied to e-mail dated July 13, 2007 at 2:31 p.m. from principal of foreign and domestic debtor entities who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court and addressed to attorney with his paralegal in copy with subject line reading "ENC: Declaration of Trust" and describing changes that principal would like to make to trust; although e-mail was sent before Brazilian court entered bankruptcy decree, it was sent after principal was on notice from involuntary petition that his assets likely would become part of bankruptcy estate and be subject to liquidation to pay estate's creditors and it was sufficiently related to, and was made in furtherance of, principal's fraudulent scheme to place his assets beyond reach of his creditors after commencement of Brazilian involuntary liquidation.

27. Bankruptcy ⚿3047(2)

Crime-fraud exception did not apply to communications between attorney and principal of foreign and domestic debtor entities who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court that might infer fraudulent concealment activities by principal, but inference was too speculative to meet second "sufficiently related to" and "in furtherance of" prong of exception, in Chapter 15 case that was ancillary to foreign main proceeding on motion by foreign representatives of debtors' involuntary bankruptcy estates to compel production of withheld documents.

28. Bankruptcy ⚿3047(2)

Crime-fraud exception to attorney-client privilege applied in Chapter 15 case to e-mail dated July 16, 2007 at 6:59 p.m. with subject line reading "FW: Declaration of Trust" and paralegal giving her opinion on changes to trust that principal of foreign and domestic debtor entities who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court requested in his July 13, 2007 e-mail, stating that her opinion was informed by her review of trust documents and her review of Cayman trust laws that were published on internet, and discussing principal's assets and his concerns about solvency at time of creation of trust; although only parties to e-mail were attorney and his paralegal, that distinction did

not vitiate applicability of crime-fraud exception.

29. Bankruptcy ⚿3047(2)

Crime-fraud exception to attorney-client privilege applied in Chapter 15 case to e-mail dated September 22, 2011 and time-stamped 12:52 p.m. from paralegal to attorney for principal of foreign and domestic debtor entities who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court which attached draft Deed of Exclusion and Designation of Beneficiaries, dated August 16, 2011, that removed principal as sole beneficiary of trust and replaced him with his son and his mother, since e-mail was dated well after Brazilian court extended Brazilian bankruptcy case to principal and it was sufficiently related to trust and in furtherance of principal's likely criminal or fraudulent effort to use trust to wrongfully and intentionally conceal and protect his assets.

30. Bankruptcy ⚿3047(2)

Crime-fraud exception to attorney-client privilege applied to e-mail dated September 22, 2011 and time-stamped 1:04 p.m. from attorney to principal of foreign and domestic debtor entities who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court discussing removal of principal as beneficiary of trust, on motion in Chapter 15 case that was ancillary to foreign main proceeding by foreign representatives of debtors' involuntary bankruptcy estates to compel production of withheld documents from attorney, since e-mail was dated well after Brazilian court extended Brazilian bankruptcy case to principal and it was sufficiently related to trust and in furtherance of principal's likely criminal or fraudulent effort to use trust to wrongfully and intentionally conceal and protect his assets.

31. Bankruptcy ⚿3047(2)

Crime-fraud exception to attorney-client privilege applied in Chapter 15 case to e-mail dated April 16, 2015 at 8:27 p.m. from attorney to two other attorneys at law firm relating to financing facility for Bermudan entity that was owned indirectly by Panama company which was owned as of date of e-mail by mother of principal of foreign and domestic debtor entities who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court, but was owned by principal as of date of Brazilian bankruptcy decree, since e-mail was sufficiently related to, and was in furtherance of, principal's efforts to use trust to conceal and protect his assets; among other things, timing of e-mail was just one month after principal's sister became sole beneficiary of trust and that material change to trust was discussed in that e-mail.

32. Bankruptcy ⚿3047(2)

Crime-fraud exception to attorney-client privilege applied in Chapter 15 case to e-mail dated July 1, 2016 at 3:58 p.m. with subject line reading "[W-US. FID332097]" from attorney to principal of foreign and domestic debtor entities who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court, asking principal who should get the shares in "N," presumably Panama company owned by principal; although e-mail was sent more than year after all trust assets were transferred to principal's sister, ownership and change of ownership of company was sufficiently related to and in furtherance of fraudulent scheme to place his assets beyond reach of his creditors after commencement of Brazilian involuntary liquidation because company was owned by principal prior to creation of trust and company was ultimate owner of shares of another company that

eventually was subject of judgment in adversary proceeding.

33. Bankruptcy ⚿3047(2)

Crime-fraud exception to attorney-client privilege did not apply to e-mail dated November 30, 2017 at 9:31 p.m. from attorney to principal of foreign and domestic debtor entities who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court, with subject line reading "[W-US.FID334028]" and which related to immigration advice, on motion in Chapter 15 case that was ancillary to foreign main proceeding by foreign representatives of debtors' involuntary bankruptcy estates to compel production of withheld documents from attorney, since any connection to fraudulent scheme to place his assets beyond reach of his creditors after commencement of Brazilian involuntary liquidation was speculative.

34. Bankruptcy ⚿3047(2)

Crime-fraud exception to attorney-client privilege applied in Chapter 15 case to e-mail dated November 12, 2018 at 8:37 p.m. with subject line reading "Northumbria [W-US.FID332097]" sent by attorney to principal of foreign and domestic debtor entities who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court, which contained chronology of changes in ownership in company owned by principal and which was sent shortly after Brazilian court entered its October 31, 2018 preliminary injunction regarding shares of another company that eventually was subject of judgment in adversary proceeding was sufficiently related to, and in furtherance of, fraudulent scheme to place his assets beyond reach of his creditors after commencement of Brazilian involuntary liquidation; e-mail may not have been privileged at all because it did not provide legal advice.

35. Bankruptcy ⚿3047(2)

Crime-fraud exception to attorney-client privilege applied in Chapter 15 case to e-mail dated November 16, 2018 at 8:47 p.m. with subject line reading "Brookmont Share Ownership [W-US.FID332097]" from attorney to principal of foreign and domestic debtor entities who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court, discussing ownership of principal's company and suggesting certain alternatives regarding characterization of company's ownership of shares in company mentioned in subject line, since subject matter of e-mail was sufficiently related to, and in furtherance of, fraudulent scheme to place his assets beyond reach of his creditors after commencement of Brazilian involuntary liquidation.

36. Bankruptcy ⚿3047(2)

Crime-fraud exception to attorney-client privilege applied to e-mails sent by attorney to principal of foreign and domestic debtor entities who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court on October 25, 2012 at 3:06 p.m., and one sent later that day at 5:18 p.m. by principal to attorney in response, on motion in Chapter 15 case that was ancillary to foreign main proceeding by foreign representatives of debtors' involuntary bankruptcy estates to compel production of withheld documents from attorney, since e-mails related to trust and were sufficiently related to, and in furtherance of, fraudulent scheme to place his assets beyond reach of his creditors after commencement of Brazilian involuntary liquidation.

37. Bankruptcy ⚿3047(2)

Crime-fraud exception to attorney-client privilege did not apply to e-mail that was sent by principal of foreign and do-

mestic debtor entities who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court to attorney, with copy to paralegal, at 7:39 a.m. on same day as another e-mail that was not protected, on motion in Chapter 15 case that was ancillary to foreign main proceeding by foreign representatives of debtors' involuntary bankruptcy estates to compel production of withheld documents from attorney, since subject of e-mail was not sufficiently related to fraudulent scheme to place his assets beyond reach of his creditors after commencement of Brazilian involuntary liquidation.

38. Bankruptcy ⚿3047(2)

Crime-fraud exception to attorney-client privilege applied in Chapter 15 case to e-mails dated September 17, 2007 from attorney to paralegal dated September 17, 2007 at 10:56 a.m., from paralegal to principal of foreign and domestic debtor entities who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court dated September 17, 2007 at 12:08 p.m., and principal's response to paralegal dated September 17, 2007 at 7:57 p.m. which involved trust and were sufficiently related to, and in furtherance of fraudulent scheme to place his assets beyond reach of his creditors after commencement of Brazilian involuntary liquidation.

39. Bankruptcy ⚿3047(2)

Crime-fraud exception to attorney-client privilege applied to e-mails dated July 26, 2007, by and between attorney, paralegal, and principal of foreign and domestic debtor entities who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court, addressing trust issues, on motion in Chapter 15 case that was ancillary to foreign main proceeding by foreign representatives of debtors' involuntary bankruptcy estates to compel production of withheld documents from attorney.

40. Bankruptcy ⚿3047(2)

Crime-fraud exception to attorney-client privilege applied to communications between paralegal and principal of foreign and domestic debtor entities who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court, discussing property ownership issues and specifically reference trust, on motion in Chapter 15 case that was ancillary to foreign main proceeding by foreign representatives of debtors' involuntary bankruptcy estates to compel production of withheld documents from attorney, since communications were sufficiently related to, and in furtherance of, fraudulent scheme to place his assets beyond reach of his creditors after commencement of Brazilian involuntary liquidation.

