UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:

Anthony Weber
and Sarah Weber,
Debtors.

Chapter 11 Case
 # 16-11492

ORDER
DENYING FACEY GOSS'S EMERGENCY MOTION FOR RELIEF UNDER F.R.E. 502(a)

On November 4, 2020, the U.S. trustee (the "UST") filed a motion to convert this chapter 11 case to chapter 7 for cause, based on the Debtors' failure to file monthly operating reports and pay UST quarterly fees (doc. # 362, the "UST Motion"). On December 2, 2020, the Debtors filed a response to the Motion, asserting the reasons they were in default of their obligations to file operating reports and pay UST fees were (a) they no longer had an attorney and (b) Covid had had a devastating impact on their business (doc. #364, the "Response").

On December 11, 2020, the Court held a hearing on the UST Motion and the Response. At that hearing, Mr. Weber stated he had sent a check to the UST that would satisfy the full outstanding delinquency in quarterly fees and, if given one month to do so, he would be able to complete, and file, all required operating reports. The UST consented to that extension of time and the Court continued the hearing to January 22, 2021.

On January 7, 2021, Facey Goss & McPhee PC ("Facey Goss"), the Debtors' former bankruptcy counsel, joined the UST Motion, based on the Debtors' failure to pay the legal fees they owed to Facey Goss, pursuant to both a post-petition promissory note and the confirmed plan. On January 28, 2020, Gravel & Shea, the Debtors' former litigation counsel in the adversary proceedings filed in this case, joined the UST Motion, also based on unpaid legal fees.

At the hearing held on January 29, 2021, Amy Ginsberg, Esq., appeared on behalf of the UST, Mr. Weber appeared pro se, Heather Cooper, Esq., appeared on behalf of Facey Goss, and Navah Spero, Esq., appeared on behalf of Gravel & Shea. About an hour prior to that hearing, Mr. Weber filed, via email, numerous operating reports, covering the periods of November 2019 through December 2020 (doc. ## 372-385). At the conclusion of the hearing, the Court determined that (1) it, and all parties in interest, needed time to review the recently filed operating reports; (2) the UST had demonstrated cause for conversion or dismissal under 11 U.S.C. § 1112(b)(4)(F)(K) & (N); and (3) the remaining issue to be decided was whether the Debtors had a reasonable justification for failing to meet their obligations based on either their attorneys' withdrawal from the case or the coronavirus pandemic.

After the hearing, the Court entered an Order which, among other things, established a schedule for the parties to file supplements to the record; it set a February 26th deadline for the Debtors to file a supplement to their Response and a March 5th deadline for the UST, Facey Goss or Gravel & Shea to file a reply to any supplement the Debtors filed (doc. # 386, the "Scheduling Order").

On February 12, 2021, the UST filed a Supplement (doc. #390, the "UST Supplement"), in which he alleged the 14 monthly operating reports the Debtors had recently filed "reuse stale information, omit required disbursement details, ultimately failing to provide complete, accurate financial information about the Debtors use of estate assets and their financial circumstances" (doc. # 390, ¶ 1). He concluded there was still cause for conversion of this case, even after the Debtors filed a report for each required period and paid all outstanding quarterly fees.

The Debtors filed a timely Supplemental Response at 10:45 a.m. on February 26, 2021 (doc. # 393, the "Debtors' Supplement"). At 3:15 P.M. that same day, Facey Goss filed the instant emergency motion asking the Court to (i) determine the Debtors had waived the attorney-client privilege by virtue of their disclosures in the Debtors' Supplement, and (ii) allow Facey Goss to "freely and fully respond to the limited issues raised," pursuant to F.R.E. Rule 502(a) (doc. # 394, the "Emergency Motion," p.2). Facey Goss asserts emergency relief is necessary because, under the Scheduling Order, it had only one week to prepare and file its reply to the Debtors' Supplement. The UST filed electronic consent to the Emergency Motion shortly after Facey Goss filed it.

The Rule under which Facey Goss seeks relief provides as follows:

> **Rule 502. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT; LIMITATIONS ON WAIVER**
> The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
>
> (a) **Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.** When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:
>
> (1) the waiver is intentional;
>
> (2) the disclosed and undisclosed communications or information concern the same subject matter; and
>
> (3) they ought in fairness to be considered together.

Federal Rule of Evidence 502(a) (2021).

THE COURT FINDS the Debtors did refer in the Debtors' Supplement to advice they received from Facey Goss in connection with this case, and they did so in the context of a federal proceeding. Therefore, Rule 502 applies. The question of whether Facey Goss is entitled to relief and, if so, the nature and extent of that relief, turns on the Court's findings under each of the three prongs of Rule 502(a).

