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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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VECTOR CAPITAL CORPORATION,

Plaintiff,

11 Civ. 6259 (PKC)

-against-

MEMORANDUM  
AND ORDER

NESS TECHNOLOGIES, INC.,

Defendant.  
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CASTEL, District Judge:

Plaintiff, Vector Capital Corporation (“Vector”), brought this diversity action against defendant, Ness Technologies, Inc. (“Ness”), for breach of an agreement which granted Vector exclusive rights to negotiate the acquisition of Ness. Vector alleges that Ness breached the agreement by failing to provide relevant information during the course of Vector’s due diligence investigation of Ness and by engaging in discussions regarding an alternative bidder during the exclusivity period. (Compl. ¶¶ 1, 12, 17, 20.) This Memorandum and Order presents the Court’s ruling as to a dispute over the application of the attorney-client privilege to, among others, documents reflecting information acquired by Vector’s attorneys in the course of the due diligence investigation.

Ness moved to compel production of documents withheld as privileged by Vector. At a conference, the Court directed counsel for Vector to review the withheld documents and certify that only communications “to or from the client for the purpose of seeking or obtaining legal advice that [] falls within a recognized attorney-client privilege” have been withheld. (Oct. 31, 2013 Tr. 19:24 - 20:15.) The Court advised counsel for Ness that following Vector’s

counsel's review, he could designate ten entries from the privilege log for in camera review of the underlying documents. (Oct. 31, 2013 Tr. 20:16 - 20:20.) Vector's counsel submitted a declaration indicating that he had conducted the privilege review and made additional productions to Ness. (Docket No. 68.) Thereafter, counsel for Ness submitted a letter to the Court seeking in camera review of documents on Vector's privilege log, claiming that "Vector continues to improperly withhold documents reflecting its receipt of due diligence information that Vector claims to not have received, or to not have timely received." Vector's counsel provided the Court with those documents. As will be explained, the Court concludes that portions of the withheld documents are protected by the attorney-client privilege and such portions may be redacted. The remaining portions of the documents must be produced.

"[I]n a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Fed. R. Evid. 501. Under New York law, "the burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity." Spectrum Sys. Int'l Corp. v. Chemical Bank, 78 N.Y.2d 371, 377 (1991) (Kaye, J.), see also Melworm v. Encompass Indem. Co., 2013 N.Y. Slip. Op. 08415 at \*1 (2d Dep't Dec. 18, 2013). The attorney-client privilege applies to communications between an attorney and his client which are made "for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship." Rossi v. Blue Cross & Blue Shield, 73 N.Y.2d 588, 593 (1989). "The communication itself must be primarily or predominantly of a legal character." Spectrum, 78 N.Y.2d at 378. "The privilege is of course limited to communications--not underlying facts." Id. at 377. The New York Court of Appeals has held that:

[A]n investigative report does not become privileged merely because it was sent to an attorney. Nor is such a report privileged merely because an investigation was conducted by an attorney; a lawyer's communication is not cloaked with privilege when the lawyer is hired for business or personal advice, or to do the work of a nonlawyer. Yet it is also the case that, while information received from third persons may not itself be privileged, a lawyer's communication to a client that includes such information in its legal analysis and advice may stand on different footing. The critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client.

Id. at 379 (internal citations omitted).

“That nonprivileged information is included in an otherwise privileged lawyer's communication to its client--while influencing whether the document would be protected in whole or only in part--does not destroy the immunity. In transmitting legal advice and furnishing legal services it will often be necessary for a lawyer to refer to nonprivileged matter.” Id. at 378.

Whether or not a document is privileged is fact specific and frequently requires in camera review. Id. In Spectrum, the New York Court of Appeals, reversing the State Supreme Court and the Appellate Division, found that a report created as a result of an internal investigation by a law firm was entirely privileged. The Court of Appeals determined that the “facts were selected and presented in the Schulte Roth report as the foundation for the law firm's legal advice, and that the communication was primarily and predominantly of a legal character.” Id. at 379. In Spectrum, the Court of Appeals determined that the factual information was privileged because the facts reflected the law firm's analysis of potential claims against the defendant, as the firm drafted a three-page narrative of the relevant facts, concluding the report with an analysis of related legal issues. Id. at 375, 379-80. The Court determined that the legal advice could not be severed from the factual narrative, and therefore, that the entire document was privileged.

Here, the documents at issue are communications between Vector and Vector's outside counsel in the course of a due diligence investigation of Ness. They contain factual information acquired from Ness and from third parties by Vector's counsel and updates regarding the status of receipt of factual information from Ness and third parties. In obtaining information from the acquisition target, Ness, Vector's counsel was acting as agent and principally for the business purpose of determining whether the acquisition was a sound investment.

This fact-acquisition process in the course of a business transaction is no more protected by privilege when conducted by an attorney than if conducted by an accountant, engineer or head of a business unit. The factual information presented is not privileged merely by the use of an attorney as a conduit for the information. See Federal Housing Finance Agency v. UBS Americas Inc., 11 Civ. 5201, 11 Civ. 6188, 11 Civ. 6189, 11 Civ. 6190, 11 Civ. 6192, 11 Civ. 6193, 11 Civ. 6195, 11 Civ. 6196, 11 Civ. 6198, 11 Civ. 6200, 11 Civ. 6201, 11 Civ. 6202, 11 Civ. 6203, 11 Civ. 6739, 11 Civ. 7010 (DLC), 2013 WL 1700923, at \*2 (S.D.N.Y. Apr. 16, 2013) (“[Factual material] is not rendered privileged simply because it was contained in a memorandum prepared by an attorney or because that memorandum was relayed to [a party] by its attorney.”).

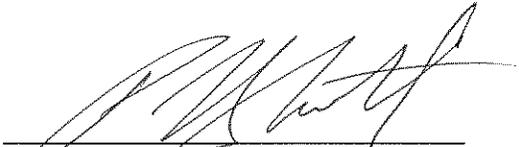
The documents also contain analysis of that factual information and legal advice based upon the information. This analysis and advice by an attorney qualifies for protection under the attorney-client privilege. But unlike in Spectrum, the factual information can be severed from the analysis and legal advice. Id. at 379.

References in the documents such as the following reflect factual information, not legal advice, and must be produced: “The due diligence material in the Data Room includes a list

...” “S&S has requested the Company to provide the following . . .” (BER-E-00003352), “I spoke with [Ness employee] . . .” (AME-E-00004231), and “The Company further provided . . .” (BER-E-00008490). Additionally, communications with agents or employees of Ness are also not privileged and shall be produced.<sup>1</sup> In contrast, references in the documents that reflect legal advice or analysis may be redacted.

By January 27, 2014, Vector shall produce all withheld documents describing or identifying facts or documents obtained from Ness or third parties or requests for information made to Ness or third parties. Vector may redact only such portions of documents that reflect analysis or legal advice by its lawyers.

SO ORDERED.



P. Kevin Castel  
United States District Judge

Dated: New York, New York  
January 8, 2014

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<sup>1</sup> In his declaration (Docket No. 68), counsel for Vector indicated that the emails that included communications between the law firms and persons other than Vector, including Ness representatives, have previously been produced to Ness. (Knuts Decl. ¶ 4.) Additionally, counsel for Vector represented that the Kinstellar engagement letter, identified in the in camera submission as BER-E-00004627, has also been produced to Ness. (Knuts Decl. ¶ 4.)