41. Bankruptcy ⚿3047(2)

Crime-fraud exception to attorney-client privilege did not apply in Chapter 15 case to e-mails sent in May, June, and July 2015 between attorneys at law firm or between attorney and Brazilian counsel, who it appeared were representing principal of foreign and domestic debtor entities who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court, members of his family, or entities related to principal; although e-mails occurred during same time period as other e-mails relating to trust to which exception applied, argument by foreign representatives was too speculative that e-mails were sufficiently related to, and in furtherance of, principal's fraudulent scheme to place his assets beyond reach of his creditors after commencement of Brazilian involuntary liquidation.

42. Bankruptcy ⚿3047(2)

Crime-fraud exception to attorney-client privilege did not apply to internal e-

mails between law firm attorneys on June 9, 2016 and June 13, 2016, on motion in Chapter 15 case that was ancillary to foreign main proceeding by foreign representatives of debtors' involuntary bankruptcy estates to compel production of withheld documents from attorney, since subject of e-mails was transaction not sufficiently related to, or in furtherance of, fraudulent scheme by principal of foreign and domestic debtor entities who allegedly fraudulently concealed his assets to avoid administration of those assets by Brazilian court to place his assets beyond reach of his creditors after commencement of Brazilian involuntary liquidation.

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ORDER GRANTING IN PART AND DENYING IN PART THE FOREIGN REPRESENTATIVE'S SECOND MOTION TO COMPEL PRODUCTION FROM WITHERS AND WIGGIN

Robert A. Mark, United States Bankruptcy Judge

To resolve the pending discovery motion in this chapter 15 case, the Court must determine whether certain documents submitted for *in camera* review are protected by the attorney-client privilege and, if so, whether the Court should order the production of these otherwise privileged documents under the crime-fraud exception to the attorney-client privilege.

Introduction

This chapter 15 case relates to the Brazilian bankruptcy case of three debtors: two business entities, SAM Indústrias S.A. ("SAM") and its parent company, Boulder Participações, Ltda. ("Boulder), and the principal of those businesses, Daniel Bensayag Birmann ("Daniel Birmann," and together with SAM and Boulder, the "Debtors"). Their foreign main bankruptcy case is an involuntary liquidation (the "Brazilian Case").

Carlos Magno, Nery e Medeiros Sociedade de Advogados, the foreign representative of the Debtors' bankruptcy estates

(the "FR") seeks to compel production of documents from an American lawyer, Bruce Hood, Esq., and from two American law firms at which Mr. Hood worked. Mr. Hood provided legal services to Daniel Birmann personally and to certain entities that Mr. Birmann controlled. Mr. Hood also served as an officer or managing partner of several Birmann-controlled entities.

The motion to compel raises two issues regarding the discovery targets' claims of attorney-client privilege. First, are the subject communications privileged at all, or were some of the communications non-privileged business advice provided by Mr. Hood as an officer or managing member of the entities subject of the advice? Second, even if the targets established that the privilege applies, should the Court compel production of the documents under the crime-fraud exception to the attorney-client privilege?

As discussed herein, the Court finds that Mr. Hood and the American law firms established that the documents at issue are protected by the attorney-client privilege. However, the Court also finds that the crime-fraud exception to the attorney-client privilege applies to certain communications in furtherance of Daniel Birmann's fraudulent and likely criminal attempt to transfer and conceal his assets. Specifically, Mr. Hood's legal advice helped Daniel Birmann establish and administer a trust created after the commencement of the Brazilian Case to unlawfully put his assets out of the reach of the creditors in the Brazilian Case. The trust and orders entered in the Brazilian Case expressly finding that Daniel Birmann fraudulently concealed his assets will be discussed in greater detail below. As will be shown, the FR has satisfied his burden to prove that the crime-fraud exception applies to several otherwise privileged communications.

Factual Background

On January 8, 2007, a creditor of SAM, Fundação de Seguridade Social Braslight ("Braslight"), commenced the Brazilian Case by filing an involuntary bankruptcy petition with the Second Business Court of the City of Rio de Janeiro (the "Brazilian Court"), seeking to liquidate SAM and to extend SAM's liquidation to both Boulder and Daniel Birmann. [DE #2-1, pp.3-4, 34-35; DE #219, p.5]. The Brazilian Court granted Braslight's request and, on February 27, 2008, ordered the liquidation of SAM and extended the liquidating bankruptcy decree to Boulder and to Daniel Birmann. [DE #2-1, pp.19-38] (the "Brazilian Bankruptcy Decree"). The extension order meant that all of Boulder's assets and Daniel Birmann's assets became assets of the Brazilian bankruptcy estates.

The Brazilian Bankruptcy Decree describes an investigation of the Debtors' affairs that was conducted by the Brazilian Securities Exchange Commission ("CVM"). That investigation concluded with the CVM imposing, on March 30, 2005, "the highest fine of its history." [DE #2-1, p.33]. The Brazilian Court found that the CVM's findings and conclusions were "trustworthy, not only because of the recognized value of the work of this institution [*i.e.*, the CVM], but also because the defendants [*i.e.*, the Debtors] never denied in this action [*i.e.*, the Brazilian Case] any of the occurrences mentioned in the [CVM's] administrative decision." [DE #2-1, p.36]. Those occurrences indicate that Daniel Birmann abused his majority ownership interest in Boulder to improperly loot SAM. [DE #2-1, pp.36-37].

The Brazilian Court describes Daniel Birmann as having "bled [SAM] dry" by causing SAM to enter into intercompany loan agreements with Boulder. *Id.* In turn, Boulder used the loan proceeds to make additional intercompany loans to Banco

Arbi S.A. ("Banco Arbi"), a bank in which Boulder held an approximately 80% ownership interest and in which SAM held an approximately 10% ownership interest. *Id.* Those loans were highly unfavorable to SAM. *Id.* The amounts loaned were excessive, amounting to 95.58% of SAM's net worth, and the term for repayment was indefinite. *Id.*

The Brazilian Court found that Daniel Birmann abused his powers as the controlling shareholder of SAM for the following reasons:

> [A]t the expense of [SAM's] funds, of its minority shareholders and creditors, the 2nd defendant [*i.e.*, Daniel Birmann] bled the 1st defendant [*i.e.*, SAM] dry, which was changed into a bank of a single client, which resulted in its situation of illiquidity. As if that were not enough, the money lent to the controlling shareholder, the 3rd defendant [*i.e.*, Boulder], and transferred to Banco Abri [sic], was paid to the 1st defendant [*i.e.*, SAM] in shares, rather than in cash, as it was lent. Said attitude represents a serious abuse of the controlling shareholder [*i.e.*, Boulder] . . . .

Id.

In addition to extending SAM's liquidation to Daniel Birmann and Boulder, the Brazilian Bankruptcy Decree forbade Daniel Birmann from transferring or encumbering his assets. [DE #2-1, p.37]. After entering the Brazilian Bankruptcy Decree, in orders and judgments described below, the Brazilian Court found that Daniel Birmann transferred his assets and used his family members, the trust, and offshore companies to conceal his assets. The FR has filed actions in Brazil and in the Cayman Islands to recover some of those assets, and the Brazilian Court has entered judgment in the FR's favor in at least one such turnover proceeding.

Specifically, the FR prevailed in an adversary proceeding filed in Brazil seeking turnover of shares in Companhia Brasileira de Cartuchos ("CBC"). After entering a preliminary injunction on October 31, 2018 [DE #19-1], on January 21, 2020, the Brazilian Court entered a judgment (the "CBC Judgment") in favor of the FR finding that Daniel Birmann illegally transferred the CBC shares and nullifying the transfer of the shares that occurred after the filing of the Brazilian Case.[1] In the CBC Judgment, the Brazilian Court noted that the Birmann family admits to being wealthy and having significant assets in a family trust that was administered by Daniel Birmann, "the only member of this rich family entity, without any asset in his name." [DE #93, p.10]. The Brazilian Court found further that "[t]he use of family members and the structuring of offshores to shield and conceal the bankrupt's [*i.e.*, Daniel Birmann's] assets is evident, allowing his business activities to be exempt from liabilities that can at least be characterized as temerarious management." *Id.* The Brazilian Court identified, in particular and among others, Daniel Birmann's sister, Miriam Benasayag Birmann, as a family member in whose name Daniel Birmann is known to conceal assets. *Id.*

The timing of the creation of The Fiduciaire De La Famille M & M Benasayag STAR Trust (the "Trust"), the way the Trust has been used, and the Brazilian Court's findings regarding the Trust are critical to this Court's conclusion that several of the communications at issue were in furtherance of creating and funding the Trust to fraudulently shield Daniel Birmann's assets from the reach of the Debt-