The first prong sets out the crucial eligibility criterion: Relief is only available to Facey Goss if the Debtors' disclosure of protected communications was intentional. The Court begins with the premise that the Debtors have been acting pro se and, most likely they have little, if any, understanding of the nuances of attorney-client privilege and what constitutes a waiver of that privilege. In support of its prayer for relief, Facey Goss asserts that, in the Debtors' Supplement, "the Debtors reference communications between them and their counsel and cites counsel's advice and review of certain documents as being justification for their failure to meet their obligations" (doc. #394, ¶ 5). However, Facey Goss does not point to any specific language in the Debtors' Supplement that meets this description or constitutes a disclosure of privileged communications. From the Court's review, it appears there are four places in the Debtors' Supplement where the Debtors refer to their attorneys:

- The reason we were late filing our financial reports was not due to Covid. It was because of us losing our attorney [sic]. We were told there was no way for us to submit the [operating] reports on the court's electronic platform. … We realize how important these reports are to show a financial picture of what is being received and disbursed and promise to submit the monthly reports going forward when due on a monthly basis through the Court Clerk.
- These [operating] reports can be overwhelmingly complicated as stated by our attorneys in the past.
- All of these disbursements have been consistent since day one of our financial reporting since 2016 and were looked at by our attorney at the time and in no way are out of the ordinary expenses in running our households or our rental business.
- As per our Bankruptcy attorney, we were told that if Sarah was to start working after the Bankruptcy Plan was put in place, that she would not have to include that in this report, so we did not.

Doc. # 393, p. 2. Since time is of the essence, rather than require Facey Goss to specify which of these statements it is alleging give rise to a waiver of the attorney-client privilege, the Court will examine each of these instances to determine if they constitute the type of disclosure that would be eligible for relief under Rule 502(a). The first instance suggests Facey Goss communicated to the Debtors that only an attorney could file operating reports through the electronic case filing system. Even assuming arguendo that Facey Goss conveyed this information to the Debtors, this was not specialized advice or confidential information limited to the Debtors' situation. This is a statement of fact, which accurately reflects this Court's Local Rules. The Debtors' repetition of this communication does not constitute a breach of attorney-client privilege. Similarly, if Facey Goss told the Debtors the operating reports are "overwhelmingly complicated" that too would fall short of the type of communication safeguarded by the attorney-client privilege.

The third and fourth instances are not so easily dispatched, and make this a close call, under Rule 502(a). In the third instance set out in the Debtors' Supplement (and above), the Debtors (i) reveal that they understood Facey Goss had reviewed and approved the disbursements itemized in the operating reports they filed while Facey Goss represented them, (ii) assert that the disbursements they listed in the recently filed operating reports are essentially the same types of disbursements, and (iii) therefore Facey Goss would approve the types of disbursements they set out in their current operating reports (or potentially, if they are not the appropriate categories of disbursements, then Facey Goss is to blame – not the Debtors). If the Debtors were making this contention in the context of a legal malpractice cause of action against Facey Goss, it might be pertinent to the subject matter of the litigation. In this case, the UST Motion initially focused on the Debtors' failure to file their operating reports, but subsequently shifted his focus to the adequacy and accuracy of the Debtors' operating reports. This new focus on content is critical. The Debtors' fourth reference to attorney advice, as part of their justification and opposition to the UST Motion, also concerns on the content of their operating reports. In this statement, the Debtors affirmatively claim the reason the Debtors did not include Ms. Weber's income in the operating reports is because Facey Goss told them they did not need to do so. This bears directly on the gravamen of the UST Motion, as modified by the UST Supplement.

The Court must focus on ascertaining whether the record would be an incomplete or inaccurate picture of the parties' rights if Facey Goss were not permitted to disclose communications or advice normally protected by the attorney-client privilege, in response to the attorney-centered statements in the Debtors' Supplement. "Whether fairness requires disclosure has been decided by the courts on a case-by-case basis, and depends primarily on the specific context in which the privilege is asserted." Adam Friedman Assocs. LLC v. MediaG3, Inc., 2012 U.S. Dist. LEXIS 62591, at *11 (S.D.N.Y. May 1, 2012),

quoting In re Grand Jury Proceedings, 219 F.3d 175, 183 (2d Cir. 2000). In this matter, the fundamental and sole remaining question is whether the Debtors' failure to comply with their chapter 11 obligations – whether it's the filing of their reports, content of their reports, or the tardiness of their payment of sums due under the confirmed plan – is due to the Debtors' lack of counsel and/or the coronavirus pandemic. To the extent the Debtors may be attempting to shift any responsibility for their defalcation to Facey Goss, the Court rejects that line of defense. The Court authorized the Debtors to file a narrowly tailored Supplement to specify if and how their failure to meet their chapter 11 responsibilities can be traced to their lack of an attorney and/or the impact of the pandemic. The Court does not consider any arguments based on advice of counsel to be germane. Since it is not considering the Debtors' allegations pointing to any other explanations, there is no need for Facey Goss to expand the record on those issues.

