

DENNIS M. DEVETTER, et al.	*	IN THE
	*	CIRCUIT COURT
Plaintiffs	*	
v.	*	FOR
ALEX. BROWN MGMT. SVCS., INC.,	*	BALTIMORE CITY
et al.	*	
Defendants	*	Part 20
	*	Case No.: 24-C-03-007514

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**DISCOVERY ORDER**

Among the discovery matters pending before the Court are (i) plaintiffs’ Notice of Intent to File Exceptions to Special Master’s Findings and Recommendations of December 12, 2005, (ii) plaintiffs’ Motion for Reconsideration of Special Master’s Conclusions and Recommendations Regarding Attorney-Client Communications with Certain Plaintiffs’ Agents, which was incorporated as plaintiffs’ formal exceptions by agreement of the parties; (iii) Motion of Alex. Brown Management Services, Inc. to Begin Videotape Depositions of Roy Ballentine, Robert Goyette and Andrew McMorrow Subject to Continuation on December 13, 2005; (iv) defendants’ letter request for return of privileged documents inadvertently produced to plaintiffs; and (v) defendants Alex. Brown Management Services, Inc. and Deutsche Bank Securities, Inc.’s Exceptions to Special Master’s Findings and Recommendations.<sup>1</sup>

These matters were referred by the Court to Special Master Donald A. Rea pursuant to an Order dated August 9, 2005. Having received the report and recommendations of the Special Master with respect to these matters, the Court must determine whether his findings

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<sup>1</sup> Filed March 16, 2006 following submission of the Special Master’s Findings and Recommendations on March 6, 2006. The Findings and Recommendations of the Special Master are attached hereto for reference.

are clearly erroneous or well supported by the evidence and whether his recommendations are correct as a matter of law.

The question whether plaintiffs Greenberg and Moore can assert an attorney-client privilege as to communications with counsel involving their financial advisors at Ballentine Finn implicates the incorporation in Maryland law of the so-called “intermediary doctrine.” The Special Master believed that the doctrine controlled the situation presented here and that the record contained the necessary factual predicates of reasonable necessity and reasonable expectation of confidentiality, citing as on all fours the decision of the U.S. District Court in *Neighborhood Development Collaborative v. Murphy*, 2005 WL 3272711 (D. Md. 2005) (the “NDC” opinion).

While I can readily see how the Special Master might find the NDC opinion persuasive, as a logical extension of the intermediary doctrine’s application to a business context, I am not prepared to say that Maryland’s appellate courts will agree. To the extent that the doctrine can be extracted from the Court of Appeals’ holding in *Newman v. State*, 384 Md. 285, 306-09 (2004), it was expressly limited to the situation where the client merely acquiesced to the presence of a third party in attorney communications. It has never been extended by a Maryland court to a situation where the client specifically retains a third party to communicate with counsel.

The court is mindful that it has a responsibility to address legal issues unique to the corporate world in managing specially designated business and technology cases. But there is nothing novel about the application of the attorney-client privilege that would authorize this Court to extend its application in the context of a business case beyond that sanctioned by

Maryland's appellate courts. Even if the Court were interested in adopting the NDC opinion's rationale, it is doubtful that our Court of Appeals would find the responsibilities of plaintiffs Greenberg and Moore directly analogous to those of the President of the United States, as set forth in *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1958). With or without a reasonable necessity requirement, some compelling basis seems to be required for third party inclusion under the intermediary doctrine as articulated in *Newman v. State, supra*, 384 Md. at 306-09.

Consequently, the Court will sustain defendants' exceptions to the Special Master's findings and recommendations concerning the asserted attorney-client privilege involving Ballentine Finn and hold that Ballentine Finn's involvement occasioned a waiver of both that privilege and plaintiffs' asserted work product protection.

In all other respects the Special Master's findings and recommendations will be accepted by this Court.

Accordingly, the Court orders as follows:

1. Plaintiffs' Motion for Reconsideration of the Recommendations submitted to the Court filed on December 19, 2005 is **DENIED**. Plaintiffs Greenberg and Moore waived privilege as to communications among Messrs. Ballentine, Goyette, and McMorrow and either plaintiffs Greenberg or Moore or their counsel.
2. To the extent plaintiffs' Notice of Intent to File Exceptions to Special Master's Findings and Recommendations seeks affirmative relief in connection with the Special Master's December 12, 2005 Recommendations, it is **DENIED** as moot in light of the ruling above.

3. The Motion of Alex. Brown Management Services, Inc. to Begin Videotape Depositions of Roy Ballentine, Robert Goyette and Andrew McMorrow Subject to Continuation on December 13, 2005, is **GRANTED**.
4. Defendants' letter request dated January 6, 2006, for the return of privileged documents inadvertently produced to plaintiffs is **DENIED** in part and **GRANTED** in part as follows: defendants' request is **DENIED** with respect to documents Bates numbers *MD-AB-DB-0122036-38*, which plaintiffs shall be entitled to retain in their un-redacted form; and defendants' request is **GRANTED** with respect to all remaining documents designated on defendants' Privilege Log. To the extent any such documents have not been returned to defendants, plaintiffs shall do so within ten (10) days of the issuance of this Order.
5. The Court's Order Appointing Special Master entered on August 9, 2005 shall remain in full force and effect, in the event that there are further matters referred to the Special Master for consideration and recommendations.

/s/

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ALBERT J. MATRICCIANI, JR.

Judge

March 22, 2006

Attachment

cc: All Counsel of Record (via e-mail)  
Donald A. Rea, Esquire (via e-mail)