1. The FR filed a copy of the CBC Judgment in a Notice of Filing dated February 13, 2020 at DE #93. An English translation of the CBC Judgment is found at DE #93, pp.4-14.

ors' creditors. The Trust was established on October 4, 2007,[2] approximately nine months after Braslight filed an involuntary bankruptcy petition against Daniel Birmann and less than five months prior to issuance of the Brazilian Bankruptcy Decree. Daniel Birmann transferred significant corporate ownership interests to the Trust, including $30.7 million worth of shares of BT Global Investments Ltd.,[3] and 100% of the membership interests in Brookmont Trading LLC and in South America Logistics LLC, both Delaware limited liability companies.[4] Even after removing himself "from future benefit under the Trust" on October 3, 2011,[5] Daniel Birmann continued to transfer several corporate ownership interests to the Trust.[6] Daniel Birmann parted with his assets purportedly for his sister Miriam's ultimate benefit. Miriam replaced Daniel Birmann as enforcer of the Trust on October 3, 2013,[7] and became the sole beneficiary of the Trust on March 31, 2015.[8] On that same date, the Trust was terminated, and all the Trust assets were transferred to Miriam.[9]

The record in the Brazilian Case, including the Brazilian Bankruptcy Decree, the CBC Judgment, and the foregoing Trust transactions, establishes a *prima facie* case that Daniel Birmann created the Trust as part of a fraudulent, if not criminal, scheme to place his assets beyond the reach of his creditors after the commencement of the Brazilian Case. The Brazilian Court found "that this family trust is actually used to remove the assets from the name of individuals, shielding the family's assets from a potential misfortune in its business ventures[.]" [DE #93, p.10].[10] In the CBC Judgment, the Brazilian Court also describes Daniel Birmann's improper use of corporate holding structures to con-

2. *See* Declaration of Trust [DE #219-3].

3. *See* Deed of Addition of Property dated October 5, 2007 [DE #219-5].

4. *See* Deeds of Donation dated August 16, 2010 [DE #219-8].

5. *See* Deed of Exclusion and Designation of Beneficiaries dated October 3, 2011 [DE #219-9] (demonstrating that Daniel Birmann removed himself as a beneficiary of the Trust and made his mother, Rahma Raquel Benasayag Birmann, and son, Bernardo Simoes Birmann, the new beneficiaries of the Trust).

6. *See* Deeds of Donation dated April 19, 2012, May 30, 2012, June 12, 2012, September 11, 2012, and January 12, 2013 [DE #219-10] (demonstrating that throughout 2012 and early 2013 Daniel Birmann transferred to the Trust 100% of the membership interests in the following entities in which Daniel Birmann owned or controlled, directly or indirectly: Anaconda Group LLC, a Delaware limited liability company; CBC Europe Sarl, a Luxembourg limited liability company; Charquinn LLC, a Delaware limited liability company; Rogerdale International LLC, a Delaware limited liability company; Rayvera LLC, a Delaware limited liability company; and Gruet LLC, a Delaware limited liability company.

7. *See* Deed of Nomination, Resignation and Appointment of Enforcer dated October 3, 2013 [DE #219-12].

8. *See* Deed of Disclaimer dated March 31, 2015 [DE #219-13] and Deed of Addition of Beneficiary dated March 31, 2015 [DE #219-13] (demonstrating that Miriam replaced Rahma and Bernardo as the sole beneficiary of the Trust).

9. *See* Deed of Direction, Discharge and Release dated March 31, 2015 [DE #219-13] (demonstrating that Miriam directed the trustee "to appoint the whole of the Trust Fund to Miriam absolutely freed and discharged from the trusts, powers and provisions of the Trust").

10. A more detailed description of the corporate holding structure and Daniel Birmann's use of his son, ex-wife, and mother, in addition to his sister Miriam, in concealing his assets is contained in in the FR's Second Motion to Compel [DE #219].

ceal his beneficial ownership interests in corporate equity and assets. [DE #93, pp.11-13].[11]

Procedural History

On November 8, 2018, the FR filed a chapter 15 petition for recognition of the Brazilian Case as a foreign main proceeding [DE #1]. The Court granted recognition by order dated December 10, 2018 [DE #8].

In June 2019, the FR served discovery requests on Bruce E. Hood, Esq. ("Bruce Hood") and the two law firms whose objections are at issue in this contested matter. Specifically, on June 12, 2019, the FR issued a Notice of Rule 2004 Examination (documents only) to Bruce Hood [DE #77], which Notice the FR re-issued to Bruce Hood on June 25, 2019 [DE #82]. On June 14, 2019, the FR issued Notices of Rule 2004 Examinations (documents only) to Wiggin & Dana LLP ("Wiggin") and to Withers Bergman, LLP ("Withers") [DE ##79 and 80]. On February 14, 2020, the FR issued a new Notice of Rule 2004 Examination (documents only) to Bruce Hood [DE #95].

After what he described as incomplete responses, the FR moved to compel production from Bruce Hood, Wiggin, and Withers (collectively, the "Respondents"). Specifically, on February 21, 2020, the FR filed the first Motion to Compel Production of Documents by Hood, Withers, and Wiggin [DE #98] (the "First Motion to Compel"). On April 16, 2020, the Respondents and CBC Ammo LLC and CBC Global Ammunition LLC filed responses in opposition to the First Motion to Compel [DE ##116 and 117]. The FR filed a reply on April 21, 2020 [DE #120].

On April 23, 2020, the Court conducted a hearing on the First Motion to Compel. By order dated June 16, 2020, the Court granted in part and denied in part the First Motion to Compel [DE #125]. That Order required production of "all non-privileged documents responsive to the [FR's] document requests" and required Respondents to file a privilege log for all documents withheld based on a claim of attorney-client privilege. [DE #125, p.5].

On May 19, 2020, the FR issued new Notices of Rule 2004 Examination (documents only) to the Respondents [DE ##122, 123, and 124]. The FR served amended document requests on Wiggin and on Withers on June 24, 2020 [DE ##129 and 130]. On August 3, 2020, the FR served its First Set of Interrogatories on Bruce Hood [DE #139]. Thereafter, document production ensued under the protection of a confidentiality agreement between the FR, Bruce Hood, and Wiggin [DE ##147 and 148].

On September 29, 2020, the FR filed a motion to set a status conference to address outstanding discovery issues and the status of the Brazilian Case [DE #151]. The FR filed a Status Report on November 5, 2020 [DE #169], to which the Respondents filed a response on November 11, 2020 [DE #177]. On November 12, 2020, the Court conducted a status conference. At the status conference, the parties updated the Court on recent events in the Brazilian Case and stated that they were productively engaged in document production and in negotiations to resolve outstanding discovery issues. No ruling was requested at the time, although the parties previewed that they may need judicial intervention in the future.

11. The CBC Judgment also stated that "[t]he attempt to hide the assets through unofficial donations is also clearly demonstrated, such as the donation of 100% of the shares of Brookmont Trading Corporation to the family trust 'The Fiduciaire de La Famille M&M Benasayag Star Trust", made in 2010 by a public deed." [DE #93, p.12]

On June 29, 2021, the FR issued a Re-Notice of Bankruptcy Rule 2004 Examination of Bruce Hood [DE #211], seeking to depose and to obtain document production from Bruce Hood.

On August 2, 2021, the FR filed the Second Motion to Compel Production of Documents by Withers and Wiggin [DE #219] (the "Second Motion to Compel"), which motion gave rise to the contested matter presently before the Court. The Respondents filed a Memorandum of Law in Opposition to the Second Motion to Compel on September 29, 2021 [DE #249]. The FR filed a Reply in Support of Second Motion to Compel on October 22, 2021 [DE #258] (the "FR Reply"). On November 3, 2021, the Court conducted a hearing on the Second Motion to Compel.[12]

On November 8, 2021, the Court entered an Order Granting, in Part, and Setting Further Briefing and Other Deadlines on the Foreign Representative's Second Motion to Compel Production from Withers and Wiggin [DE #267]. That Order set a deadline for Withers and Wiggin to file a sur-reply and to submit documents to the Court for *in camera* review because, as the Court was advised at the November 3, 2021 hearing, only a small subset of the documents at issue in the Second Motion to Compel were still the subject of a contested claim of privilege (the "Withheld Documents"). All other relief requested in the Second Motion to Compel was resolved by agreement or was otherwise moot.