This is consistent with the role of the relief Rule 502(a) authorizes. The Advisory Committee Note to Federal Rule of Evidence 502 is clear that the gateway to this relief is narrow:

> [A] subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. . . . [S]ubject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner.

Fed. R. Evid. 502, Advisory Committee Notes (emphasis added). See also In re Genger, No. 19-13895(JLG), 2021 Bankr. LEXIS 324, at *51-52 (Bankr. S.D.N.Y. Feb. 9, 2021) and United States v. Treacy, 2009 U.S. Dist. LEXIS 66016, 2009 WL 812033, *3 (S.D.N.Y. Mar. 24, 2009) (both quoting this Note to find the alleged disclosure did not justify granting of the narrow relief available under 502(a)).

Based on the instant facts and circumstances, and the authorities cited above, THE COURT FINDS the Debtors' disclosure of certain communications with their attorneys was not intentional for purposes of this Rule because Facey Goss has not shown the Debtors, acting pro se, deliberately interjected any references to protected communications in a misleading or unfair manner. However, since it is a close call, the Court nonetheless considers whether, even if the disclosures were intentional for purposes of this Rule, they would warrant granting Facey Goss the relief it seeks in the Emergency Motion.

As the Second Circuit has held, the "considerations which underlie 'the fairness doctrine' aim to prevent prejudice to a party and distortion of the judicial process that may be caused by the privilege-holder's selective disclosure during litigation of otherwise privileged information." Mass. Mut. Life Ins. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 293 F.R.D. 244 (D. Mass. 2013), 2013 U.S. Dist. LEXIS 142823, 2013 WL 5328307, citing In re von Bulow, 828 F.2d 94, 101 (2nd Cir., 1987) As one court observed, the issue is if any privilege has been waived, whether the claims and defenses are so "enmeshed" in privileged evidence that the material must be produced, and balancing fairness concerns arising from withholding privileged materials." In re von Bulow, 828 F.2d at 102. Here, the claims and defenses are not enmeshed in that way. The Court has no intention of deciding whether the Debtors have a reasonable justification for failing to meet their chapter 11 obligations based on whether Facey Goss had previously approved the categories of disbursements they included in their operating reports, or whether Mr. Weber's failure to include Ms. Weber's income in the operating reports was based on earlier advice of Facey Goss. Rather, the Court will focus on whether the Debtors' dereliction of chapter 11 duties can be reasonably attributed to their lack of counsel or the consequences of the pandemic. Hence, THE COURT FINDS there is no basis for authorizing Facey Goss to disclose otherwise protected communications it had with the Debtors with respect to either which disbursements must be set out in chapter 11 operating reports or whether Facey Goss advised the Debtors with respect to the need to disclose Ms. Weber's income – the only two potential doors the Debtors have opened under Rule 502.

This analysis also applies to the third prong of Rule 502(a): Since the Court will not be giving any weight to the latter two attorney-related disclosures in the Debtors' Supplement, there is no need for Facey Goss to present their view, a clarification, or a contextualization of that "advice" in order to give the Court a balanced and full understanding of those allegations, or to consider Facey Goss disclosures in tandem with the Debtors' allegations, as they are beyond the scope of the open issues at bar.

Therefore, THE COURT FURTHER FINDS the record does not support a finding that Facey Goss is entitled to disturb the sanctity of the attorney-client privilege in this case, or to disclose any information or communications obtained in the course of their representation of the Debtors, under the strict standard established by Rule 502(a). Hence, Facey Goss's request to "freely and fully respond to the limited issues raised" must be denied. See Mass. Mut. Life Ins. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 293 F.R.D. 244 (D. Mass. 2013), 2013 U.S. Dist. LEXIS 142823, 2013 WL 5328307.

In conclusion, and based on the foregoing findings, IT IS HEREBY ORDERED that Facey Goss's Emergency Motion is denied.

This constitutes the Court's findings of fact and conclusions of law on the Emergency Motion.

March 1, 2021 7:30 PM
Burlington, Vermont

Colleen A. Brown
United States Bankruptcy Judge