[1] On November 19, 2021, the Respondents filed a Sur-Reply to the Second Motion to Compel [DE #276] and emailed the Court a copy of the Withheld Documents requiring *in camera* review. This procedure is appropriate where the parties contest the applicability of the attorney-client privilege to particular documents. *See, e.g., In re Grand Jury Proceedings #5*, 401 F.3d 247, 253 (4th Cir. 2005); *Clarke v. Am. Com. Nat. Bank,* 974 F.2d 127, 129 (9th Cir. 1992). Thereafter, the Court took this contested matter under advisement.

Discussion

[2, 3] In determining whether to compel production of the Withheld Documents, the Court must first determine whether U.S. or Brazilian privilege law applies. Federal Rule of Bankruptcy Procedure 2004 generally governs the appropriate scope of discovery requests propounded under that rule, even when such requests are propounded in a chapter 15 case that is ancillary to a foreign main proceeding. *In re SAM Industrias, S.A.*, No. 18-23941-BKC-RAM, 2019 WL 1012790, at *4, 2019 Bankr. LEXIS 677 (Bankr. S.D. Fla. Mar. 1, 2019) (citing *In re Petroforte Brasileiro de Petrolea Ltda.*, 542 B.R. 899, 911 (Bankr. S.D. Fla. 2015)). The general rule, however, does not always apply to claims of privilege, which may be governed by foreign law even if asserted in the context of a discovery request propounded under Rule 2004. *See Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 64-65 (S.D.N.Y. 2010) (discussing the "touch base" test applicable in the Second Circuit).

[4] Nonetheless, domestic privilege law applies to this contested matter because an American lawyer is providing services that relate to both foreign and domestic Birmann-controlled entities. Moreover, the parties' pleadings assume that domestic privilege law applies,[13] and the Court can-

12. The findings and conclusions in this Order supersede any inconsistent observations or comments by the Court at the November 3rd hearing.

13. A separate issue is the law that governs the

not find otherwise when there is no other country that has a more compelling interest in the communications. Although foreign legal proceedings and the creation of foreign trusts and holding structures are discussed, American counsel was retained for purposes of overseeing a global asset management strategy involving the Trust, and the Trust assets include shares in domestic corporations.

[5, 6] Under U.S. law, the attorney-client privilege protects all confidential communications that occur between attorneys and their clients regarding legal advice. *Eastman v. Thompson*, 594 F. Supp. 3d 1156, 1175 (C.D. Cal. Mar. 28, 2022) ("*Eastman I*"). The Respondents bear the initial burden of proving the following essential elements of attorney-client privilege:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is [a] member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

In re Grand Jury Proceedings 88-9, 899 F.2d 1039, 1042 (11th Cir. 1990) (quotations omitted).

The FR argues that the Respondents have failed to establish that some of the Withheld Documents are privileged at all because it is unclear who the client is in some of the emails and because, as described earlier, Bruce Hood was both counsel and an officer or managing partner in several of Daniel Birmann's entities. Upon review of the Withheld Documents, the Court finds that the communications did contain legal advice and are protected by the attorney-client privilege unless the crime-fraud exception applies.

[7, 8] The crime-fraud exception extinguishes both the attorney-client privilege and the work product doctrine, and "applies when (1) a client consults an attorney for advice that will help them in the commission of a fraud or crime, and (2) the communications are sufficiently related to and were made in furtherance of the crime," regardless of whether the scheme was even successful. *Eastman v. Thompson*, 636 F.Supp.3d 1078, 1089 (C.D. Cal. 2022) ("*Eastman II*") (internal quotations omitted). This exception "applies only to documents and communications that were themselves in furtherance of illegal or fraudulent conduct." *Id.* (internal quotations omitted). The crime-fraud exception is not a recent doctrine. The Supreme Court applied the exception nearly a century ago. In 1933, the Supreme Court held that "[a] client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." *Clark v. United States*, 289 U.S. 1, 15, 53 S.Ct. 465, 77 L.Ed. 993 (1933).

[9] The crime-fraud exception has been applied to communications regarding fraudulent transfers that show an intent to defraud an individual or entity, even when the actual crime has not been committed

underlying fraud or crime. On this point, the parties agree that Brazilian law would govern. *See* FR Reply, DE #258 at p.2.

yet. *See e.g.*, *Carbajal v. Hayes Mgmt. Serv. Inc.*, Case No. 4:19-cv-00287-BLW, 2022 WL 2869205 at *16, 2022 U.S. Dist. LEXIS 130744 at *49 (D. Idaho July 21, 2022) (citing cases in support). The crime-fraud exception can also apply to communications between an attorney and another attorney representing the same client regarding the client's legal matters depending on its relation to the potential fraud or crime. *In re Warner*, 87 B.R. 199, 202 (Bankr. M.D. Fla. 1988).

[10–12] The party seeking disclosure must make a *prima facie* case that communications between an attorney and a client, or between attorneys, were for an unlawful purpose or that they demonstrate a future unlawful activity, without having to "conclusively prove the elements of the purported crime or fraud." *In re Andrews*, 186 B.R. 219, 222 (Bankr. E.D. Va. 1995) (citing *X Corp. v. Doe*, 805 F. Supp. 1298, 1306 (E.D. Va. 1992)). The movant must show that the client had the intent of committing a fraud or crime. *Id.* (*citing Industrial Clearinghouse, Inc. v. Browning Mfg. Div. of Emerson Elec. Co.*, 953 F.2d 1004, 1008 (5th Cir. 1992)). The movant does not have to prove that the attorney had knowledge of the crime for the exception to apply; the exception relies on a showing of the client's intent, not the attorney's intent. *Gutter v. E.I. Dupont de Nemours*, 124 F. Supp. 2d 1291,1298 (S.D. Fla. 2000) (*citing United States v. Soudan*, 812 F.2d 920, 927 (5th Cir. 1986)).

[13, 14] As discussed earlier, U.S privilege law applies and under U.S law, documents otherwise protected under the attorney-client privilege must be produced if the communications were in furtherance of a crime or fraud that was likely committed by the client, in this case, Daniel Birmann. Although the Court must apply U.S. law in analyzing whether the crime-fraud exception applies, the findings that this Court must derive from the Brazilian Case must be findings establishing a *prima facie* case of crime or fraud under Brazilian law.

The FR argues that Daniel Birmann's creation of the Trust was criminal under Chapter VII of the Brazilian Bankruptcy Law,[14] as described in the Sworn Declaration of Marcelo Lucidi that is attached as Exhibit 1 to the FR's Reply in Support of Second Motion to Compel [DE #258-1] (the "Lucidi Declaration"). Mr. Lucidi is a licensed Brazilian attorney and represents the FR in the Brazilian Case. In the Lucidi Declaration, Mr. Lucidi identifies Brazilian bankruptcy laws that criminalize the following conduct: (1) engaging in fraud to secure an undue advantage for oneself or for others either prior to or after issuance of a bankruptcy decree, (2) misleading creditors or the bankruptcy court by making false statements or material omissions, (3) concealing or diverting a debtor's assets, (4) illegally acquiring, receiving, or using property of the bankruptcy estate, or inducing a third-party to engage in such activity, and (5) failing to comply with mandatory accounting obligations [DE #258-1, pp.2-4, ¶4].

[15, 16] The FR has the burden to establish that Daniel Birmann sought legal advice for purposes of committing bankruptcy crimes or fraud. The FR must sat-

14. The Respondents argue that the FR failed to identify the crimes at issue and the country whose law criminalizes the conduct at issue. The Court rejects that argument. The pleadings demonstrate that the FR is not relying solely on a classic claim of fraudulent transfer. Rather, the FR has argued that Daniel Birmann committed crimes in Brazil by fraudulently concealing his assets to avoid administration of those assets by the Brazilian Court, among other crimes. The particular bankruptcy crimes at issue are described in the above synopsis of the Lucidi Declaration.

isfy a two-part test. First, the FR must make a *prima facie* showing that Daniel Birmann

> was engaged in criminal or fraudulent conduct when he sought the advice of counsel, . . . was planning such conduct when he sought the advice of counsel, or . . . committed a crime or fraud subsequent to receiving the benefit of counsel's advice. Second, there must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.

In re Grand Jury Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987) (citations omitted). If the FR carries his burden, the crime-fraud exception applies, and the communications at issue are not protected from disclosure by attorney-client privilege.

In determining whether the crime-fraud exception applies here, the Court finds guidance in three recent U.S. District Court decisions: *Carbajal*, 2022 WL 2869205, 2022 U.S. Dist. LEXIS 130744 (D. Idaho July 21, 2022), *Eastman I*, 594 F. Supp. 3d 1156 (C.D. Cal. Mar. 28, 2022), and *Eastman II*, 636 F.Supp.3d 1078.

In *Carbajal*, the plaintiff argued that the defendant's transfer of assets was a fraudulent conveyance and, therefore, that the communications relating to the sale fell under the crime-fraud exception. *Carbajal*, 2022 WL 2869205 at *16, 2022 U.S. Dist. LEXIS 130744 at *48. The District Court found that the defendant entered into a transaction as part of a fraudulent scheme to conceal the defendant's assets from the plaintiff to avoid paying any potential judgment in the plaintiff's favor. *Id.* at *17–18, 2022 U.S. Dist. LEXIS 130744 at *52. The defendant sold its assets for an inadequate purchase price to its principal's daughter and a longtime employee while the District Court litigation was pending and immediately after the District Court denied the defendant's motion for summary judgment. *Id.* The defendant concealed the transactional documents and, in doing so, made false or misleading statements to the plaintiff, the plaintiff's lawyer, and the District Court. *Id.* at *18, 2022 U.S. Dist. LEXIS 130744 at *53.

The District Court held that the foregoing facts, among other things, established sufficient "badges of fraud," such as the sale to a close relative, to raise a presumption of fraudulent intent. *Id.* at *18, 2022 U.S. Dist. LEXIS 130744 at *54. Therefore, in finding that the first prong of the crime-fraud exemption was met (*i.e.*, client consults an attorney for advice that will serve them in the commission of a fraud or crime), the District Court found it "more likely than not" that the defendant entered into the transactions with the wrongful intent to conceal assets from the plaintiff to avoid any potential judgment against it in the case. *Id.*; *see also In re Andrews*, 186 B.R. at 224 (inference that transfers may have been fraudulent was sufficient to apply crime-fraud exception). The District Court also found that the communications were "sufficiently related to" and made "in furtherance of" the fraud, satisfying the second prong of the crime-fraud exception. *Id.* The email communications furthered the fraudulent scheme; the defendant's principal, his daughter and the longtime employee retained counsel to paper the transactions, and each of the communications reflect a "necessary step" toward the accomplishment of the fraudulent scheme." *Id.* at *18, 2022 U.S. Dist. LEXIS 130744 at *55. The District Court concluded that the communications were a "direct nexus" to the potential fraud. *Id.* Because both prongs of the crime-fraud exception were met, the defendant was ordered to produce

the documents. *Id.* at **18–19, 2022 U.S. Dist. LEXIS 130744 at **55-56.

[17] The *Eastman I and Eastman II* cases involved emails between Former U.S. President Donald J. Trump and Dr. John Eastman ("Dr. Eastman") during Dr. Eastman's tenure as a law professor at Chapman University. The documents were subpoenaed by the House of Representatives Select Committee to Investigate the January 6, 2021 Attack on the U.S. Capitol (the "Select Committee"). In *Eastman I*, Dr. Eastman asserted the attorney-client privilege and work product protection in withholding certain documents and filed a complaint in the U.S. District Court for the Central District of California seeking a declaratory judgment to prevent Chapman University from complying with the subpoena. *Eastman I*, 594 F. Supp. 3d at 1167. In connection with that lawsuit, 111 documents were submitted to the District Court for *in camera* review. *Id.* Of the 111 documents, the District Court found that none of the documents were protected by attorney-client privilege but that eleven (11) of the documents were protected work product. *Id.* at 1175-87. The District Court then examined each of the eleven documents at issue to determine whether the documents fell under the crime-fraud exception. *Id.* at 1187-97. In its opinion, the District Court used the term "protected documents" to refer to the documents that were found to have been protected work product prior to considering the application of the crime-fraud exception. *Id.* at 1187.[15]

In *Eastman* I, the District Court found that it was "more likely than not that President Trump corruptly attempted to obstruct the Joint Session of Congress on January 6, 2021," *id.* at 1193, and that it was "more likely than not that President Trump and Dr. Eastman dishonestly conspired to obstruct the Joint Session of Congress on January 6, 2021." *Id.* at 1196. Accordingly, the District Court found evidence to support two crimes, obstruction of an official proceeding in violation of 18 U.S.C. § 1512(c)(2) and conspiracy to defraud the United States in violation of 18 U.S.C. § 371. *Id.* at 1189-95.

The District Court then addressed the second issue, whether the eleven documents were "in furtherance of" the two crimes. *Id.* at 1195. The District Court found that only one document, an email forwarded to Dr. Eastman containing a draft memo that knowingly violated the Electoral Count Act, was "intimately related to and clearly advanced the plan to obstruct the Joint Session of Congress on January 6, 2021." *Id.* at 1196-97. Therefore, the District Court concluded that "[b]ecause the memo likely furthered the crimes of obstruction of an official proceeding and conspiracy to defraud the United States, it is subject to the crime-fraud exception" and, therefore, it must be disclosed. *Id.* at 1197.

In *Eastman II*, the same District Court found that an additional 536 documents were protected either by work product or attorney-client privilege and, therefore, analyzed each of the 536 documents to determine whether any fell under the crime-fraud exception. *Eastman II*, 636 F.Supp.3d at 1089, 2022 U.S. Dist. LEXIS 192764 at *16. As described above, the District Court had previously found that President Trump was more likely than not engaged in or planning an obstruction of an official proceeding and a conspiracy to

15. The crime-fraud exception extinguishes both the attorney-client privilege and the work product doctrine. *Eastman I,* 594 F. Supp. 3d at 1188. Accordingly, *Eastman I*'s application of the crime-fraud exception to protected work product is relevant to this Court's application of the crime-fraud exception to documents protected under attorney-client privilege.

defraud the United States when he sought advice from Dr. Eastman. *Id.* at **16-17. The District Court then addressed whether the additional 536 documents fell under the crime-fraud exception by determining whether they were "sufficiently related to" and made "in furtherance of" said crimes. *Id.* at *17.

The District Court held that the crime-fraud exception did not apply to eighteen emails related to ongoing or prospective litigation in key battleground states. *Id.* at **17-18. The District Court found that although those eighteen emails were "sufficiently related" to disrupting the January 6th vote, it could not conclusively determine that these emails furthered the obstruction of the January 6, 2021 congressional proceedings. *Id.* at *18. However, the District Court found that the crime-fraud exception applied to four other emails, "in which Dr. Eastman and other attorneys suggested that . . . the primary goal of filing [certain lawsuits] is to delay or otherwise disrupt the January 6 vote," because the emails were sufficiently related to and in furtherance of the obstruction crime. *Id.* at **18-19. Finally, the District Court found that the crime-fraud exception applied to four additional emails related to and in furtherance of the conspiracy to defraud the United States because they "demonstrate an effort by President Trump and his attorneys to press false claims in federal court for the purpose of delaying the January 6 vote." *Id.* at *19. Regarding these emails, the District Court found that "the emails show that President Trump knew that the specific numbers of voter fraud were wrong but continued to tout those numbers, both in court and to the public." *Id.* at **20-21.

Determining Whether the Crime-Fraud Exception Applies to the Withheld Documents Will Not Infringe on the Brazilian Court's Jurisdiction

[18] The Respondents argue that applying the crime-fraud exception to any of the Withheld Documents would require this Court to make findings of fact that would violate principles of comity and be contrary to the ancillary role U.S. bankruptcy courts should perform in chapter 15 cases. *See* DE #249, pp. 16-20.

[19] The Respondents' argument fails because this Court does not need to make a finding on the merits of a crime or fraud to apply the crime-fraud exception to the attorney-client privilege. Rather, the FR must simply make a *prima facie* showing that Daniel Birmann was engaged in or planning to engage in criminal or fraudulent behavior when he sent or received emails with counsel that comprise most of the Withheld Documents. *In re Grand Jury Investigation*, 842 F.2d at 1226; *Gutter*, 124 F. Supp. 2d at 1303-09; *In re Grand Jury Proceedings #5*, 401 F.3d at 251 ("In satisfying this prima facie standard, proof either by a preponderance or beyond a reasonable doubt of the crime or fraud is not required.").

In fact, in the crime-fraud exception cases discussed earlier, the client in the attorney-client communications had not been convicted, or even indicted for a crime, or had a judgment entered against him or her for fraud. For example, in *Eastman I* and *Eastman II*, discussed above, the District Court applied the crime-fraud exception not based on a criminal conviction or even an indictment of President Trump, but rather based on a record establishing that President Trump was "more likely than not" engaged in or planning an obstruction of an official proceeding and a conspiracy to defraud the United States when he sought legal advice from Dr. Eastman. *Eastman I*, 594 F.Supp. 3d at 1193, 96; *Eastman II*, 636 F.Supp.3d at 1089–90, 2022 U.S. Dist. LEXIS 192764 at **16-17; *see also Carbajal*, 2022 WL 2869205 at **18, 2022 U.S. Dist. LEXIS 130744 at **54-55 (applying crime-fraud exception based on a finding

that it was "more likely than not" that the defendant entered into a fraudulent transaction to conceal assets).

The Crime-Fraud Exception Applies to Attorney to Attorney Communications Without Proof of Misconduct by Counsel

[20–22] Communications between attorneys representing the same client or between an attorney and paralegal representing the same client are also subject to scrutiny under the crime-fraud exception. *In re Warner*, 87 B.R. at 202. Moreover, it is the client's intentions and knowledge that matter. The party seeking discovery does not need to show that the attorney or other agent was aware of the client's illegal or fraudulent intent. *In re Grand Jury Proceedings #5*, 401 F.3d at 251 ("When applying the crime-fraud exception to the attorney-client privilege, we have held that it is the client's knowledge and intentions that are of paramount concern because the client is the holder of the privilege."); *Gutter*, 124 F. Supp. 2d at 1298 ("The application of this exception is primarily controlled by the client's intent – it is unnecessary to show that the attorney had actual or constructive knowledge of the crime.").

The Respondents argue that the exception cannot be applied to communications between attorneys (or between attorney and paralegal) absent allegations of wrongdoing by the attorney, relying on both the *Warner* case and the *Grand Jury Proceedings #5* case cited above. The Court rejects this argument because the need to demonstrate attorney misconduct was discussed in both cases in connection with the work-product privilege, not the attorney-client privilege. *See In re Grand Jury Proceedings #5,* 401 F.3d at 252 ("Thus, while the attorney-client privilege may be vitiated without showing that the attorney knew of the fraud or crime, those seeking to overcome the opinion work product privilege must make a prima facie showing that the attorney in question was aware of or a knowing participant in the criminal conduct.") (internal quotations omitted); *In re Warner*, 87 B.R. at 203 ("The Court further concludes that the Committee is not entitled to the production of any documents which fall within the scope of the work product privilege . . . or which reflect [the attorney's] mental impressions, conclusions, opinions, or legal theories developed in connection with this case.").

[23] The Respondents have not satisfied their burden of establishing that the work-product doctrine bars production of any of the Withheld Documents. The Respondents' Memorandum of Law in Opposition to the FR's Second Motion to Compel [DE #249] does not mention work product. It was raised for the first time in the Respondents' Sur-Reply at DE #276, which includes brief argument that one of the Withheld Documents constitutes work product in only one section of the Sur-Reply [DE #276, p.8].

[24] Work product protection only applies to documents prepared in anticipation of litigation or for trial. Fed. R. Civ. Pro. 26(b)(3); *Eastman II*, 636 F.Supp.3d at 1084, 2022 U.S. Dist. LEXIS 192764 at *7. The Respondents do not advance any meaningful argument that any of the Withheld Documents were prepared in anticipation of litigation. Because work product protection is not applicable, the Court concludes that the crime-fraud exception may be applied here to attorney to attorney (or paralegal) communications without demonstrating knowledge, or misconduct, by counsel.

The Record in the Brazilian Case Establishes a *Prima Facie* Case that Daniel Biermann Consulted Bruce Hood for Advice Assisting Him in Committing a Crime or Fraud

[25] Determining whether the crime-fraud exception applies to the Withheld

Documents depends on whether the communications between Bruce Hood and/or his paralegal and Daniel Birmann (1) were sufficiently related to crimes, or a fraudulent scheme perpetrated or committed by Daniel Birmann to protect his assets from the creditors in the Brazilian Case, and (2) were in furtherance of the crimes or fraud.

Addressing the first element, in the CBC Judgment, the Brazilian Court recognized that Daniel Birmann engaged in a "constant practice of concealment and asset shielding," and that one of the ways in which Daniel Birmann hid assets was by donating assets to the Trust [DE #93, pp.12-13]. The Brazilian Court states that an investigative report submitted by the Debtors' bankruptcy estate contains "unequivocal proof that the bankrupt debtor [*i.e.*, Daniel Birmann] has assets abroad and that he has been evading the bankruptcy court[.]" [DE #93, p.10].

Hiding assets from the reach of creditors is fraudulent and likely criminal under Brazilian law. And the record in the Brazilian case establishes that, more likely than not, Daniel Birmann solicited Bruce Hood's services in furtherance of his fraudulent and likely criminal activities. Daniel Birmann knew that an insolvency decree would likely be entered against him when he sought Bruce Hood's legal advice and business assistance in the creation of the Trust and in moving assets into the Trust. Moreover, advice Bruce Hood provided in later years relating to the removal of Daniel Birmann as a beneficiary of the Trust, additional asset transfers into the trust, and the eventual termination of the Trust in 2015 all assisted Daniel Birmann in the continuation of his fraudulent scheme. *See United States v. Ballard*, 779 F.2d 287, 293 (5th Cir. 1986) (describing later conversations with counsel as a continuation of the defendant's earlier concealment of assets from his creditors and the Internal Revenue Service).

Braslight filed its involuntary bankruptcy petition against SAM on January 8, 2007. [DE #2-1, pp.3-4; DE #219, p.5]. The Brazilian Court did not enter the Brazilian Bankruptcy Decree until February 27, 2008. [DE #2-1, pp.3-5; DE #219, p.7]. However, when the Bankruptcy Case was filed, the involuntary petition also sought to extend the bankruptcy to Boulder and Daniel Birmann.[16] [DE #2-1, pp.3-4, 34-35].

The Brazilian Court has found that the Trust was improperly used to conceal assets rather than for legitimate estate-planning purposes. [DE #93, pp.12-13]. In the CBC Judgment, the Brazilian Court states that "the assets of these [Birmann] family members are intertwined in a tangle of offshores and this family [T]rust is actually used to remove the assets from the name of individuals, shielding the family's assets from a potential misfortune in its business ventures, thus avoiding the personal liability of the partners, [and] allowing the irresponsible performance of the company administrator [*i.e.*, Daniel Birmann]." [DE #93, pp.10-11].

Based on those findings and the documents referenced therein and considering the Brazilian bankruptcy crimes outlined in the Lucidi Declaration, this Court finds *prima facie* evidence that Daniel Birmann more likely than not committed Brazilian bankruptcy crimes and/or fraud by creating the Trust, with the assistance of Bruce Hood, to illegally avoid the disclosures and asset-freezes that he knew would be imposed upon entry of the Brazilian Bankruptcy Decree and engaged in further actions relating to the Trust with Bruce

16. As described earlier, when a bankruptcy case in Brazil is "extended" to an additional party, the additional party's assets become assets of the bankruptcy estate.

Hood's assistance. Therefore, the crime-fraud exception applies to all communications relating to the creation, management, use, and dissolution of the Trust to the extent said communications were made in furtherance of the crime or fraud.

The Crime-Fraud Exception Applies to Some, But Not All, of the Withheld Documents

[26, 27] The Court must still determine whether the communications in the Withheld Documents were "sufficiently related to" and "in furtherance" of the crime or fraud. Summarized in brief, the Court finds that the crime-fraud exception applies to communications related to the creation and funding of the Trust, later transfer of assets into the Trust, changes to the Trust's beneficiaries, and the termination of the Trust. Conversely, the crime-fraud exception does not apply to communications that might infer other fraudulent concealment activities by Daniel Biermann, but the inference is too speculative to meet the second "sufficiently related to" and "in furtherance of" prong of the exception.

Log Entry 1 and 2

Two emails pertaining to the creation of the Trust are at issue,[17] and both emails must be produced.

The first email is dated July 13, 2007 at 2:31 PM. It is from Daniel Birmann and is addressed to Bruce Hood. Betsy Hall, Bruce Hood's paralegal, is in copy. The subject line reads "ENC: Declaration of Trust." The email describes changes that Daniel Birmann would like to make to the Trust.

The July 13, 2007 email was sent before the Brazilian Court entered the Brazilian Bankruptcy Decree but after Daniel Birmann was on notice from the involuntary petition that his assets would likely become part of the Brazilian bankruptcy estate and be subject to liquidation to pay the Brazilian bankruptcy estate's creditors. The Court finds that the first email dated July 13, 2007 at 2:31 PM is sufficiently related to and was made in furtherance of Daniel Birman's fraudulent scheme and, therefore, must be produced.

[28] In addition to producing the July 13, 2007 email, the Respondents must also produce the other document at issue in Log Entry 1 and 2, an email dated July 16, 2007 at 6:59 PM. The only parties to this second email are Bruce Hood and his paralegal, Betsy Hall. The subject line reads "FW: Declaration of Trust." In the email, Ms. Hall gives her opinion on the changes to the Trust that Daniel Birmann requests in his July 13, 2007 email. Ms. Hall states that her opinion is informed by her review of the Trust documents and her review of Cayman Trust Laws that are published on the internet.

The July 16, 2007 email must be produced for the same reason that the July 13, 2007 email must be produced. The July 16, 2007 email discusses Daniel Birmann's assets and his concerns about solvency at the time of creation of the Trust. Those facts are sufficiently related to and in furtherance of the Brazilian bankruptcy crimes or fraud that Daniel Birmann more likely than not committed, as discussed above. Although the July 16, 2007 email is not between a lawyer and his or her client, as discussed earlier, that distinction does not vitiate applicability of the crime-fraud exception. *See In re Warner*, 87 B.R. at 202.

17. The redacted versions are at DE #230, pp. 16-18/168 and are bate stamped WIGGIN000136-WIGGIN000138.

Therefore, and in sum, the Second Motion to Compel is granted with respect to Log Entry 1 and 2, and these documents must be produced.

Log Entry 13 and 14

[29] These entries consist of two emails dated September 22, 2011, a date well after the Brazilian Court extended the Brazilian Bankruptcy Case to Daniel Birmann. Both emails relate to the Trust. The first email, time-stamped 12:52 PM, is from Betsy Hall to Bruce Hood and simply attaches a draft Deed of Exclusion and Designation of Beneficiaries, dated August 16, 2011, that removes Daniel Birmann as the sole beneficiary of the Trust and replaces him with his son, Bernardo, and his mother, Rahma Raquel Benasayang.

This Deed is not new evidence. The FR already has received an executed copy of the Deed, dated October 3, 2011. [DE #219-9]. The copy attached to this first September 22, 2011 email from Hall to Hood is not identical, but the differences do not appear to be material.

[30] The second September 22, 2011 email, time-stamped 1:04 PM, is from Bruce Hood to Daniel Birmann and discusses, among other things, the removal of Daniel Birmann as a beneficiary of the Trust. The Court finds that both of the September 22, 2011 emails and the attachment to the first email are sufficiently related to the Trust and in furtherance of Daniel Birmann's likely criminal or fraudulent effort to use the Trust to wrongfully and intentionally conceal and protect his assets. Therefore, the Court is requiring production of these emails under the crime-fraud exception.

Log Entry 36

[31] This entry is a single email dated April 16, 2015 at 8:27 PM, from Bruce Hood to two other Withers' attorneys. The email relates to a financing facility for a Bermudan entity called Anhinga, owned indirectly by Northumbria Corporation, a Panama company. As of the date of this email, Northumbria Corporation was owned by Daniel Birmann's mother, Rahma. However, as of the date of the Brazilian Bankruptcy Decree, Northumbria was owned by Daniel Birmann. *See* CBC Judgment [DE #93, p.12].

The Court finds that this email is sufficiently related to and was in furtherance of Daniel Birmann's efforts to use the Trust to conceal and protect his assets and, therefore, it must be produced under the crime-fraud exception. Among other things, the timing of the email was just a month after Daniel's sister, Miriam, became the sole beneficiary of the Trust and this material change to the Trust is discussed in this email.

Log Entry 43

[32] This entry is a single email dated July 1, 2016 at 3:58 PM with a subject line reading "[W-US.FID332097]" from Bruce Hood to Daniel Birmann asking Daniel Birmann who should get the shares in "N" (presumably Northumbria). Although this email is more than a year after all the Trust assets were transferred to Miriam, Daniel Birmann's sister, the ownership and change of ownership of Northumbria is sufficiently related to and in furtherance of the fraudulent scheme and, therefore, must be produced under the crime-fraud exception. Prior to the creation of the Trust, Northumbria was owned by Daniel Birmann and Northumbria was the ultimate owner of the CBC shares eventually subject of the CBC Judgment. *See* CBC Judgment [DE #93, p.12].

Log Entry 45

[33] This entry is a single email dated November 30, 2017 at 9:31 PM from Bruce Hood to Daniel Birmann with a subject

line reading "[W-US.FID334028]." This email relates to immigration advice. Any connection to the fraudulent scheme is speculative. Thus, the Court finds that the crime-fraud exception does not apply and, therefore, this email is protected from disclosure.

Log Entry 46

[34] This entry is a single email dated November 12, 2018 at 8:37 PM with a subject line reading "Northumbria [W-US. FID332097]" sent by Bruce Hood to Daniel Birmann. The email contains a chronology of changes in ownership in Northumbria. This email was shortly after the Brazilian Court entered its October 31, 2018 preliminary injunction regarding the CBC shares. The email may not be privileged at all because it does not provide legal advice. However, assuming it is privileged, the Court finds that it is sufficiently related to and in furtherance of the fraudulent scheme and, therefore, must be produced under the crime-fraud exception.

Log Entry 47

[35] This entry is an email dated November 16, 2018 at 8:47 PM with a subject line reding "Brookmont Share Ownership [W-US.FID332097]" from Bruce Hood to Daniel Birmann, four days after the email in Log Entry 46. The email discusses ownership of Northumbria and suggests certain alternatives regarding the characterization of Northumbria's ownership of shares in Brookmont. In the CBC Judgment, the Brazilian Court stated that "it was proven that behind a complex corporate chain, Daniel Birmann held the corporate control of [CBC] at the time of the bankruptcy, since in the end he held all the capital stock of Northumbria Corporation, which is at the top of the pyramid of the corporate chain that owned the shares of CBC." DE #93, p.12. Brookmont was in this chain. At the time of the bankruptcy, Daniel Birmann, through Northumbria, owned all the Brookmont shares. *Id.* In 2010, as part of the fraudulent scheme to divest himself of ownership of the CBC shares, Daniel Birmann donated the Brookmont shares to the Trust.[18] The subject matter of this email is sufficiently related to and in furtherance of the fraudulent scheme and, therefore, must be produced under the crime-fraud exception.

Wiggin No. 0121-122

[36, 37] This entry has five emails but two have already been produced. The three at issue include one sent by Bruce Hood to Daniel Birmann on October 25, 2012 at 3:06 PM, and one sent later that day at 5:18 PM by Daniel Birmann to Bruce Hood in response. These two emails relate to the Trust, are sufficiently related to and in furtherance of the fraudulent scheme and, therefore, must be produced under the crime-fraud exception. The third email at issue was sent by Daniel Birmann to Bruce Hood, with copy to Betsy Hall, that same day at 7:39 AM, but the subject of this email is not sufficiently related to the fraudulent scheme and, therefore, this email is protected from disclosure.

Wiggin 0197-204

[38] This entry contains several emails, but only three have been withheld, all dated September 17, 2007. The first is from Bruce Hood to Betsy Hall dated September 17, 2007 at 10:56 AM, the second is from Betsy Hall to Daniel Birmann dated

18. *See* Deeds of Trust dated August 16, 2010 [DE #219-8]. Daniel Birmann signed the Deeds as Donor and Betsy Hall, Bruce Hood's paralegal, signed as a witness. The transfer of the Brookmont stock into the Trust is also referred to in the CBC Judgment [DE #93, p.12].

September 17, 2007 at 12:08 PM, and the third is Daniel Birmann's response to Betsy Hall dated September 17, 2007 at 7:57 PM. All involve the Trust, are sufficiently related to and in furtherance of the fraudulent scheme and must be produced under the crime-fraud exception.

Wiggin 0255-60

[39] Like the emails in Wiggin 0197-204 discussed in the preceding paragraph, the emails at issue in this entry, dated July 26, 2007, by and between Bruce Head, Daniel Birmann and Betsy Hall, also address Trust issues, fall within the crime-fraud exception, and must be produced.

Wiggin No. 0266-267

[40] This entry is a chain of four emails sent on March 27, 2013, initiated by an email from Citibank to Betsy Hall requesting information about Anaconda Group, LLC and Northumbria Corporation and requesting information about certain transfers of funds from Anaconda to Northumbria. The initial email from Citibank to Hall is not privileged and has been produced. The Court finds that the subsequent communications between Hall and Daniel Biermann are sufficiently related to and in furtherance of the fraudulent scheme and the Court is requiring production under the crime-fraud exception. These emails discuss ownership issues and specifically reference the Trust.

Withers 0742-762

[41] This entry contains twenty-nine emails sent in May, June, and July 2015. Bruce Hood has produced all of these emails but five were produced with redactions.

The five emails at issue are all emails between attorneys at Withers or between Bruce Hood and Brazilian counsel, who it appears were representing Daniel Birmann, members of his family or Birmann-related entities. Although these emails occurred during the same time period as some of the above-described emails relating to the Trust, the Court rejects, as too speculative, the FR's argument that these emails are sufficiently related to and in furtherance of Daniel Biermann's fraudulent scheme and, therefore, these emails are protected from disclosure.

Withers No. 0789

[42] This entry contains two internal emails between two Withers' attorneys on June 9, 2016 and June 13, 2016. The subject of these emails is a transaction not sufficiently related to or in furtherance of the fraudulent scheme to come within the crime-fraud exception and, therefore, the emails are protected from disclosure.

Conclusion

At the end of his opinion in *Eastman I*, U.S. District Judge David O. Carter stated that "[m]ore than a year after the attack on our Capitol, the public is still searching for accountability. This case cannot provide it." *Eastman I*, 594 F. Supp. 3d at 1198. The District Court explained that it was "tasked only with deciding a dispute over a handful of emails. This is not a criminal prosecution; this is not even a civil liability suit." *Id.*

The Brazilian Case and the pursuit of Daniel Birmann's assets are not comparable to the enormity of the events leading up to the January 6th attack on the U.S. Capitol. But Judge Carter's comments in *Eastman I* resonate here. This Order does not find Daniel Birmann guilty of violating Brazilian criminal statutes nor does it adjudicate any fraud or fraudulent transfer civil remedies that the FR is pursuing, or may pursue, against Daniel Birmann or others in the Brazilian Case. Those determinations must be made in Brazil, if neces-

sary in the FR's pursuit of estate assets. This Order resolves only a limited discovery dispute in this chapter 15 case between the FR and the Respondents. For the foregoing reasons, the Court **ORDERS** as follows:

1. The Second Motion to Compel is granted in part and as detailed herein, the Respondents must produce unredacted copies of the Withheld Documents identified as Log Entries 1, 2, 13, 14, 36, 43, 46 and 47, and Wiggin 0121-122 (except for the email from Daniel Birmann to Bruce Hood dated October 25, 2012 at 7:39 AM), Wiggin 0197-204, Wiggin 0255-260 and Wiggin 0266-267.

2. The Second Motion to Compel is denied in part and as detailed herein, the Respondents are not required to produce the Withheld Documents identified as Log Entry 45, Wiggin 0121-122 (only the email from Daniel Birmann to Bruce Hood dated October 25, 2012 at 7:39 AM), Withers 0742-762, and Withers 0789.

ORDERED in the Southern District of Florida on July 26, 2023.

IN RE: EDGEWATER CONSTRUCTION GROUP, INC., Debtor.

Case No.: 23-12217-LMI

United States Bankruptcy Court,
S.D. Florida,
Miami Division.

Signed August 1, 2023

Filed August 2, 2023

Background: Corporate debtor, in case under Subchapter V of Chapter 11, filed emergency motion for order enforcing automatic stay and awarding sanctions for willful violation of stay. The case proceeded to trial.

Holdings: The Bankruptcy Court, Laurel M. Isicoff, Chief Judge, held that creditor willfully violated the stay by serving default papers on debtor, declaring debtor to be in default under contracts, and taking possession of debtor's property postpetition.

Ordered accordingly.

1. Bankruptcy ⚿2464

If the court finds a willful violation of the automatic stay, the violator may be subject to appropriate sanctions, including damages, an award of attorney fees and costs, and injunctive relief. 11 U.S.C.A. § 362(k).

2. Bankruptcy ⚿2467, 2468

If a party willfully violates the automatic stay, a debtor who is injured by the willful violation is entitled to recover his or her actual damages including costs and attorney fees, and if appropriate, may also recover punitive damages. 11 U.S.C.A. § 362(k).

3. Bankruptcy ⚿2467

To establish a willful violation of the automatic stay, the movant bears the burden of showing by a preponderance of the evidence that: (1) a bankruptcy petition was filed; (2) the violator received notice of the petition; and (3) the violator's actions were in willful violation of the automatic stay. 11 U.S.C.A. § 362(k).

4. Bankruptcy ⚿2467

Violation of the automatic stay is "willful" if the party knew the automatic stay was invoked and intended the actions which violated the stay; it does not matter whether the violator specifically intended to violate the stay. 11 U.S.C.A. § 362(k).

Faculty

James S. Feltman, CPA is a senior managing director with Teneo's Financial Advisory business, based in New York. He has more than three decades of experience leading fiduciary and restructuring matters, having served as a chapter 11 trustee in 25 assignments, an examiner in 14 matters and as a chapter 7 trustee in more than 10,000 cases. Mr. Feltman's experience as a bankruptcy fiduciary is multi-jurisdictional, including the Southern District of New York and cross-border. Additionally, he has served in other fiduciary roles in numerous matters, including as a mediator, arbitrator and monitor. His industry specialization includes agriculture, retail, manufacturing and distribution, real estate/construction, aviation, health care, financial services and other industries. Mr. Feltman's experience as a fiduciary includes operating and managing businesses, overall case management, sales and liquidation of assets and business interests, claims development and prosecution, negotiating settlements, and administering claims payment schemes in a variety of cases for more than the last two decades. He has managed the dispositions of a range of businesses and business interests, real estate, and personal and intellectual property. Mr. Feltman is a Fellow of the American College of Bankruptcy, and a member of the American Institute of Certified Public Accountants and Florida Institute of Certified Public Accountants. He is a Certified Public Accountant in the State of Florida. From 2002-08, Mr. Feltman was a member of ABI's Board of Directors, and he was honored as one of the 2015 Consultants of the Year by *Consulting Magazine*. Mr. Feltman received his B.A. from the University of Wisconsin, Madison and his M.P.S. from Cornell University.

Paul Kennedy is a partner in Campbells' Litigation, Insolvency & Restructuring Group in George Town, Grand Cayman, Cayman Islands. His practice covers economic sanctions and other asset-freezing measures, cross-border fraud and insolvency. In addition, he regularly advises professionals and their insurers on coverage and liability issues. Mr. Kennedy is an experienced advocate and recently appeared as leading counsel in *Re Obelisk* and *Re Performance Insurance*, two of the most significant cases on segregated portfolio companies. His expertise spans the areas of economic sanctions, fraud and asset recovery, professional negligence, insurance and reinsurance, commercial litigation, insolvency and restructuring, and injunctions and interim measures. Mr. Kennedy is admitted to practice in Ireland, England and Wales, and the Cayman Islands. He also is an accredited mediator with the London School of Mediation, and a legal practitioner for the British Virgin Islands. Mr. Kennedy is a member of the Asset Recovery Committee, Litigation Committee and Insolvency Section of the IBA, as well as a member of the International Association of Restructuring, Insolvency & Bankruptcy Professionals (INSOL), Recovery and Insolvency Specialists Association (RISA) Cayman Islands and the Cayman Islands Legal Practitioners Association, and he is a Fellow of the International Academy of Financial Crime Litigators. He received his B.A. in English and the Classics in 2000 from Trinity College Dublin and his postgraduate diploma in law from Technological University Dublin in 2005.

Hon. Robert A. Mark is a U.S. Bankruptcy Judge for the Southern District of Florida in Miami, appointed in 1990, and he served as Chief Judge from 1999-2006. Prior to his appointment to the bench, Judge Mark was head of the bankruptcy department of the Miami firm of Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson, PA. He is a frequent speaker at international programs sponsored by INSOL, III, IWIRC and ABI, and he has served for several years as the co-judicial chair of the ABI's Caribbean Insolvency Symposium. Judge Mark is a Fellow of the American College of Bankruptcy

and an author for *Collier on Bankruptcy*. His community activities include participation in a program that offers internships to minority law students, and participation in financial education programs for high school students through the Bankruptcy Bar Association's CARE program, which teaches students about the dangers of credit card abuse. Judge Mark is a graduate of Boalt Hall School of Law, University of California at Berkeley.

Megan W. Murray is a founding shareholder of Underwood Murray PA in Tampa, Fla., and has nearly 20 years of reorganization and workout experience advising business owners, debtors, trustees, creditors' committees, secured and unsecured creditors, and asset-purchasers and sellers. She has experience both on the legal side and business side in a global financial institution, and she counsels businesses and owners in a wide variety of industries, including but not limited to real estate, health care, hospitality, pharmaceutical, medical services, construction, insurance, transportation, logistics, aviation and financial services. Ms. Murray also has experience representing a variety of fiduciaries, from chapter 7 and 11 trustees to assignees in assignments for the benefit of creditors and receivers in proceedings across the state. In addition to her broad range of representations in core bankruptcy matters, she counsels her clients in making critical business decisions, while prosecuting and defending complex business disputes. She has experience in director and officer liability litigation, bondholder disputes, shareholder and partnership disputes, court-appointed receiverships, health care receiverships, assignment proceedings, recovery of large and small business assets, and lien priority disputes related to a variety of collateral, including real property, equipment, medical equipment, aircraft and logistics-related assets. Ms. Murray has been recognized in *Chambers USA*, *Florida Super Lawyers* and *The Best Lawyers in America*, and she was named a *Florida Trend Magazine* "Legal Elite." She is rated AV-Preeminent by Martindale-Hubbell, and she is a 2018 honoree of ABI's "40 Under 40" program. Ms. Murray received her B.B.A. from the University of Iowa Tippie College of Business in 2002 and her J.D. with honors from the University of Iowa College of Law in 2011, where she was a contributing editor to the *Iowa Law Review* and an ABI Medal of Excellence recipient.